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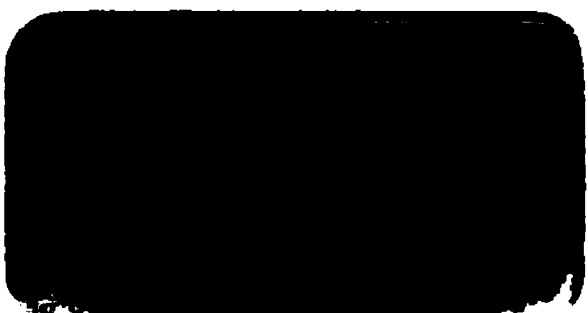
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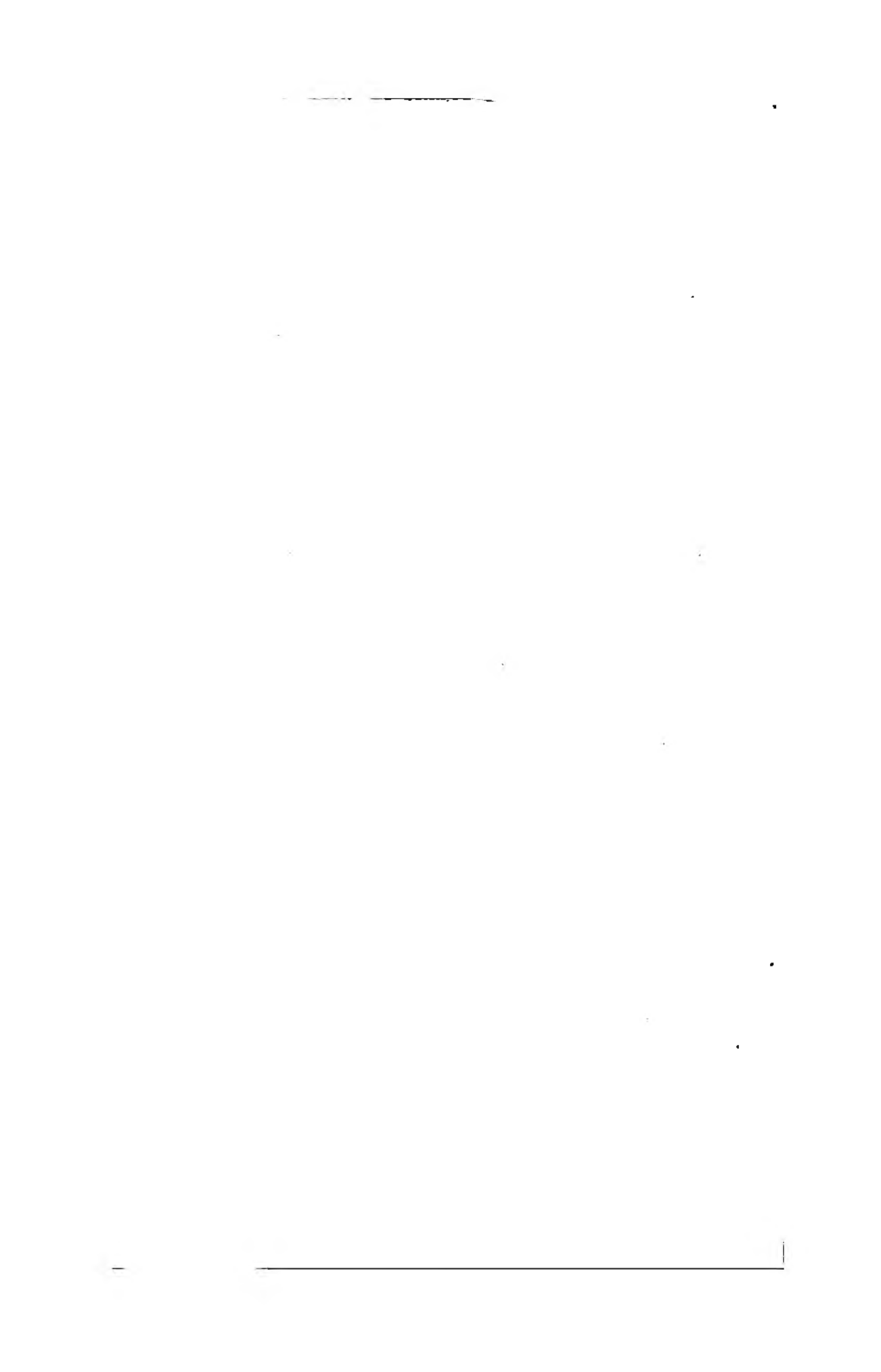




















**THE**  
**AMERICAN LAW**  
**OF**  
**REAL PROPERTY.**

**BY**  
**FRANCIS HILLIARD,**  
AUTHOR OF "THE LAW OF TORTS," "THE LAW OF INJUNCTIONS," ETC., ETC.

***FOURTH EDITION, REVISED AND IMPROVED.***

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## PREFACE

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THE following work is nominally the fourth edition of a book, first published many years ago, and which has become too well known to the profession to require any statement of its original nature and purpose. As now re-issued, however, it rather demands a brief explanation of the changes made from its former construction, with the view of better adapting it to the present prevailing sentiment in regard to the most desirable form of legal treatises and text-books.

As is well known, there is no branch of the law which has been more extensively and variously changed by *American statutes*, than that of Real Property. It was a leading part of my original object, to incorporate in this book, as exhaustively as its limits would allow, the statutory law. In each successive edition, the statutes enacted since the publication of the one next preceding were designed to be summarily inserted. The same system is retained in the present edition; but the substantial change to which I have adverted is this. The *text* of the book is confined to a consecutive view of rules and principles, independent of the statute law; while the statutes, heretofore to a great extent made part of the text, and giving it an objectionable *fragmentary* character, have been uniformly thrown into the notes.

There is another important explanation. With refer-

ence to the statute law, I have never failed, as a law-writer, to avail myself of every suitable occasion for expressing the conviction, that no entirely reliable opinion can be formed, and no reasonably safe counsel given, with reference to the construction of a statute, more especially the statute of another State, without reading the text of the statute itself. Of this, no mere abstract, however copious, can supply the place. Hence the references to the statutory law, in the present work, may be termed *suggestive*. They, for the most part, briefly state, that the law upon a particular topic has been changed by legislation, in what States, at what times, and, summarily, in what manner; serving, in this way, their only practicable purpose, of a guide to the statutes themselves. These statutory references may also be termed *historical*. They do not purport always to cite the *Codes* or *Revisions*, in which American statute law is now so extensively and usefully embodied, but retain the form adopted in earlier editions, of citing the annual compilations of legislative acts. In justification of this course, two suggestions may be made. In the first place, very many of the so called *Codes* are themselves mere arranged collections of preëxisting statutes; sometimes with not even verbal changes; sometimes in a condensed form but with no alteration of sense; and very rarely as original works of legislation. And, moreover, few fundamental statutory changes in the law of Real Property have been rescinded or very materially modified by subsequent legislation. For example, it is safe to say, that no State, which has once substantially abolished *estates tail*, has ever restored them. And the same may be confidently said of statutes relating to *joint tenancy*, *curtesy* and *dower*, the words *necessary to pass estates in deeds and devises*, and indeed all the

topics upon which the State enactments have been so copious and so various. The reader of this work — with the unavoidable omissions incident to so wide a field — will uniformly find a reference to the statutory changes; and, as I have already remarked, for fuller information, the prudent counsellor will in the last resort rely only upon the authentic text of the latest statutes themselves.

It has always been a part of the plan of this work, to cite at some length the *decided cases*. Another change, and, I trust, improvement, in the present edition, is to throw the decisions, as well as statutes, into the notes; and moreover, whenever the cases in a particular State seem connected with a statute of that State, or for other cause to be of a local character, to bring them into immediate contact with such statute, or with each other alone. The confusion, which might arise from the intermixing of statutes and cases, may be found in some degree avoided, by including the latter in marks of parenthesis. And the general purpose, however imperfectly accomplished, at which I have aimed, has been, by a combination of the statutory and *judicial* law, to present in the notes *the law* of each State, which is the product of these conjoint sources, as far as possible disentangled from that of every other. It may be doubted whether the nature of the case admits more than an approximation to such a result. At any rate, this is all which I dare to believe that I have attained.

F. H.





# CONTENTS.

---

## CHAPTER I.

### REAL PROPERTY IN GENERAL . . . . . 1-51

- |  |                                   |
|--|-----------------------------------|
| 1, 4. Lands, tenements, and hereditaments.             | 10. Mines.                        |
| 2. Heir-looms.   | 12. Trees.                        |
| 5. Real estate — definition ; land — what it includes. | 14. Growing crops.                |
| 6. Water.  | 15. Emblements.                   |
| 6 a. Chamber of a house.                               | 28. Sea-weed ; wreck, &c.         |
| 7. Pews.   | 29. Manure.                       |
| 8. Building on another's land.                         | 31. Fixtures.                     |
|  | 51. Shares in corporations.       |
|  | 52. Money to be laid out in land. |

## CHAPTER II.

### ESTATES IN LAND. — ESTATE IN FREE-SIMPLE . . . . . 52-81

- |   |  |
|---|--|
| 1. <i>Estate, &amp;c.</i> — meaning of the terms. | 23. Seisin in <i>law</i> and <i>deed</i> . |
| 5. <i>Freehold</i> .                              | 24. <i>Disseisin</i> .                     |
| 7. <i>Fee-simple</i> .                            | 32. <i>Abeyances</i> .                     |
| 8. Feudal law and American tenures.               | 34. <i>Freehold in futuro</i> .            |
| 16. <i>Seisin</i> .                               | 35. Rectors and parsons.                   |
| 20. <i>Entry</i> .                                | 36. <i>Incidents</i> to a fee-simple.      |
| 23. Seisin of heirs — <i>continual claim</i> .    |  |

## CHAPTER III.

### QUALIFIED AND CONDITIONAL FEES AND ESTATES TAIL 82-92

- |   |  |
|---|--|
| 1. <i>Fees, qualified, conditional, &amp;c.</i> | 18. Conveyance by tenant in tail.      |
| 3. <i>Estates tail</i> — origin.                | 25. Contracts of tenant in tail.       |
| 5. Description.                                 | 27. Entailment — how barred.           |
| 6. What may be entailed.                        | 28. Estates tail in the United States. |
| 12. Rights and duties of tenant in tail.        |  |

## CHAPTER IV.

### ESTATE FOR LIFE . . . . . 93-106

- |   |  |
|---|--|
| 1. Definition.                                      | 8. Payment of incumbrances.                                |
| 2. How created ; different forms of life estates.   | 14. Transfer of estate.                                    |
| 2 c. <i>Merger</i> — estate <i>pour autre vie</i> . | 15. Forfeiture.  |
| 3 a. <i>Incidents</i> — <i>estovers</i> .           | 18. Estate <i>pour autre vie</i> .                         |
| 4. <i>Praying in aid</i> .                          | 19. Termination of estate for life ; presumption of death. |
| 5. Title deeds.                                     |  |

## CHAPTER V.

## ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT . 107-108

- |                                       |                             |
|---------------------------------------|-----------------------------|
| 1. Life estates created by law.       | 3. When it arises.          |
| 2. Estate tail after possibility, &c. | 7. Qualities of the estate. |

## CHAPTER VI.

## CURTESY . . . . . 109-120

- |   |  |
|---|--|
| 1. Estates arising from marriage.                           | 13. Conditional fees, &c.  |
| 2. Curtesy — origin of the name.                            | 14. Money to be converted into land, or land converted into money. |
| 3. Definition of the estate ; curtesy in the United States. | 15. Wife must have the inheritance.                                |
| 4. Requisites.  | 16. Wild lands.  |
| 5. Marriage.  | 17. Entry not necessary.   |
| 6. Seisin.  | 18. How barred ; effect of a contract upon curtesy.                |
| 8. Birth of issue.  |  |
| 11. Aliens.   |  |

## CHAPTER VII.

## LIFE ESTATE OF THE HUSBAND IN LANDS OF THE WIFE 121-132

- |  |   |
|--|---|
| 1. Description of estate.              | 4 b. Contract by and rights of the husband.                             |
| 2. Description and incidents.          | 8. Conveyances by husband and wife, and statutory law relating thereto. |
| 3 n. Statute law as to conveyance, &c. | 14. Separate trust estate of the wife.                                  |
| 4. Liability to creditors.             |   |
| 4 a. Rents and profits.                |   |

## CHAPTER VIII.

## DOWER. — NATURE AND REQUISITES OF DOWER . 133-152.

- |   |  |
|---|--|
| 1. Definition of dower.                 | 10. Elopement, &c.                                 |
| 1 n., 3. Dower in the United States.    | 12. Seisin of husband ; reversions and remainders. |
| 2. Origin and history of dower.         | 14. <i>Dos de dote</i> .                           |
| 4. Dower favored.                       | 16 a. Instantaneous seisin.                        |
| 5. Requisites of dower ; marriage.      | 19. Whether husband's seisin may be denied.        |
| 7. Void and voidable marriage.          | 20. Death of the husband ; presumption of death.   |
| 8. Marriage — how proved.               |  |
| 9. Marriage and divorce in England.     |  |
| 9 n. Marriage and divorce in U. States. |  |

## CHAPTER IX.

## DOWER. — WHAT PERSONS MAY BE ENDOWED, AND IN WHAT THINGS . . . . . 153-164

- |  |   |
|--|---|
| 1. Aliens ; English and American law.                      | 13. Land appropriated to public use.  |
| 2. Dower — in what things.                                 | 13 n. Mill and fishery ; annuities ; lands held by improvement, &c. ; lands contracted for. |
| 3. Things incorporeal.                                     | 14. Estates tail, &c. ; for years ; uses, &c.   |
| 4. Mines and quarries.                                     | 15. Estates <i>pour autre vie</i> .   |
| 5. Wild lands.   | 16. Wrongful estates.   |
| 6. State of cultivation — what.                            |   |
| 7. Improvement or depreciation by heir or purchaser.       |   |
| 12. Increase or diminution of value from extrinsic causes. |   |

## CHAPTER X.

### DOWER. — HOW BARRED . . . . . 165-188

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Inchoate right.</li> <li>2. Crime of husband.</li> <li>3. <i>Detinues of charters.</i></li> <li>5. Transfer by the husband.</li> <li>5 a. <i>Exchange of lands.</i></li> <li>6. Equitable and implied bars of dower.</li> <li>7. Partition.</li> <li>8. Deed of wife, in England; fine, &amp;c.; deed of husband alone, and sale of land for debts.</li> <li>9. Deed of husband and wife.</li> </ol> | <ol style="list-style-type: none"> <li>18. Wife's release can operate only as such.</li> <li>19. Devise or legacy, when a bar.</li> <li>20. When an implied bar, in law or equity.</li> <li>22 and notes. Legacy to widow, how regarded; apportionment of legacy; disposal of legacy, when renounced; American law as to devises in bar of dower.</li> <li>23. Election between a devise and dower; time of election; mode of election.</li> </ol> |
|--|--|

## CHAPTER XI.

### ASSIGNMENT OF DOWER . . . . . 189-208

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Necessity of assignment.</li> <li>2. Nature of estate before assignment; tenancy in common with the heirs, in Massachusetts, &amp;c.</li> <li>6. Assignment not required in equity.</li> <li>7. <i>Quarantine.</i></li> <li>11. Assignment by the heir or other tenant.</li> <li>15. Action at law for dower.</li> <li>17. When the only remedy.</li> <li>18. <i>View.</i></li> <li>19. Damages.</li> </ol> | <ol style="list-style-type: none"> <li>20. Demand; costs.</li> <li>22. Bill in equity for dower.</li> <li>27 and notes. Assignment by Probate Court; forms of proceeding; how far evidence of title; when adverse and compulsory, or otherwise; application for assignment — by whom; wrong assignment — how remedied; assignment — when it may be demanded.</li> <li>28. Limitation of suit for dower.</li> <li>32. Death of widow.</li> </ol> |
|---|---|

## CHAPTER XII.

### ASSIGNMENT OF DOWER. — WHAT SHALL BE ASSIGNED AND BY WHOM; AND THE EFFECT OF ASSIGNMENT . 209-219

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. By metes and bounds or otherwise; practice in the United States.</li> <li>2. Value of land assigned.</li> <li>3. Assignment in common.</li> <li>4. Partition by husband.</li> <li>5. Assignment by sheriff, and commissioners.</li> <li>6. Improper assignment by sheriff.</li> </ol> | <ol style="list-style-type: none"> <li>7. Assignment <i>against common right.</i></li> <li>8. Assignment of rent, &amp;c.</li> <li>10. Assignment must be <i>absolute.</i></li> <li>11. Assignment by parol; by guardian.</li> <li>12. Implied warranty.</li> <li>13. Entry not necessary to title.</li> <li>14. Assignment has <i>relation</i>; rule in the United States.</li> </ol> |
|---|--|

## CHAPTER XIII.

### JOINTURE . . . . . 220-234

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>2. Definition.</li> <li>3. Origin.</li> <li>5. Value.</li> <li>6. When to take effect.</li> <li>7. Quantity of estate.</li> <li>8. Must be a legal interest.</li> <li>10. Must be an entire satisfaction; and so stated.</li> <li>11. Ante-nuptial.</li> <li>12. Provisions not strictly jointures.</li> <li>14. Equitable jointure.</li> <li>15. Who may receive a jointure.</li> </ol> | <ol style="list-style-type: none"> <li>16. A <i>provision</i> — not a contract; infants.</li> <li>17. Waste.</li> <li>18. Emblements.</li> <li>19. Eviction, or breach of covenant; and the jointress' lien upon lands.</li> <li>23. Favored in equity.</li> <li>26. Interest.</li> <li>27. How barred — by deed.</li> <li>28. By elopement, &amp;c.</li> <li>29 and notes. By devise, &amp;c.; jointure in the United States.</li> </ol> |
|---|---|

**CHAPTER XIV.**

**ESTATE FOR YEARS . . . . . 285-260**

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>1. Estates less than freehold — estate for years — lease.</li> <li>3. Definition — "term," what is a.</li> <li>4. How created, and for what time.</li> <li>5. Must be certain; estate of executors and trustees.</li> <li>6. An inferior estate.</li> <li>7. Tenant not <i>seised</i>.</li> <li>8. When it commences — entry — <i>interesse termini</i>; liability of tenant as depending on possession.</li> <li>19. <i>In futuro</i>.</li> <li>21. How terminated.</li> <li>22. Is a chattel.</li> </ul> | <ul style="list-style-type: none"> <li>22, 29. Limitation of.</li> <li>23. Husband and wife.</li> <li>24, 28. Liable for debts.</li> <li>25. Freehold cannot arise from.</li> <li>26. Incidents.</li> <li>27. <i>Estovers</i>.</li> <li>30. <i>Merger</i>.</li> <li>33. <i>Surrender</i>, actual or constructive; assignment, whether a.</li> <li>36. Assignment and under-lease.</li> <li>46 a. Assignment by reversioner.</li> <li>49. Conveyance of.</li> <li>50. Forfeiture.</li> </ul> |
|---|---|

**CHAPTER XV.**

**LEASE . . . . . 261-305**

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1, 2. Definition.</li> <li>3. Form.</li> <li>5. Presumption of.</li> <li>6. Words necessary; whether a <i>contract</i> or a <i>lease</i>.</li> <li>8. Whether an assignment or a <i>contract</i> for it.</li> <li>9. Whether a lease or sale.</li> <li>10. Whether a lease or an <i>agency</i>.</li> <li>11. Whether a lease or a <i>partnership</i>.</li> <li>12. <i>Contract upon shares</i>; lease in some of the United States.</li> <li>13. Acceptance of lease.</li> <li>14. Commencement and termination; "date" and "day of the date."</li> <li>16. "Lease," import of the word.</li> </ul> | <ul style="list-style-type: none"> <li>18. In the alternative.</li> <li>19. Conditional.</li> <li>22. Who may lease — tenants in tail.</li> <li>23. Husband and wife.</li> <li>24. Tenant for life.</li> <li>25. Guardian.</li> <li>26. Executor and heir.</li> <li>28. Joint tenants, &amp;c.</li> <li>33. Infant.</li> <li>34. Avoiding or forfeiture of lease, and what will be a confirmation.</li> <li>42. Covenants; <i>usual</i>; for title, repairs, &amp;c.</li> <li>59. Renewal; <i>perpetual</i> lease.</li> <li>60. Estoppel.</li> <li>67 note. License.</li> </ul> |
|--|---|

**CHAPTER XVI.**

**RENT . . . . . 306-340**

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1. Definition.</li> <li>3. Must be certain.</li> <li>4. In what payable; effect of a reservation of part of the produce, and whether the landlord has a lien.</li> <li>5. Kinds of rent; rent-service; rent-charge; rent-seck; fee-farm rent.</li> <li>6. Seisin of rent.</li> <li>7. From what it may issue.</li> <li>10. On what conveyance reserved.</li> <li>11. Several rents reserved by one deed.</li> <li>13. To whom reserved.</li> <li>22. When payable.</li> </ul> | <ul style="list-style-type: none"> <li>25. To whom it passes upon the lessor's death.</li> <li>31. Remedies for recovery of rent — distress.</li> <li>35. Reentry; mode and time of demand.</li> <li>40. Actions of debt, covenant, and assumpsit.</li> <li>41. Election of remedies; restoration of land after forfeiture; attachment for — before due.</li> <li>42. Suit in chancery.</li> <li>43. Estates in a rent.</li> <li>51. Not lost by non-user.</li> </ul> |
|--|---|

## CHAPTER XVII.

### RENT. — DISCHARGE AND APPORTIONMENT . . . 341-358

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1. General rule—no apportionment as to time.</li> <li>2. Eviction by landlord or third persons; from the whole or a part of the premises; what is an eviction; what is not an eviction; constructive eviction; covenants in the lease, &amp;c.</li> <li>10. Loss by the act of God, &amp;c.,—total</li> </ul> | <ul style="list-style-type: none"> <li>or partial loss; loss by fire; debt and covenant.</li> <li>14. Purchase of the land by landlord—effect upon a rent-service.</li> <li>15. Apportionment by transfer of the land.</li> <li>16. Lease by tenant for life.</li> <li>18. Rent-charge—when extinguished and when not; when apportioned.</li> </ul> |
|--|---|

## CHAPTER XVIII.

### WASTE . . . . . 359-381

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>1. Importance of the subject.</li> <li>2. American doctrine.</li> <li>3. Definition.</li> <li>4. Voluntary or permissive.</li> <li>6. Felling timber; American law.</li> <li>10. Waste of buildings.</li> <li>15. Loss by fire.</li> <li>16. Disturbance of the soil—mines, &amp;c.</li> <li>17. Conversion of the land.</li> <li>19. Heir-looms—destruction of.</li> <li>20. Permissive waste—repairs.</li> <li>23. Act of God.</li> <li>24. Amount of waste.</li> <li>25. Who punishable for—tenant for life, &amp;c.—Statutes of Marlbridge, &amp;c.</li> </ul> | <ul style="list-style-type: none"> <li>27. Ecclesiastical persons.</li> <li>28. American doctrine.</li> <li>28 a. Who may sue and be sued for.</li> <li>35. Waste by third persons.</li> <li>36. Action on the case for.</li> <li>38. Injunction and other equity proceedings.</li> <li>40. Property in timber cut, &amp;c.—who has; contingent remainders, &amp;c.</li> <li>43. Cutting of timber by order of court.</li> <li>44. Lease <i>without impeachment of waste</i>, &amp;c.; special proceedings as to waste in the United States.</li> </ul> |
|---|---|

## CHAPTER XIX.

### ESTATE AT WILL AND AT SUFFERANCE . . . 382-397

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>1. Estate at will—definition.</li> <li>3. Incidents.</li> <li>4. Estate from year to year—notice to quit; laws of the several States.</li> <li>6. Estate at will—whether assignable, &amp;c.</li> </ul> | <ul style="list-style-type: none"> <li>7. How terminated.</li> <li>14. Notice to quit, and summary process to eject.</li> <li>28. Estate at will—how affected by the statute of frauds.</li> <li>30. Tenant at <i>sufferance</i>.</li> </ul> |
|--|--|

## CHAPTER XX.

### USES AND TRUSTS. — USES PRIOR TO THE STATUTE OF USES . . . . . 398-403

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1. Origin.</li> <li>3. Nature and definition of.</li> <li>6. The three incidents of.</li> <li>9. Who might be seised to.</li> </ul> | <ul style="list-style-type: none"> <li>10. How distinguished from legal estates.</li> <li>21. Evils and mischiefs of, and statutes to prevent.</li> </ul> |
|--|---|

## CHAPTER XXI.

USES AND TRUSTS. — STATUTE OF USES, CONSTRUCTION AND  
EFFECT THEREOF . . . . . 404-412

- |  |   |
|--|---|
| 1. Terms of the statute; adopted in the United States. | persons; construction, where they are the same.               |
| 2. Instantaneous seisin of trustee.                    | 12. Exceptions to the rule.                                   |
| 3. Who may be seised to uses.                          | 13. There must be a use <i>in esse</i> .                      |
| 6. What estate may be held to uses.                    | 14. <i>Actual seisin</i> vests in <i>cestui</i> .             |
| 8. There must be a <i>cestui</i> " <i>in esse</i> ."   | 15. Estate of feoffee will not merge.                         |
| 9. What estate a <i>cestui</i> may take.               | 17. Limitations to uses, how far subject to common-law rules. |
| 11. Feoffee and <i>cestui</i> must be different        | 19. Implied and resulting uses.                               |

## CHAPTER XXII. .

TRUSTS. — EXPRESS TRUSTS . . . . . 418-427

- |  |  |
|--|--|
| 1. Trusts in general.  | gage, &c.; trust ceases when the objects are effected.   |
| 2. Trusts in real estate; uses preferred to.                                   | 8. Or when the <i>cestui</i> alienates.  |
| 3. Classifications of trusts.  | 9. Lands subjected to payment of debts — not necessarily a trust estate.                                     |
| 4. How created — use upon a use.   | 10. Where the estate is less than freehold — a trust.  |
| 5. Where the uses require a legal estate in the trustee; intention of parties. | 11. Express trust, how created — statute of frauds, &c. — need not be declared, but only proved, by writing. |
| 6. Trusts for married women.   |  |
| 7. Limitations with authority to mort-   |  |

## CHAPTER XXIII.

TRUSTS. — IMPLIED AND RESULTING TRUSTS . . . . . 428-448

- |   |   |
|---|---|
| 1. Implied trusts — not within the statute of frauds; how proved.   | 20. Election of <i>cestui</i> .   |
| 2. General classification of; distinction between an express and implied trust; cannot contradict a deed. | 21. Conveyance without consideration; declaration of trusts in part.  |
| 3. Contract to convey land.   | 28. Consideration to be determined afterwards; trusts illegal, &c.; trusts failing or exhausted; trusts to be afterwards appointed. |
| 4. Purchase by one person with the money of another; parol evidence, &c.                                  | 29. Conveyance obtained by fraud.   |
| 13. Cases not within the rule.  | 30. Conveyance to a father in the name of a child.  |
| 17. Aliens; rules in different States.  | 42. Conveyance to husband and wife, &c.   |
| 18. Purchase with trust money.  |   |

## CHAPTER XXIV.

TRUSTS. — NATURE, ETC., OF A TRUST ESTATE . . . . . 449-460

- |                                |   |
|--------------------------------|---|
| 1. Analogous to legal estates. | 15. Actions by and against the <i>cestui</i> , &c.                        |
| 2. Alienation of.              | 16. Conveyance of the legal estate, when presumed.                        |
| 2 a. Curtesy.                  | 17. Trust, how affected by lapse of time, and the statute of limitations. |
| 6. Dower.                      |   |
| 9. Subject to debts.           |   |
| 14. Merger.                    |   |



## CHAPTER XXV.

### TRUSTS — CESTUI AND TRUSTEE — THEIR RESPECTIVE INTERESTS, RIGHTS, AND DUTIES, AS BETWEEN THEMSELVES, AND IN RELATION TO THIRD PERSONS 461-498

- |  |  |
|--|--|
| 1. Incidents of a trust — right of cestui to a conveyance.                         | 22. For what amount trustees shall account.  |
| 2. Cestui not prejudiced by any act, &c., of trustee; change of estate by trustee. | 23. Exchange of lands.   |
| 3. Executory agreement — binding in favor of cestui.                               | 24. Cestui's remedy against trustees.  |
| 4. Conveyance by trustee to third persons — notice of trust, &c.                   | 26. Compensation and allowance to trustee.   |
| 10. Authorized sale by trustee — liability of purchaser to the cestui.             | 29. Trustee shall not purchase the trust estate; executors, agents, &c.; exceptions to the general rule. |
| 12. Joint trustees — conveyances and receipts by.                                  | 43. Disclaimer and release by trustee.   |
| 13. Liability of trustee to cestui. Release of debts.                              | 45. Trustee cannot delegate his power.   |
| 20. Sale of land.  | 46. Chancery may remove, appoint new trustee, &c.; descent of trust to heirs.                            |
| 21. One trustee, whether liable for another.                                       | 48. Who may be trustees.   |
|  | 49. Trust <i>fastens</i> on the estate.  |
|  | 50. How affected by escheat, &c.   |

## CHAPTER XXVI.

### TRUST TERMS. — TRUSTS IN NEW YORK . . . 494-501

- |                 |                        |
|-----------------|------------------------|
| 1. Trust terms. | 9. Trusts in New York. |
|-----------------|------------------------|

## CHAPTER XXVII.

### ESTATE ON CONDITION. — NATURE AND KINDS OF CONDITIONS . . . 502-519

- |  |   |
|--|---|
| 1. Definition.                                   | 14. Repugnant conditions; cannot be made void by a change of the law. |
| 2 and note. <i>Implied or express; charge.</i>   | 15. Repugnant obligations.  |
| 3. <i>Precedent or subsequent.</i>               | 16. Conditions against assignment of lease.                           |
| 6. May belong to any estate.                     | 20. Confession of judgment, whether a transfer.                       |
| 7. Things <i>executed</i> and <i>executory</i> . | 21. For reëntry in case of insolvency.                                |
| 8. Must determine the whole estate.              | 23. In restraint of marriage.   |
| 9. To whom reserved.                             |   |
| 12. Impossible conditions.                       |   |
| 13. Illegal conditions.                          |   |

## CHAPTER XXVIII.

### ESTATES ON CONDITION. — PERFORMANCE, BREACH, DISCHARGE, ETC., OF CONDITIONS . . . 520 589

- |   |   |
|---|---|
| 1. Performance — conditions precedent and subsequent. | 11. Breach and forfeiture at law; condition and covenant, &c. |
| 2. Performance as far as possible.                    | 14. Relief in equity.   |
| 3. Copulative condition.                              | 16. Breach, how taken advantage of.                           |
| 4. Who may perform.                                   | 20. Breach, who may take advantage of.                        |
| 5. When performed.                                    | 24. Effect of entry.  |
| 7. Place.   | 25. Waiver of condition.                                      |
| 8. Who bound by.                                      | 27. Release of condition.                                     |
| 9. Impossible conditions.                             | 28. Accord and satisfaction.                                  |
| 10. Refusal to accept performance, &c.                | 29. Condition and limitation — distinction.                   |

## CHAPTER XXIX.

## MORTGAGE. — NATURE, FORM, AND EFFECT OF A MORTGAGE . . . . . 540-558

- |  |   |
|--|---|
| 1. Definition and history of mortgages.                      | whether implied in a mortgage, or necessary to constitute one.  |
| 2. Right of redemption.                                      |   |
| 5. In fee or for years.                                      | 14. Right of redemption cannot be restrained; mortgage and <i>conditional sale</i> , distinction between. |
| 6. Deed and defeasance.                                      | 25. <i>Power to sell</i> , given to a mortgagee.  |
| 11. What constitutes a mortgage in chancery. Parol evidence. |   |
| 12. Personal liability of mortgagor;                         |   |

## CHAPTER XXX.

## MORTGAGE. — WHAT ESTATE IT CREATES IN THE MORTGAGOR AND THE MORTGAGEE . . . . . 559-570

- |   |   |
|---|---|
| 1. Estate remains in the mortgagor, as to third persons, but not as to the mortgagee. | 8. Cannot commit waste, but not bound to repair.  |
| 4. Mortgagee may take possession, when; agreement for mortgagor's possession.         | 9. Lease by mortgagor before or after the mortgage; rights of the lessee and mortgagee. |
| 7. Mortgagor in possession, nature of his estate—tenancy at will, &c.                 | 20. Waste by mortgagee.   |
|   | 21. Lease by mortgagee.   |

## CHAPTER XXXI.

## EQUITY OF REDEMPTION. — NATURE OF THE ESTATE — WHO MAY REDEEM, ETC. . . . . 571-592

- |   |  |
|---|--|
| 1. Distinction between an equity of redemption and a trust; mortgagor has seisin. | 10. Heirs, &c.   |
| 2. Curtesy.   | 11. Whether the whole debt must be paid.                   |
| 3. Dower.   | 12. <i>Tacking</i> .                                       |
| 4. Whether assets.  | 14. Whether known in United States.                        |
| 5. Subject to legal process.  | 15. Future advances, &c.                                   |
| 7. Who may redeem.  | 17. <i>Time</i> of redemption.                             |
| 8. Subsequent incumbrancers.  | 20. No redemption in case of <i>fraud</i> .                |
| 9. Dowress, &c. — on what terms.  | 21. Terms of redemption — account — repairs, interest, &c. |

## CHAPTER XXXII.

## MORTGAGE. — ESTATE OF A MORTGAGEE — SUCCESSIVE MORTGAGES OF THE SAME LAND . . . . . 593-603

- |  |   |
|--|---|
| 1. Mortgage — personal estate — passes to executors, &c.; devise of a mortgage; American doctrine — whether an assignment of the debt passes the mortgage. | 6. Subsequent mortgages — general principles.   |
| 2. Assignment of mortgage is the transfer of <i>an estate</i> .  | 7. Rights of, not affected by transactions between first mortgagee and mortgagor.                 |
| 3. Interest of mortgagee, not liable to execution.   | 9. Assignment of first mortgage.  |
| 4. Statute of limitations, and lapse of time.  | 10. Mortgage to several persons by one deed.  |
| 5. Insurance.  | 12 and note. Equitable interference for subsequent mortgagee; fraud on the part of the mortgagor. |

## CHAPTER XXXIII.

### MORTGAGE. — ASSIGNMENT, PAYMENT, RELEASE, ETC., OF MORTGAGES, AND TRANSFERS OF EQUITIES OF REDEMPTION . . . . . 604-621

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Mortgage cannot be assigned without the debt.</li> <li>2. Assignment cannot prejudice the mortgagor — notice, &amp;c.</li> <li>3. Mortgage an incident to the debt — principle considered — and whether payment revests the estate in the mortgagor; discharging mortgage upon the record.</li> <li>7. Release of equity — whether a payment; release of mortgage — release in part.</li> <li>8. Deposit of money with mortgagee — no payment.</li> <li>9. Death of mortgagor does not turn a mortgage into payment — practice in case of insolvency.</li> </ol> | <ol style="list-style-type: none"> <li>10. Discharge of execution — not conclusive of discharge of mortgage.</li> <li>11. Payment on mortgage, cannot be applied to other debts.</li> <li>12. Substituting of one security for another, &amp;c. — in general, no payment of mortgage.</li> <li>14. Assignment and discharge of mortgage — when a transfer will be construed as an assignment, and when as a discharge.</li> <li>23. Satisfied mortgage — whether a stranger may set it up.</li> <li>24. Sale by mortgagor with mortgagee's consent.</li> <li>25. Joint release to mortgagee and mortgagor.</li> </ol> |
|--|---|

## CHAPTER XXXIV.

### MORTGAGE. — FROM WHAT FUND TO BE PAID . . . . . 622-630

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Debt paid from the fund benefited — executor and heir.</li> <li>2. Mortgage by father and son.</li> <li>3. Devised lands; personal estate may be expressly exempted; exceptions</li> </ol> | <p>to the rule of applying the personal estate; rule in New York; in Pennsylvania; recapitulation of cases.</p> <ol style="list-style-type: none"> <li>7. Application of payments in equity.</li> </ol> |
|--|---|

## CHAPTER XXXV.

### SALES OF EQUITIES OF REDEMPTION ON EXECUTION . . . . . 631-639

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Estate of mortgagor — universally liable to execution.</li> <li>2. Effect of sale — mortgagor's right after sale.</li> <li>3. Levy upon two executions.</li> <li>4. Levy in case of disseisin.</li> <li>5. No ouster of mortgagee.</li> <li>6. Purchaser becomes seised.</li> </ol> | <ol style="list-style-type: none"> <li>7. Attachment of equity — mortgage discharged before sale.</li> <li>8, 15. Redemption from purchaser — when, and on what terms.</li> <li>16. Fraudulent mortgage; sale of equity void; right to redeem subsequent mortgages.</li> </ol> |
|---|--|

## CHAPTER XXXVI.

### MORTGAGE. — WHEN VOID OR VOIDABLE . . . . . 640-647

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. General remarks.</li> <li>2. Usury.</li> <li>7. Infancy.</li> </ol> | <ol style="list-style-type: none"> <li>8. Eviction.</li> <li>9. Want of consideration.</li> <li>9 a. Fraud.</li> </ol> |
|---|--|

## CHAPTER XXXVII.

## MORTGAGE. — REMEDIES OF MORTGAGEE AND MORTGAGOR

AT LAW . . . . . 648-655

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>1. Distinction between a mortgage and trust as to remedy.</li> <li>2. Action at law by mortgagor, after payment; action at law by mortgagee, after payment.</li> <li>3. Concurrent remedies; form of judgment for mortgagee.</li> <li>5. Possession under a judgment, no payment.</li> </ul> | <ul style="list-style-type: none"> <li>6 and notes. Title of mortgagee under a third person, no payment; no action at law by mortgagee in New York and South Carolina; tender in court by mortgagor; suit by execution purchaser; assumpsit by mortgagor; remedy by <i>scire facias</i>, &amp;c.; commitment of mortgagor; form of action.</li> </ul> |
|---|---|

## CHAPTER XXXVIII.

## MORTGAGE. — REMEDIES IN EQUITY — FORECLOSURE AND REDEMPTION . . . . . 656-670

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>1, 14. Lapse of time.</li> <li>2. General principles of foreclosure; parties; practice in the several States.</li> <li>8. Foreclosure; whether payment of debt, &amp;c.</li> <li>9. Right of redemption may be revived; mortgage cancelled by mistake.</li> </ul> | <ul style="list-style-type: none"> <li>10. Equity will not relieve, where there is a legal right.</li> <li>11. Fraud.</li> <li>12. Payment into court.</li> <li>13. Mortgagor cannot redeem on payment by a third person.</li> </ul> |
|--|--|

## CHAPTER XXXIX.

## MORTGAGE. — EQUITABLE MORTGAGES AND LIENS . 671-678

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>1. Deposit of title deeds.</li> </ul> | <ul style="list-style-type: none"> <li>4. Lien for purchase-money; lien of purchaser after payment.</li> </ul> |
|--|--|

## CHAPTER XL.

## LIEN OF MECHANICS, ETC., FOR LABOR AND MATERIALS 679-690

## CHAPTER XLI.

## REMAINDER. — VESTED AND CONTINGENT REMAINDERS 691-697

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>1. Definition — cannot be after a fee.</li> <li>2. By what words created.</li> <li>3. Vested or contingent; when contingent.</li> <li>6. Classification of contingent remainders.</li> <li>7. Exception to third class — limitation for a long term — remainder after</li> </ul> | <ul style="list-style-type: none"> <li>the termination of a life; limitation after a life, where the term for years is short.</li> <li>8. Exceptions to fourth class — Shelley's case — "<i>designatio personæ</i>," &amp;c.</li> <li>9. Ch. J. Willes' division of contingent remainders.</li> </ul> |
|---|---|

## CHAPTER XLII.

## REMAINDER. — VESTED AND CONTINGENT REMAINDERS 698-714

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>1. Contingency of remainder depends on present capacity of taking effect.</li> <li>2. Law favors vested remainders.</li> </ul> | <ul style="list-style-type: none"> <li>4. Remainder may be vested, though not to take effect upon every possible termination of prior estate.</li> </ul> |
|---|--|

5. Intervention of contingent estate — remainder not thereby contingent, unless the estate is a fee.
7. Contingent estates may be *devised*, as substitutes for each other.
10. Cross remainders.
11. Prior limitation to trustees and their heirs till a certain event.
12. Where one of concurrent remainders, &c., vests — the rest defeated.
- 12 a. Successive remainders — whether the contingency named affects only one or the whole; limitation after an estate, depending on a contingency which never happens.
14. After the conditional termination of an estate, which never takes effect.
15. After the conditional termination of an estate which takes effect, but terminates otherwise.
16. Words importing not a contingent remainder, but when a remainder shall come into possession.
19. Remainder upon condition *subsequent*.

### CHAPTER XLIII.

#### REMAINDER. — VOID CONDITIONS . . . . . 715-720

2. Illegality.
3. Remoteness of probability.
4. Abridgment, &c., of preceding estate.
7. Or of preceding remainder.
8. Exception — enlargement of prior estate.
10. Devise — conditional limitation.
11. Limitation by way of use.

### CHAPTER XLIV.

#### REMAINDER. — BY WHAT ESTATE SUPPORTED . . . . . 721-724

1. Contingent freehold remainder must be limited on a freehold; contingent remainder for years.
3. Possession not necessary — a right of entry sufficient — to sustain a remainder.
7. Both estates must be created by one instrument.
8. Estate of trustees sufficient to support remainder.

### CHAPTER XLV.

#### REMAINDER. — AT WHAT TIME IT SHALL VEST . . . . . 725-727

1. Remainder must vest during, or immediately upon termination of, the prior estate; subsequent revival of prior estate does not render valid the remainder; remainder void, though a prior estate for years continues.
2. Posthumous child.
5. Vested remainder not affected by defeat of prior estate.
6. Remainder may become void in part.

### CHAPTER XLVI.

#### REMAINDER. — REMAINDER BY WAY OF USE . . . . . 728-732

2. Since the statute of uses, a freehold trust necessary to support contingent remainders; preceding trust must continue till the contingency happens; resulting trusts sufficient to support remainders; contingent uses arise out of seisin of trustees — discussions upon this subject — Chudleigh's case, &c.
4. Springing and shifting uses.

### CHAPTER XLVII.

#### REMAINDER. — HOW DEFEATED . . . . . 733-740

1. By destroying the particular estate.
2. Whether by a mere *change* of estate.
3. Where the particular estate and a subsequent remainder unite, whether

- |   |   |
|---|---|
| contingent remainders destroyed.<br>Distinction of cases. | stroyed; whether actual seisin necessary, &c. |
| 5. Remainder by way of use, how de-                       | 9. American opinions and cases.               |

## CHAPTER XLVIII.

REMAINDER. — TRUSTEES TO PRESERVE CONTINGENT RE-  
MAINDERS . . . . . 741-747

- |   |   |
|---|---|
| 1. Origin and history.                                      | 7. Chancery sometimes directs a conveyance in favor of mortgagees, creditors, &c. |
| 3. Trustees take <i>an estate</i> .                         | 8. But generally will not interfere.  |
| 4. May destroy the remainders; but it is a breach of trust. | 9. Trustees cannot safely defeat the remainders.                                  |
| 5. Exceptions — remote relations may be barred.             | 10. Power and duty in case of waste.  |
| 6. If remainder-men join; no breach of trust.               |   |

## CHAPTER XLIX.

REMAINDER. — DOCTRINE OF ABEYANCE. — CONDITION OF  
THE FEE, IN CASE OF CONTINGENT REMAINDERS 748-751

- |  |   |
|--|---|
| 1. Limitation to uses — use results; limitation by devise. | 5. Limitation by common law conveyance. |
|--|---|

## CHAPTER L.

REMAINDER. — ALIENATION, ETC., OF CONTINGENT REMAIN-  
DERS . . . . . 752-757

- |  |   |
|--|---|
| 1. Vested remainders alienable, &c.; contingent remainders said to be descendible and devisable. | 3. Cannot be conveyed at law, but may be in equity, and may pass by <i>estoppel</i> . |
|  | 5. Transfer to creditors; general remarks.  |

## CHAPTER LI.

## REMAINDERS IN NEW YORK . . . . . 758-762

- |  |  |
|--|--|
| 1. Expectancies. Remainders vested and contingent.   | 13. Remainder not barred by destruction of prior estate. |
| 6. Fee upon a fee.                                   | 14. Not void for improbability.                          |
| 7. Remainder after estate tail.                      | 15. Remainder to heirs.                                  |
| 8, 18. Remainder after estate for life or for years. | 16. Contingency may abridge prior estate.                |
|  | 17. Limited application of the statute.                  |

## CHAPTER LII.

## REVERSION . . . . . 763-776

- |  |   |
|--|---|
| 1. Definition and principle of the estate.           | 7. Subject to same rules with estates in possession.  |
| 2. An incorporeal hereditament.                      | 8. Actions by reversioner for injuries to the land.   |
| 3. After conditional fee, &c.; after base fee.       | 13. Rights of reversioner in case of adverse possession.  |
| 4. After estate for years.                           | 15 and note. Reversion, how far liable for debts; transfer of reversion — when set aside; miscellaneous provisions. |
| 5. May belong to a particular tenant, who underlets. |   |
| 6. Created by act of law.                            |   |

# CHAPTER LIII.

## JOINT TENANCY . . . . . 777-791

- |  |   |
|--|---|
| 1. Number and connection of the owners of real estate. | 12. Unity of time.  |
| 2. Joint tenancy, how created.                         | 13. Unity of possession.                                  |
| 4. Joint tenancy, in a remainder.                      | 14. Survivorship; exceptions to the rule of survivorship. |
| 6. Joint tenancy, for lives, and several inheritances. | 20. Who may be joint tenants.                             |
| 9. Unities necessary to joint tenancy.                 | 25. Not subject to charges made by one.                   |
| 10. Unity of interest.                                 | 26. Except by lease.                                      |
| 11. Unity of title.                                    | 32. Severance of joint tenancy.                           |

# CHAPTER LIV.

## TENANCY IN COMMON . . . . . 792-820

- |   |  |
|---|--|
| 1. Three forms of joint ownership in England.   | 22. Estate in common subject to the same rules with a several estate.  |
| 2. Co-parcenary; obsolete in the United States.   | 24. But a tenant cannot convey by metes and bounds.  |
| 5. Tenancy in common, what.   | 28. General rights and remedies of tenants in common, &c.; receipt of rents, &c., by one; assumpsit, &c.   |
| 6. Joint tenancy favored in England, but discountenanced in the United States; statutory provisions changing it into tenancy in common. | 29. Trespass, waste, &c.   |
| 7. Exceptions — husband and wife.   | 31. Whether the possession of one is <i>adverse</i> to the other; disseisin; limitation; purchase by one; whether it enures to the use of the other. |
| 10. Joint mortgagees.   | 45. Form of action by tenants in common for the land.  |
| 13. Trustees and executors.   |  |
| 14. Statutes apply to vested estates.   |  |
| 18. Legislative grants.   |  |

# CHAPTER LV.

## TENANCY IN COMMON, ETC. — PARTITION . . . 821-835

- |   |  |
|---|--|
| 1. Methods of partition; partition in equity.   | ssippi; Maryland; Delaware; Tennessee; Illinois; Indiana; Missouri; Kentucky; Ohio; Virginia; North Carolina; South Carolina; Georgia; other States. |
| 2 and note. Statutes of the several States concerning; the New England States; New York; Pennsylvania; New Jersey, Alabama, and Missis- |  |





## INDEX TO CASES CITED.

	PAGE		PAGE
<b>A.</b>		<b>Aldworth v. Robinson</b>	580
<b>Aaron v. Bayne</b>	162	<b>Alexander v. Bonnin</b>	265, 304
<b>Abbe v. Newton</b>	643	<i>v. Frary</i>	659
<b>Abbot v. Burton</b>	402	<i>v. McMurray</i>	460
<b>Abbott v. Reeves</b>	466	<i>v. Sams</i>	430
<i>v. Sturtevant</i>	637	<b>Alford v. Vickery</b>	385
<i>v. Upton</i>	612	<b>Allaire v. Whitney</b>	241
<b>Abertrombie v. Redpath</b>	257, 258	<b>Allard v. Lane</b>	606
<b>Abergavenny's case</b>	787, 791	<b>Allaway v. Wagstaff</b>	12
<b>Abernathy v. Abernathy</b>	491	<b>Allen v. Allen</b>	173
<b>Abingdon's case</b>	214	<i>v. Bicknell</i>	561
<b>Academy, &amp;c. v. Hackett</b>	285, 328, 343	<i>v. Bryant</i>	485
<b>Accey v. Simpson</b>	184	<i>v. Carman</i>	689, 751
<b>Acherley v. Vernon</b>	429	<i>v. Clark</i>	578, 665
<b>Achey v. Hull</b>	369	<i>v. Culver</i>	821, 322, 351
<b>Acker v. Ledyard</b>	311	<i>v. Hall</i>	817
<i>v. Witherell</i>	252	<i>v. Holton</i>	67, 803
<b>Ackland v. Atwell</b>	370	<i>v. McCoy</i>	364
<i>v. Lutley</i>	99	<i>v. McKeen</i>	2
<i>v. Pring</i>	242	<i>v. McRae</i>	548
<i>v. Talley</i>	236	<i>v. Parish</i>	631
<b>Adair v. Lott</b>	111, 112, 113, 459	<i>v. Shackleton</i>	644
<b>Adams v. Adams</b>	187	<b>Allyn v. Mather</b>	96
<i>v. Barnes</i>	642	<b>Almy v. Wilbur</b>	586
<i>v. Barrow</i>	214	<b>Alsberry v. Hawkins</b>	140, 153, 154
<i>v. Brown</i>	589	<b>Altemas v. Campbell</b>	64
<i>v. Bucklin</i>	315, 340	<i>v. Long</i>	65
<i>v. Cruft</i>	86	<b>Altham v. Anglesea</b>	411
<i>v. French</i>	242, 257	<b>Altimus v. Elliott</b>	477
<i>v. Guerard</i>	414, 432	<b>Amand v. Bradburn</b>	477
<i>v. Paynter</i>	658	<b>Ambler v. Norton</b>	223
<i>v. Savage</i>	412, 728	<i>v. Weston</i>	226
<i>v. Smith</i>	4, 35	<b>Ambrose v. Ambrose</b>	452
<i>v. The Amca, &amp;c.</i>	816, 818, 827	<b>American, &amp;c. v. Dyett</b>	131
<b>Addis v. Campbell</b>	776	<i>v. Pringle</i>	682, 724
<i>v. Clement</i>	477	<b>Amidown v. Peck</b>	651
<b>Addison v. Crow</b>	599, 635	<b>Amis v. Amis</b>	835
<b>Agar v. Young</b>	197	<b>Amory v. Carpenter</b>	833
<b>Aiken v. Appleby</b>	272	<i>v. Francis</i>	610
<i>v. Gale</i>	651	<i>v. Reilly</i>	676
<i>v. Ogilvie</i>	785	<b>Amphlett v. Parke</b>	48
<i>v. Smith</i>	266, 309	<b>Ancaster v. Mayer</b>	549, 628
<b>Aikin v. Morris</b>	644	<b>Ancots v. Catherick</b>	148
<b>Albany v. Bay</b>	130, 560	<b>Anders v. Meredith</b>	812
<b>Alden v. Gilmore</b>	72	<b>Anderson v. Bacon</b>	484
<b>Alderman v. Neate</b>	264	<i>v. Baumgartner</i>	595
<b>Aldis v. Mason</b>	289	<i>v. Chicago Ins. Co.</i>	342
<b>Aldrich v. Parsons</b>	5, 10	<i>v. Critcher</i>	291, 334, 390
<b>Aldridge v. Burlison</b>	128	<i>v. Hughes</i>	822
		<i>v. Lamon</i>	481, 486



# INDEX TO CASES CITED.

xxiii

	PAGE		PAGE
Bailey v. Campbell	383	Bank, &c. v. Torrey	479
v. Carleton	65	v. Whyte	548, 573
v. Carter	584	v. Wise	16, 325
v. Ekins	468	Banks v. Rebbeck	268
v. Etna, &c.	557	v. Sutton	136, 453, 463, 573
v. Freeman	251	v. Walker	643
v. Lincoln	645	v. White	349
v. Moore	297	v. Wilkes	488
v. Myrick	546, 613	Baptist, &c. v. Witherill	6
v. Rust	826	Barber v. Cary	599
v. Sisson	822	v. Root	120, 121, 122
v. Wells	240, 251	Bard v. Fort	642, 659
v. Willard	613, 665	Barker v. Barker	118
Baily v. Smith	644	v. Bates	24
Bain v. Clark	24	v. Salmon	67
Baird v. Baird	505	v. Smark	676
v. Evans	342	Barksdale v. Elam	511
v. Reman	489	Barlow v. Barlow	90
Baker v. Adams	391	v. Lambert	57
v. Baker	216	v. Wainwright	384
v. Fettes	577	Barnard v. Edwards	206, 207
v. Gittings	389	v. Large	746
v. Hathaway	129	v. Pope	647, 824
v. Holtpzoffell	352	Barnardiston v. Carter	702
v. Leathers	432	v. Fane	527
v. Lorillard	712	Barnes v. Baxter	601
v. Newton	80	v. Cunningham	210
v. Root	395	v. Gay	162
v. Thrasher	555	v. Raester	630
v. Vining	430, 446	v. Wright	684
v. Whiting	450, 459, 484, 809	Barnet v. Barnet	490
v. Wind	547	v. Dougherty	430, 436
Balk v. Onion	586	Barnett's, &c.	417
Baldwin v. Jenkins	541, 544	Barnett v. Barnett	187
v. Norton	619	v. Goings	448
v. Whiting	806, 809	v. Weston	580
Balfour v. Welland	470	Barney v. Frownar	159, 160, 205
Ball v. Carew	485, 486	v. Keith	263
v. Harris	470	Barnfather v. Jordan	251
v. Wyeth	284	Barnitz v. Casey	753, 756
Ballard v. Ballard	712, 757	Barnum v. Landon	809
v. Carter	593	Barr v. Gratz	65
Ballantine v. Greer	311	Barrell v. Joy	424, 475, 476
Ballentine v. McDowell	333	Barroilhet v. Battelle	543
v. Poyner	364	Barron v. Barron	131
Ballinger v. Edwards	640	v. Martin	586
Ballitt v. Musgrave	363	Barrow v. Nave	819
Baltimore v. McKim	7, 58	Barruso v. Madan	506
Bancroft v. Andrews	206	Barry v. Alsbury	507
v. White	149	v. Barry	476
Bank, &c. v. Beverly	459	v. Ryan	334
v. Christie	581	Bartlett v. Bartlett	132
v. Cray	18	v. Harlow	806
v. Dubuque	479	v. Hodgson	472
v. Dunseith	198	v. Janeway	211
v. Finch	581, 611	Bartol v. Calvert	236
v. Fox	668	Barton v. Bigelow	709
v. Mitchell	601, 609	v. Moss	480
v. Mott	565	v. Smith	772
v. Peter	599	Barton's case	250, 738
v. Rose	588	Barwick v. Foster	322
v. Smyers	65, 71	Basford v. Pearson	129
v. Sprigg	548	Baskins v. Giles	492
v. Tarleton	613	v. Seechrist	298

	PAGE		PAGE
Bass v. Scott	418, 462	Beebe v. Coleman	259
Bassett v. Bassett	226, 543, 727	Beecher v. Parmelee	395
v. Mason	665	Beckman v. Gibbs	663
Batchelor v. Middleton	586, 659	v. People	495
Batchelder v. Robinson	668	Beer v. Beer	355
v. Thompson	106	Beers v. St. John	33
Bates v. Norcross	64	Beeson v. Beeson	482
v. Ruddick	603	v. McNabb	211
v. Sparrel	5	Beirne v. Campbell	674
v. Thornberry	834	Belch v. Harvey	585
v. Webb	697	Belcher v. McIntosh	289
Battle v. Griffin	665	v. Sanders	479
Batty v. Snook	551	Belfour v. Davis	297
Baxter v. Bush	310	v. Weston	352
v. Child	550	Belingall v. Gear	652
v. Galloway	112	Bell v. Fry	77
v. McIntire	611, 640	v. Hartley	66
v. Taylor	767	v. Morse	595
v. Willey	547, 555	v. Neely	142
Baykes v. Baykes	463	v. Scannon	78
Bayley v. Bailey	544, 550, 555	v. Twilight	100, 150
v. Com.	581	v. Welch	479
v. Greenleaf	675	v. Wilson	187
v. Homan	537	Bellasis v. Compton	432
v. Rees	472, 473	Bellinger v. Shafer	475, 478, 495
Baylis v. Le Gros	333	Belloe v. Rogers	610, 656, 659
v. Newton	446	Bellows v. Wells	307
v. Staats	490	Belmont v. O'Brien	584
Bayliss v. Sinex	683, 724	v. Smith	53
Baylor v. Dejarnette	694	Belvidere v. Rochford	629
Bayne v. Gaylord	688	Benbow v. Townsend	433, 547
Beach v. Barons	321	Bend v. Susquehannah, &c.	548
v. Cooke	575	Benedict v. Morse	387
v. Crain	289	Bennet v. Box	454
v. Farish	349	v. Davis	493
v. Grav	335	v. Holt	555
Beale v. Sanders	291	Bennett v. Butterworth	588
Beall v. Barclay	603	v. Clemece	818
Beals v. Cong. &c.	688	v. Cooper	585
Beamish v. The Overseers	560	v. Fuhner	423, 459
Bean v. Mayo	562	v. Herring	257
Beanpland v. McKean	484	v. Robinson	519
Bear v. Bitzer	22	v. Shackford	683, 794
v. Snyder	146	v. Womack	282
v. Whisler	506	Bennock v. Whipple	544
Beard v. Knox	135	Bensley v. Burdon	755
v. Nutthall	22	Benson v. Benson	421
Beardslee v. Beardslee	536	Bentley v. Long	699
Beardsley v. Knight	47	v. Phelps	548
Beare v. Prior	588	Benzein v. Lenoir	493
Beatty v. Clement	605	Berger v. Hiester	619, 652
Beaty v. Gibbons	21, 37	Bernal v. Bernal	85
Beaver v. Filson	504	Berrian v. Conover	206
Beavers v. Smith	159, 210	v. Olmstead	286
Beck v. M'Gillis	594	Berrington v. Parkhurst	701
Beck's, &c. v. Graybill	430, 431	Berry v. Mutual, &c.	673
v. Urich	471	v. Taunton	518
Becket v. Snow	602	v. Williamson	415, 490
Beckwith v. Bent	312	Berryhill's, &c.	476
v. Boyce	23, 32, 37	Bethlehem v. Annis	555, 562
v. Lamb	127	Bettes v. Dana	647
Beckwith's case	410	Betton v. Williams	674, 675
Beddingfield's case	87	Betts v. Lee	7
Bedford v. Thomas	389	Betty v. Moore	86

# INDEX TO CASES CITED.

XXV

	PAGE		PAGE
Bevans v. Briscoe	24	Blanchard v. Blood	493
Beverly v. Beverly	696	v. Brooks	692, 702, 703, 825
v. Burke	72	Blaney v. Bearce	560, 562, 564, 568, 570
Bewick v. Whitfield	378	Blanvelt v. Woodworth	681
Bickford v. Daniels	547	Bleecker v. Smith	281
Bickley v. Bickley	216	Bleight v. Manufacturers', &c.	48
Bicknell v. Hood	266	Blevins v. Baker	806
Biddeford v. Onslow	767	Blewett v. Millett	481
Biddle v. Starr	831, 832	Bligh v. Brent	46, 48
Bigelow v. Collamore	351	Bliss v. Smith	408
v. Finch	388	Blodgett v. Hildreth	816
v. Jones	818	Blodwell v. Edwards	715
v. Topliff	547	Blood v. Blood	149, 167
v. Wilson	272, 576	v. Wood	63
Biggin v. Bridge	322	Bloomer v. Henderson	605
Biggot v. Smyth	738	Blossom v. Blossom	804
Biggs v. Brown	21	v. Brightman	804
Billings v. Taylor	155	Blount v. Winter	229
Binion v. Stone	443	Blow v. Maynard	144, 171
Binnerman v. Weaver	519	Blowder v. Baugh.	70
Binney's case	46	Blower v. Morret	185
Binney v. Chapman	296	Blume v. McClurker	333
Birch v. Dawson	85	Blunden v. Baugh	388
v. Ellames	672	Blyer v. Monholland	603
v. Wright	258, 567	Blystone v. Burgett	57
Bird v. Gardner	576	Blythe v. Easterling	482
Birnel v. Eakie	611	Boardman v. Masman	474
Birnie v. Caystile	585	Boarman v. Catlett	575, 631
Birst v. Davies	89	v. Groves	131
v. Dawes	752	Bodwell v. Webster	544, 545
Bisbee v. Hall	255	Bogardus v. Trinity, &c.	71, 534
Bishop v. Bishop	462	Bogert v. Hertell	48
v. Doty	270	Bogue v. Rutledge	149
Bishop, &c.	236	Bohannon v. Ithreshly	459
Bishop of Bath's case	272	Bolles v. Chauncey	612
Bisland v. Hewett	197	Bollinger v. Chouteau	585, 590, 659
Bittenger v. Baker	18, 21, 23	Bolster v. Cushman	192
Black v. Black	496	Bolton v. Ballard	573
Blackburn v. Baker	65	v. Humphries	518
v. Pennington	678	Bombaugh v. Bombaugh	801
v. Walwick	640	Bond v. Hopkins	585
Blacket v. Lamb	512	v. Kent	676
Blacklow v. Laws	417	v. Roshing	264
Blackman, &c.	221	Bonham v. Badgley	70
Blackmore v. Boardman	292, 294	v. Galloway	611, 612
Blackstone, &c. v. Davis	80	v. Newcomb	554, 585
Blackwell v. Overby	548	Bonner v. Proprietors, &c.	824
Blain v. Harrison	178, 190, 200	Booker v. Gregory	591
Blair v. Bass	433, 455	Bookover v. Hurst	644
v. Claxton	344	Boon v. Barnes	674
v. Harrison	177	v. Eyre	507
v. Pathkiller	58	Boos v. Ewing	676
v. Rankins	255	Boothby v. Vernon	117
Blake v. Blake	104	Booth v. Adams	812
v. Crowninshield	272	Booth's case	407
v. Dexter	418	Boqt v. Coburn	550
v. Foster	450	Borah v. Archers	834
v. Freeman	122	Boraston's case	694, 707, 756
v. Milliken	813	Boraston v. Green	21, 37
v. Shrive	528	Bordman v. Osborn	256, 341, 343
v. Tucker	301	Borst v. Boyd	572, 585, 659
Blakemore v. Byrnside	548	Borland v. Nichols	184
Blakeley v. Whieldon	13	Boson v. Williams	672
Blamford v. Blamford	780	Boston, &c. v. Binney	297

	PAGE		PAGE
Boston, &c. v. Bulfinch	75	Brainerd v. Cooper	575
v. King	371, 564, 591, 611	Brainn v. Stewart	654
v. Sparhawk	74	Braker v. Devereaux	828
Boteler v. Alington	416	Bramhall v. Ferris	420, 515
Botsford v. Burr	430	Bramley v. Chesterton	391
Bottomley v. Fairfax	452	Branch v. Doane	303
Bould v. Winston	738	v. Morrison	15
Bourne v. Littlefield	591, 664	Brashear v. Williams	59
v. Simpson	169	Brashier v. Jackson	226
Bournonville v. Goodall	688	Bratton v. Clawson	38, 39, 41
Bovey v. Smith	467	v. Mitchell	122, 203
Bowen v. Bowen	530	Bratton, &c.	575
v. May	664	Bray v. Tracy	373, 380
Bowers v. Bowers	206	Braybroke v. Inskip	594
Bowie v. Berry	159, 160, 162	Braythwaite v. Hitchcock	386
Bowker v. Bull	580, 602	v. Skinner	504, 569
Bowling v. Dobyns	479, 693	Brayton v. Lee	168
Bowles' case	95, 108, 701, 735	Breckenridge v. Ormsby	649
Bowles v. Poore	338	Bree v. Holbeck	605
Bowman v. Long	100	Breeding v. Taylor	820
v. Manter	612	Breese v. Barge	42, 43, 244, 250
v. McElroy	612	Brent's case	405, 716, 730, 738
v. Wathen	2	Brewer v. Connell	172
Bowra v. Wright	822	v. Hardy	740
Bowser v. Bowser	257	v. Harris	236
v. Colby	527, 531	v. Staples	602, 608
v. Scott	326	Brewster v. Striker	458, 459, 501
Boyce v. Greene	46	Brick v. Getzinger	564
Boyd v. McCombs	322	Brickhead v. The Archbishop	166
v. McLean	433	Bridenbecker v. Lowell	595
v. Shaw	660	Bridge v. Brown	478
v. Sloam	324	v. Hubbard	642
v. Stone	547	Bridge, &c. v. The State	262
v. Talbert	332	Bridge's case	2, 225
Boyden v. Lancaster	202	Bridges v. Purcell	2
Boyers v. Elliott	783, 784	Bridgewater v. Bolton	52
v. Newbanks	216	Bridgham v. Tileston	251
v. Smith	300	Briggs v. Davis	571
Boylston v. Carver	594	v. Earl	376, 379
Boynton v. Hubbard	772	v. French	644, 647
Brace v. Duchess, &c.	580	v. Richardson	15
Bracebridge v. Buckley	528	v. Richmond	666
Bracebridge's case	732	v. Sholes	642
Bracken v. Miller	467	v. Thompson	309, 346
Brackett v. Leighton	133	v. Titus	686, 689, 751
Brackenridge v. Holland	479	Brigham v. Eveleth	810
Bradford v. Foley	705	v. Shattuck	507, 509, 523
v. Marvin	675	v. Tileston	250
v. Potts	643	Bright v. Wilson	371
Bradish v. Gibbs	131	Briles v. Race	393
Bradley v. Boynton	820	Brindernagle v. German	657
v. Chester	557	Brinsmaid v. Mayo	811
v. Fuller	609, 652, 824	Brisbane v. Houghton	557
v. Holdsworth	46	Briscoe v. Bronaugh	674
Bradshaw v. Ellis	17	Bristed v. Wilkins	98
Bradstreet v. Huntington	818	Bristol v. Morgan	596
v. Schuyler	463	Brizich v. Manners	672
Brady v. McCosker	322	Broadway v. The State	503
v. Peiper	249	Brock v. Eastman	827
v. Weeks	253	v. Savage	459
Brailsford v. Heyward	450	Brockenbrough v. Ward	506, 507
Brainard v. Hooper	658	Brocklehurst v. Jessop	586
Brainerd v. Arnold	238	Broddie v. Johnson	318
v. Bushnell	272	Brodrick v. Poillon	684

# INDEX TO CASES CITED.

xxvii

	PAGE		PAGE
Bromfield v. Crowder	714	Brownfield v. Weicht	653
Bromley v. Hopewell	311	Browning v. Clymer	659
Brolaski v. Ferguson	333	v. Dalesme	5
v. Miller	642	v. Haskell	274, 334
Bronson v. La Crosse	560	Brownswords v. Edwards	710
v. Railroad	657	Bruce v. Halbert	300
v. Robinson	575	v. Roney	433
v. Yancy	190, 194	v. Wood	124, 127
Brooks v. Avery	640, 642	Bruch v. Lantz	479, 480
v. Briggs	300	Brueston v. Rainsford	242
v. Dent	428, 447	Brugman v. Noyes	281
v. Fowle	68, 437	Brumfield v. Brown	389
v. Harwood	578	Brundige v. Poor	129
Broome v. Alston	481	Brunnenmeyer v. Buhre	490
Brothers v. Porter	434, 464	Brush v. Kinsley	675
Brough v. Higgins	97	Bryan v. Butts	560, 593
Broughton v. Errington	231	v. Fisher	349
v. Langley	416	v. Lawrence	40
v. Randall	147	v. Stump, &c.	126
Brouster v. Robinson	575	Bryant v. Crosby	547
Brower v. King	72	v. Tucker	63
Brown v. Adams	135, 190	Brydges v. Brydges	456
v. Bailey	506	Buchan v. Sumner	783
v. Barkham	551	Buchanan v. Buchanan	228, 229
v. Bartee	450	v. Deshon	153, 154
v. Bragg	329	v. Hamilton	491
v. Brown	413, 424, 826	v. Munroe	659
v. Burrington	307	v. Shannon	657
v. Dewey	547	Buck v. Binninger	390
v. Dwelley	482	v. Fisher	300
v. Edson	66	v. Sherman	575
v. Farran	174	v. Squiers	75
v. Hodgdon	185	v. Winn	466, 785
v. Jones	441	Buckbridge v. Ingram	154, 162
v. Keller	294, 387	Buckey v. Snouffer	326
v. King	7, 71, 385	Buckingham v. Drury	225
v. Lapham	573, 613	Buckland v. Butterfield	29
v. Lawrence	698	v. Papillon	282
v. Lynch	442	Buckley v. Buckley	30, 32, 40, 42, 112, 783
v. McCormick	301	Buckmaster v. Needham	531
v. Meredith	189	Buckman v. Buckman	71
v. Pinkham	4	Bucks v. Drury	225
v. Porter	79	Bucksport v. Spofford	78, 79
v. Quilter	352	Buckworth v. Thurkell	116
v. Scott	611, 644	Budeley v. Massey	542
v. Simons	588, 603, 665	Buell v. Cook	267
v. Snell	560	Buffum v. Dean	245, 259, 333, 345
v. Spand	124	Buford v. Smith	653
v. Sparel	127	Bugbee v. Sargent	505
v. Stead	616	Buist v. Dawes	691, 702
v. Stewart	561, 564	Bulkley v. Dolbeare	378
v. Storey	566	Bull v. Birkbeck	98
v. Turner	827	Bullard v. Bowers	148, 578
v. Wallace	476	v. Copps	297
v. Wenham	58	v. Hinckley	638
v. Wernway	654	Bullen v. Arnold	8
v. Williams	173	Buller v. Chaverton	338
v. Wood	825	Bullock v. Dommitt	169
v. Worcester	578, 631, 638	v. Griffin	289, 366
v. Wright	548	v. Sneed	323
Browne v. Amgot	325	Bume v. Cambridge	277
v. Potter	150	Bumpus v. Platner	467, 643
v. Smith	682, 724	Bunn v. Winthrop	415
Brownell v. Brownell	828		



	PAGE		PAGE
Bunyan v. Mersereau	593	Cadbury v. Duval	471
Burchard v. Hubbard	301	Cage v. Acton	246
Burden v. Thayer	256, 321	v. Russel	527
Burdet v. Hopegood	726	Caillanet v. Bernard	133
Burdett v. Clay	581, 595, 611	Cairns v. Chabert	97
Burges v. Mawbey	542	Caldecott v. Brown	97
Burgess v. Sturgis	657	Caldwell v. Copeland	11
v. Wheate	449, 572, 676, 678	v. Fulton	11
Burgin v. Chenault	417	v. Moore	290
Burhans v. Burhans	822	Calhoun v. Calhoun	125
v. Van Zandt	71, 811	v. Curtis	16, 20
Burk v. Baxter	32	v. Jester	302
v. Osborn	194, 295	v. Mahon	688
Burke v. Barron	109, 161	Calkins v. Calkins	586
v. Wilder	766, 776	Call v. Barker	827
Burks v. Chrisman	674	Callen v. Hilty	302
Burling, &c.	683	Calverly v. Phelps	657
Burnell v. Martin	654	Calvert v. Godfrey	462
Burnett v. Denniston	608	v. Simpson	393
v. Pratt	655	Camden v. Balterbury	266
v. Thompson	263	Cameron v. Irwin	551, 557, 663
Burns v. Bryant	387	Camp v. Barker	525
v. Cooper	308	v. Camp	271, 299
v. Hobbs	644	v. Coxe	575
v. Page	163	v. Homesley	819
Burnside v. Merrick	788	v. Pulver	361
v. Wall	111	Campbell v. Arnold	767
Burr v. Spencer	238	v. Campbell	68
Burrell v. Bull	481	v. Drake	436
v. Davis	288	v. Hand	811
v. Sheil	493	v. Knights	613
Burridge v. Bradyl	185	v. Lowe	419, 807, 823, 832
Burrows v. Holt	68, 406	v. Macomb	564
Burt v. Haslett	30	v. Pennsylvania, &c.	479, 480,
Burton v. Slattery	351	v. Procter	483
Buryhardt v. Van Deusen	824	v. Renwick	388
Bush v. Allen	418	v. Thomas	334
v. Bradley	64	v. Walker	66
v. Cooper	642	v. Wallace	479, 485
v. Livingston	640	v. Worthington	64
Bush's case	179	Campbell's case	547
Buskirk v. Cleveland	307	Canal, &c. v. Railroad, &c.	355
Bustard's case	217	Canby v. Porter	2, 530
Bussey v. Paige	564, 570	Canvy v. Troutman	123
Buswell v. Davis	611, 647	Capel v. Butler	465
Butler v. Baker	336	Capen v. Richardson	602
v. Buckingham	128	Cardwell v. Cheatham	544
v. Butler	626, 721	Cargill v. Sewall	469, 470
v. Elliott	609	Carnagy v. Woodcock	79
v. Haskell	775	Carmichael v. Carmichael	17
v. Mannings	357	Carpenter v. Carpenter	206
v. Page	29	v. Cummings	97
v. Phelps	818	v. Griffin	647
v. Rivers	685	v. Jaques	271
v. Seward	667	v. Providence	586
v. Taylor	601	v. Schermerhorn	598
v. Viele	644	v. Thompson	712
Butt v. Maddox	664	v. Westcott	299
Butterfield v. Baker	307, 308, 516	Carr v. Carr	327
Button v. Button	505	Carrington v. Roots	156
Butts v. Edwards	328	Carroll v. Craine	17, 302
Buxton v. Uxbridge	91	Carroll v. Reddington	687
Byam v. Robins	821		664
Byrne v. Beeson	299		

# INDEX TO CASES CITED.

xxix.

	PAGE		PAGE
Carston v. White	682	Champlin v. Foster	657
Cart v. Reeve	243	v. Williams	605
Carter v. Barnardiston	237, 749	Champney v. Coope	613
v. Carter	548	Chandler v. Edson	7
v. Cummings	852	v. Spear	65, 302
v. Hammett	256	Chandler v. Thurston	383, 388
v. Kerr	833	v. Walker	74
v. Neal	473	Chandos v. Talbot	362
v. Parker	138, 149, 159	Chaney v. Tiptom	832
v. Rocket	598	Chapin v. Harris	506, 526
v. Vurr	292	v. Hill	233
v. Williams	113	v. Marvin	693, 700
Cartledge v. West	335	Chaplin v. Chaplin	339, 340, 449, 453
Caruthers v. Caruthers	222, 225	v. Givens	466, 489
v. Wilson	170, 203	Chapman v. Blissett	417
Carver v. Earl	71	v. Bluck	263
v. Jackson	713, 739	v. Chapman	673
v. Miller	371	v. Gray	242, 273
Carwell v. Craine	687	v. McGrew	260
Cary v. Callan	432	v. Mull	573
v. Prentiss	612	v. Schroeder	206
v. Rawson	545	v. Tanner	588, 676
Carwardine v. Wisblade	659	v. Towner	266
Casborne v. Inglis	572	v. Turner	541, 555
v. Scarfe	572	v. Wright	330
Case v. Davis	312	Chappel v. Brewster	90
Casey v. Inloes	75	Charles v. Andrews	223
Cason v. Lawrence	97	v. Dunbar	588
Casporus v. Jones	196	Charlestown v. Ackworth	4
Cass v. Martin	577	Chase v. Gates	661
v. Thompson	168	v. Lockerman	474
Cassiday v. McDaniel	455	v. McDonnell	267
Cassidy v. Rhodes	17, 23	v. Palmer	661
Castleman v. Belt	564, 566, 567	v. Tuckerman	593
Caston v. Caston	186, 206	Chatterton v. Fox	343, 344
Caswell v. Ward	657	Cheek v. Waldrum	557
Cater v. Longworth	647	Cheesborough v. Green	811
Cathcart's, &c.	575	Cheeseman v. Thorne	819, 830
Catlin v. Ware	175	Cheever v. Fair	603
Cator v. Charlton	580	v. Pearson	79, 278, 388
v. Clarke	454	Chelsea, &c. v. Rowley	1
Caufman v. Sayre	550, 663	Chelsey v. Thompson	813
Canley v. Lawson	232	Cherokee, &c. v. Georgia	58
Caulfield v. Maguire	98	Cherry v. Bowen	550
Cause v. Anders	812	v. Clements	131
Cavandish v. Worsley	88	v. Truro	624
Cavender v. Smith	190	Cheslyn v. Dalbey	597
Cavis v. McClary	569	Chesround v. Cunningham	819
Cazenove v. Cutler	589, 590, 665	Chester v. Wheelwright	609
Cecil v. Dorsey	833	Chesterfield v. Bolton	366
Chadbury v. Duval	468	v. Janssen	774
Chadwick v. Felt	433	Chetham v. Williamson	13
Chalán v. Malone	71	Chew's Ex'rs v. Chew	52
Chalker v. Chalker	381, 530, 537	Chick v. Rollins	584
Chalmers v. Stovil	183, 185	Chickering v. Hatch	548
Chamberlain v. Barnes	605	Child v. Clark	256, 337
v. Brown	260, 390	Childe v. Willis	490
v. Gardner	661	Childers v. Smith	321
v. O'Connor	686	Childs v. Bolan	562
v. Thompson	561, 580	v. Childs	560, 660
Chambers v. Goldwin	551, 615	v. Russell	707
v. Hise	543	v. Smith	156, 213, 364, 377
v. Mauldin	576	Chilton v. Chapman	602
v. Yarnall	685	v. Niblett	298

	PAGE		PAGE
Chipman v. Emeric	332	Clark v. Williams	58
Chittenden v. Barney	578, 630	Clarke v. Cummings	105
Cholmley's case	700, 715, 716, 742	v. Lott	415
Cholmondeley v. Clinton	560, 588, 649	v. Sibley	573
Chouteau v. Burlando	586	v. Spaulding	239
Chretien v. Doney	273, 391	v. Stanley	599
Christian v. Dripp	30, 33, 39	v. Windham	131
Christie v. Herrick	659	Clarkson v. Hanks	58
v. Tancred	292	Clason v. Rankin	72
Christophers v. Blackford	678	Claassen v. La Franz	430, 482
v. Sparke	564, 584	Clay v. Hart	48, 186
Chudleigh's case	330, 399, 401, 407, 733, 741	v. Sharp	557
Church v. Brown	282	v. White	61, 63
v. Bull	178, 180, 181, 182	v. Willis	557
v. Clark	256	v. Wren	562
v. Church	211	Clemmence v. Steere	361, 362, 365, 367, 368
v. Griffith	683, 724	Clench v. Witherby	550
v. Savage	624, 626	Clepper v. Livergood	831
Churchill v. Cole	642	Clere's case	410
v. Grundy	795	Clerk v. Clerk	787
v. Loring	652	Cleveland v. Martin	611, 676
v. Marks	81	Cleves v. Willoughby	282, 334, 345
v. Munroe	127	Cline v. Black	352
City, &c. v. Corlies	289	Clinton v. M'Kenzie	303
v. Dedham	4	Clopton v. Bolton	507
v. Lannan	332	Cloud v. Calhoun	487, 493
v. Moorhead	286	v. Ivie	490
v. Price	285	Clough v. Elliott	573
v. Smith	527, 528	Clun's case	322
City of Baltimore v. White	321	Coale v. Barney	833
Clabaugh v. Byerly	672	Coates v. Cheever	155, 204, 209, 669
Clagett v. Salmon	583	v. Woodworth	430, 548, 571, 573, 584, 652
Claiborne v. Henderson	454	Cobb v. Thompson	456
Clair v. Williams	217	Coburn v. Hollis	74
Clanahan v. Porter	198	Cockran v. O'Hern	451, 452
Clap v. Draper	16	Cockrane v. Libby	141, 150, 152
Clapp v. Bromaghan	818, 828	Codman v. Jenkins	332
v. Paine	395	v. Tinkham	825
v. Stoughton	125, 509, 711, 757	Codwise v. Taylor	676
v. Titus	542	Coe v. Peacock	557
Clarendon v. Barham	629	Coffee v. Crouch	492
Claridge v. M'Kenzie	298	Coffin v. Loring	594
Clark v. Abbott	566	v. Lunt	384, 386
v. Austin	639	v. Morrill	123
v. Beach	560	Cogan v. Cogan	587, 718
v. Brown	540, 599	Cogswell v. Tibbetts	142
v. Bull	597	Cohen v. Dupont	347
v. Flint	605	v. Kyler	40
v. Griffith	178	Coit v. Fitch	667
v. Henry	550	Coke v. Pearsall	566
v. Holden	362	Colburn v. Mason	815, 817
v. Holdford	27	Colby v. Poor	660
v. Kingsley	686	Cole v. Hall	828
v. Lucy	518	v. Paterson	323, 355
v. Martin	527	v. Sury	322
v. M'Eloy	15	Colegrave v. Dias Santos	3
v. Munroe	148	Coleman v. Haight	285
v. Owens	106	v. McKinney	471
v. Robins	589	v. Packard	562
v. Smith	58	Coles v. Trecothick	485
v. Thompson	275	Collamore v. Langdon	618
v. Trinity	521	Collett v. Munden	580

# INDEX TO CASES CITED.

xxxi

	PAGE		PAGE
Collins v. Carlile	581	Cook v. Gudger	548
v. Harding	354	v. Hammond	3, 64, 218, 773
v. Marcy	512	v. Herle	340
v. Robinson	455	v. Hutchinson	445
v. Shirley	659	v. Nicholas	207
v. Smith	484	v. Norriss	335
v. Torry	574, 669	v. Soltan	585
v. Varrow	289	v. Stearns	302, 303
Colt v. Colt	452	Cooles v. Wooding	821
Colthirst v. Bejushin	713, 716	Coombs v. Jordan	17, 32, 580
Colton v. Smith	825	Coon v. Brickett	281, 332, 336
Columbia, &c. v. Lawrence	598	Coons v. Nall	201
Colvin v. Baker	388	Cooper v. Adams	8, 388, 389, 391
Colwell v. Hamilton	652	v. Chartin	600
v. Wood	544	v. Cole	593, 668
Com. v. Alger	52	v. Cooper	456
v. Barnitz	490	v. Davis	560, 564
v. Blanton	493	v. Henderson	490
v. Cartner	307	v. Whitney	142, 452, 463, 541, 544, 573, 613, 619
v. Rigney	309	Copeland v. Stephens	239
v. Stauffer	519	Copis v. Middleton	602
Combs v. Young	167	Coppage v. Alexander	94, 538
Comer v. Chamberlain	114	v. Barnett	430
Comfort v. Duncan	21	Copperthwait v. Dummer	654
Comley v. Hendrick	659	Coppering v. Cooke	588
Comly v. Strader	140	Coppin v. Coppin	676
Commercial, &c. v. Cunningham	583	Corbet's case	408, 509
Comyns v. Latimer	537	Corhin v. Healy	89
Compton v. Oxenden	614	Corbit v. Corbit	226
Conant v. Little	216	v. Stone	722
v. Warren	659	Corley v. Hobart	664
Condit v. Neighbor	321	Corm v. Hufey	831
Condit v. Soane	2	Cornel v. Sykes	585
Coert v. Hertzog	137	Cornelius v. Ivins	533
Coager v. Lancaster	549	Cornell v. Lamb	311, 314, 315, 333
v. Ring	479	v. Pierson	543
Conghanour v. Bloodgood	297	v. Varnartsdalen	286
Congregational Ch. v. Morris	154	Cornish v. Strutton	366
Conklin v. Bowman	649	Cornwall v. Hoyt	271
v. Conklin	712	Corriell v. Bronson	213
Conkling v. King	537	v. Harn	171, 175, 179
Conley v. Palmer	312	Corwin v. Corwin	72, 816
Connally v. Smith	154	Coster v. Clarke	47, 163
Conner v. Bradley	332	v. Lorillard	498
v. Coffin	25	Coteman v. Freeman	681
v. Lewis	430	Cotheal v. Blydenburgh	640
v. Sheperd	212	Cother v. Essex	319
v. Sheperel	156	v. Merrick	318
v. Tuck	424	Cottee v. Richardson	244, 245, 292
v. Whitmore	564, 605	Cotterel v. Hampson	468
Conover v. Porter	573	Cotterell v. Long	541
v. The Mutual, &c.	560	v. Purchase	543, 551, 553
Constant v. Mattison	475, 477	Cottes v. Jeffers	611
Constantine v. Van Winkle	129	Cottington v. Fletcher	547
Conway v. Alexander	549, 550, 555	Cottle v. Sydnor	66
v. Shrimpton	586	Couch v. Couch	459, 464, 493
Conwell v. Evill	424, 548	v. M'Kellar	334
Conyers v. Kenan	70	v. Stratton	223
Cook v. Arnham	585	County, &c. v. Brown	819
v. Brightly	315	Countz v. Geiger	126
v. Colver	641	Courtee v. Dawson	474
v. Colyer	584	Courtney v. Taylor	549
v. Cook	167, 386, 778	Contant v. Servoss	557
v. Fountain	408, 428		

	PAGE		PAGE
Coventry v. Coventry	628	Crooker v. Jewell	586, 593, 618
Coverdale v. Aldrich	450	Crop v. Norton	433
Covert v. Hertzogg	167	Crosby v. Bradbury	40
Cowan v. Wheeler	64	v. Chase	511, 616
Cowden v. Cairns	785	v. Harlow	566
v. Oyster	447	v. Loop	323, 354
Cox v. Fenwick	253, 677	v. Otis	125
v. Grant	430	Croskey v. Coryell	684
v. Jagers	189, 192	Cross v. Button	251
v. Walker	277	v. Carson	523, 530, 534
v. Wheeler	624	v. Coleman	531, 545
Coxe v. Smith	460	v. Hepner	588
Coy v. Leach	105	v. Marston	32
Coyte's, &c.	48, 464	v. Tome	307
Cozens v. Stevenson	242	Crotts v. Collins	241
Crabs v. Fetick	303	Crouch v. Puryear	155, 209, 364
Craddock v. Reddlesbarger	16	Crow v. Powers	186
Craft v. Wilcox	797	v. Tinsley	639
v. Webster	595	v. Vance	593, 595
Crafts v. Aspenwall	676	Crowell v. Bebee	65
v. Crafts	590	Crowley v. Vitty	262
Craig v. Craig	495	Cruger v. Cruger	131, 500
v. Leslie	48	Crummel v. Andros	522
v. Tappin	581	Crumpton v. Ballard	413
v. Walthall	184	Crusoe v. Bugby	513, 514
v. Watts	80, 94, 517	Crystal v. Flannelly	685
Cram v. Dresser	288, 293, 349	Cubberly v. Wine	653
Crane v. Caldwell	675	Cudworth v. Hall	449
v. Crane	187, 457	Cullen v. Riley	443
v. Deming	583	Cullum v. Emanuel	608, 666
v. Hardman	395	v. Irwin	576, 597
v. March	596	Culp v. Fisher	608
v. Marshall	72	Culpeper v. Alston	471
v. O'Connor	242	Cumberland's case	362
v. Paine	586	Cumming v. Cumming	603
v. Palmer	674	Cummings v. Daniel	186
Cranson v. Cranson	167	Cunningham v. Cunningham	141
Craven v. Hardman	282	v. Davis	640
Cravenor v. Bowser	301	v. Doe	110, 111
Crawford v. Chapman	252	v. Goelet	390
v. Jarrett	311	v. Harper	544
v. Morris	262	v. Knight	148
v. Severson	505	v. M'Kindley	458
Crawley's case	405	v. Moody	451
Cray v. Willis	781	Cure v. Lowell	387
Cresson v. Stout	32	Curling v. Shuttleworth	557
Creswell v. Altemus	814	Curran v. Jago	444
v. Crane	393	Curre v. Bowyer	49
Crewe v. Dickins	470	Currier v. Webster	665
Crews v. Pendleton	28, 564	Currin v. Finn	154
Cripps v. Conklin	708	Curtis v. Curtis	136, 137, 201
Crisp v. Heath	576	v. Groat	7
Crist v. Jack	811	v. Hobart	140, 141, 199, 216
Crittenden v. Woodruff	150, 173	v. Hoyt	9
Croade v. Ingraham	192	v. Price	416
Crocker v. Fox	206, 372	v. Tyler	596, 598, 602
v. Frazier	631	Curtiss v. Hoyt	767
v. Thompson	607	Cushing v. Adams	301, 305, 766
Croft v. Lumley	238	v. Ayer	603, 659, 661, 665
v. Powell	557	v. Kenfield	766
Croghan v. Livingston	831	v. Mills	264
Crommelin v. Minten	58	v. Smith	661
v. Thiess	251, 262, 350, 394	Cushingham v. Phillips	344
Cronkright v. Thompson	687	Cushney v. Henry	496, 829

# INDEX TO CASES CITED.

xxxiii

	PAGE		PAGE
Cuthbert v. Baker	470	Davis v. Mason	112
v. Wolfe	131	v. Maynard	611, 612
Cutler v. Haven	595	v. Mills	602
v. Lincoln	606	v. Norris	831
Catts v. York, &c.	593, 596, 660, 661	v. Norton	705
Cayler v. Bradt	802	v. Rider	603
		v. Simpson	479, 485
		v. Single	183
		v. Speed	410, 748
		v. Stonestreet	555
		v. Thomas	337, 552, 555
		v. Winn	610
		Davison v. De Freest	643
		v. Donalor	343
		Dawes v. Haywood	48
		Dawson v. Dawson	101
		v. Dewan	313
		v. Harrington	684
		v. Mitchell	674
		Day v. Patterson	602
		v. Perkins	42, 672, 783
		v. Swackhamer	257
		v. Watson	346
		Dean v. Dean	427
		v. Mitchell	162
		v. Richmond	130
		v. Sanford	418
		Dean, &c. v. Dorrington	96
		Dearborn v. Dearborn	562
		Dearden v. Evans	367
		Dearty v. Murphy	436
		Deaver v. Rice	308, 311
		Debow v. Colfax	19
		v. Lowen	753
		v. Lower	753
		v. Titus	753
		De Bevoise v. Sandford	464
		De Cotter v. Jefferr	602, 659
		De Fonst v. Byrne	238
		De Graw v. Richardson	113
		De Haven v. Landell	660
		Dehon v. Redfeen	99, 740
		Dejarnette v. Allen	122, 123, 374
		De Kay v. Irving	497
		De Lancey v. Garnier	332
		v. Ga Nun	333
		Deland v. Montague	395
		v. Mershon	664
		Delahay v. Clement	654
		Delay v. Vinal	187
		Delmonico v. Guillaume	783
		Demainbray v. Metcalf	580
		Demarest v. Willard	321
		v. Wyncoop	131
		Demi v. Borstar	21
		Deming v. Comings	605, 660, 661, 665, 668
		Den v. Adams	395
		v. Cartwright	273
		v. Crawford	702
		v. Demarest	129, 196, 699, 754
		v. Dimon	560, 595
		v. McKnight	482, 485
		v. Spinning	597, 651
		Dendy v. Nicholl	332

D.

	PAGE		PAGE
Denham v. Harris	311	Doe v. Bernard	143, 194
Deniston v. Potts	659	v. Bolton	416
Denk v. Hunter	266	v. Brown	299
Denman v. Soper	330	v. Brower	93
Denn v. Allen	457	v. Bucknell	566
Dennett v. Dennett	740	v. Burnett	36
Dennis v. Dennis	144, 201, 478	v. Burt	5
Dennison v. Goehring	442, 443	v. Butcher	279, 280
Denny v. Allen	712	v. Cadwallader	561
v. Hamilton	634	v. Carew	516
Denton v. McKenzie	437	v. Carter	512, 515
v. Nancy	573	v. Clare	267
De Peyster v. Clendening	495	v. Cooper	258
Derby, &c. v. Landon	667	v. Crisp	539
Dermott v. Wallack	251	v. Davis	458
Derush v. Brown	162, 453	v. Dixon	793
Despatch, &c. v. Bellamy, &c.	28, 40	v. Edwards	95
Detheridge v. Woodruff	124	v. Ellis	421
Devens v. Bower	651	v. Everington	299
Dewall v. Covenhoven	122	v. Fonnereau	723
Dewart v. Purdy	831	v. Forwood	247
Dewey v. Bellour	307	v. Francis	261
v. Campan	58	v. Fuller	296
v. Dupuy	251	v. Gatacre	733
v. Field	647	v. Giles	561
De Wolf v. Harris	582	v. Goldwin	385, 389, 560
Dexter v. Arnold	579, 584, 585, 586, 587, 588, 590, 661, 662	v. Gorham	10
v. Manley	284	v. Green	384, 385
Dey v. Dunham	545	v. Gregory	72
De Young v. Buchanan	291, 334	v. Gwinnell	159
Dick v. Batch	598	v. Hicks	416
Dickey v. McCullough	537	v. Horrocks	817
Dickinson v. Gunn	600, 669	v. Howland	798
Dickson v. Robinson	178, 183	v. Hulse	817
Dieffendorf v. Spaker	489	v. Hutton	116, 772
Dikeman v. Parish	298	v. Jones	366
Dillar v. Young	49	v. Knebell	535
Dillingham v. Jenkins	242	v. Lansham	352
Dillon v. Fraine	400, 730, 737	v. Lewis	103
Dilworth v. Linderling	477	v. Luxton	102, 103, 104
Dingley v. Dingley	712, 726, 776	v. Lynes	70
Dingman v. Randall	612	v. Maisey	561, 564
Dinsmore v. Biggert	422	v. Martin	731
Dixfield v. Newton	618	v. Martyn	755
Dixie v. Davies	566	v. McCleary	65
Dixon v. Buell	260	v. McKay	386
v. Dixon	674, 675	v. McLoskey	560, 561, 610, 654
v. Homer	476, 491	v. Migem	385
v. La Farge	684	v. Moore	714
v. McCue	184	v. Morgan	726
v. Picket	694	v. Needs	203
v. Saville	573	v. Nicholls	710
Dockham v. Parker	308	v. Nowell	711
Dodd v. Thompson	314	v. Oliver	755
v. Watson	366	v. Olley	566
Dodge v. Dodge	181	v. Passingham	416
Doe v. Abey	794	v. Perryn	702, 712, 714, 756
v. Archer	280	v. Phillips	526
v. Asby	526	v. Pott	457
v. Ashburner	264	v. Prigg	708
v. Barker	385	v. Prosser	817
v. Barton	566	v. Provoost	712, 756
v. Benjamin	264, 266	v. Rees	336
		v. Rivers	118

# INDEX TO CASES CITED.

XXXV

	PAGE		PAGE
Doe v. Rock	383, 429	Doyle v. Sleeper	444
v. Rogers	115	D'Oyley v. Loveland	465
v. Scudamore	694	Drake v. Munday	265
v. Sea	710	v. Pell	707
v. Seaton	299	Drane v. Gregory	128, 817
v. Shippard	706	Draper v. Baker	203
v. Shotter	52	Dresser v. Dresser	810
v. Simpson	421, 692	Drew v. Rust	617
v. Smarridge	384	Drexel v. Milles	651
v. Smith	267	Driscoll v. Hill	687
v. Staggy	248	Driver v. Frank	710, 713, 714, 753
v. Steele	103	Drury v. Drury	793
v. Tom	564	v. Moree	640
v. Tomkinson	52	Drury, &c. v. Chapman	333
v. Walker	245	Dry, &c. v. Stillman	495
v. Warburton	566	Drybutter v. Bartholomew	46
v. Watkins	273	Dryden v. Frost	96
v. Watson	695	Duberly v. Day	659
v. Watt	526, 529	Dubois v. Kelly	83, 37
v. Watts	274	v. Xiques	813
v. Weller	279	Dubs v. Dubs	116
v. Wells	102	Dudley v. Bosworth	430
v. Wilson	58	Duffield v. Whitlock	282
v. Woodroffe	83, 84	Duffy v. Culvert	449, 467, 468, 470, 493
Dolan v. The Mayor, &c.	505	Du Hourmelin v. Sheldon	437
Dold v. Geiger	122	Duke, &c. v. Graves	424
Dolittle v. Eddy	302	Dumpores v. Case	514
Dollen v. Batt	295	Duncan v. Blachford	395
Donahoo v. Scott	684, 688	v. Duncan	182, 185
Donahy v. Clap	681	v. Forrer	783
Donelson v. Posey	476	v. Hobart	664
Donisthorpe v. Patis	246	Dunch v. Kent	467
Donley v. Hays	596	Duncomb v. Duncomb	146, 481, 735, 742
Donnell v. Mateer	823	Duncroft v. Albrecht	46
Donnelly v. Donnelly	138	Dundas v. Muhlenberg	12
Donnington v. Meeker	640	Dunham v. Minard	585
Donovan v. Donovan	686	v. Osborne	144, 147
Dorchester v. Coventry	160	Dunklee v. Adams	529
Dorr v. Wainwright	86	Dunlap v. Gibbs	2, 3
Dorrell v. Johnson	387, 397	Dunn v. De Nuovo	248, 324
Dorrill v. Stephens	293	Dunning v. Clark	689, 751
Dorsey v. Clark	432, 436	Dunseth v. Bank, &c.	159, 160, 209
v. Gilbert	462	Dunshee v. Parmelee	591
Dorwin v. Pottes	288	Dunwoodie v. Reed	702, 739
Doton v. Russell	606	Duppa v. Mayo	324
Doab v. Barnes	642	Dupre v. Thompson	497
Dougall v. Fryer	512	Durando v. Wyman	252
Dougherty v. Lithicum	631, 639	Durant v. Johnson	633
v. McColgan	555, 590, 593	Durham v. Angier	207
v. Smithicum	637	v. Jugier	206
Doughty v. Devlin	687	v. Waun	813
Douglas v. Dickson	147	Durnford v. Lane	790
v. McCoy	178, 192	Dursley v. Berkeley	468
Douglass v. Darin	622	Dutch, &c. v. Mott	459
v. Wiggin	365	Du Vigier v. Lee	584
Dow v. Plummer	72	Dyer v. Dyer	446
Dowling v. Ford	585, 586	v. Haley	25
Downe v. Morris	576	v. Lincoln	640
Downer v. Clement	600	v. Lowell	827, 828
v. Downer	831	v. Toothaker	605
v. Smith	816	v. Wilbur	811
Downing v. De Klyn	248	Dyeth v. N. A. Coal Co.	131
Downs v. Cooper	296	v. Pendleton	344
Doyle v. Murphy	413	Dyson v. Morris	598



	PAGE		PAGE
<b>E.</b>		<b>Elwood v. Klock</b>	127, 147
<b>Eakin v. Brown</b>	766	<b>Ely v. Ely</b>	654
<b>Earl, &amp;c. v. Hurlet</b>	12	<i>v. Horne</i>	479
<i>v. Hobart</i>	97	<i>v. McGuire</i>	631
<i>v. Taylor</i>	775	<i>v. Schofield</i>	593
<i>v. Temple</i>	780	<b>Emans v. Turnbull</b>	24
<b>Earl of Belvidere v. Rochford</b>	629	<b>Emeric v. Toms</b>	664
<b>Earl of Oxford v. Lady Rodney</b>	627	<b>Emerson v. Gilman</b>	602
<b>East Haven v. Hemmingway</b>	503	<i>v. Harris</i>	164
<b>Eastman v. Foster</b>	8, 572, 602	<b>Emery v. Owings</b>	13
<b>Eaton v. George</b>	605, 615	<b>Emmanuel, &amp;c. v. Evans</b>	542
<i>v. Green</i>	552, 673	<b>Empson v. Soden</b>	36
<i>v. Jaques</i>	568	<b>Endsworth v. Griffith</b>	553
<i>v. Simonds</i>	577, 589, 618	<b>Enfield, &amp;c. v. Connecticut, &amp;c.</b>	537
<i>v. Tillinghast</i>	489	<b>Engle v. Haines</b>	603
<i>v. Whiting</i>	558, 597	<i>v. Underhill</i>	651
<b>Ebrand v. Dancer</b>	444	<b>English v. Foot</b>	40
<b>Eckford v. De Kay</b>	544, 547	<b>Ensign v. Colburn</b>	564
<b>Ede v. Knowles</b>	672	<b>Erskine v. Townsend</b>	543, 660
<b>Edmonds v. Povey</b>	580	<b>Eshleman v. Lewis</b>	482
<b>Edward Seymour's case</b>	163, 692	<b>Eskridge v. McClure</b>	676
<b>Edwards v. Bodine</b>	643	<b>Euston v. Friday</b>	611
<i>v. Clemons</i>	393	<b>Evans v. Bicknell</b>	647
<i>v. Edwards</i>	89	<i>v. Elliott</i>	566, 568
<i>v. Hale</i>	395	<i>v. Evans</i>	149, 163
<i>v. Hammond</i>	711	<i>v. Hoffman</i>	585
<i>v. Ins. Co.</i>	542	<i>v. Inglehart</i>	18
<i>v. Jones</i>	542	<i>v. King</i>	449
<b>Edwards, &amp;c. v. Trumbull</b>	672	<i>v. Kingsberry</i>	123
<b>Eggleston v. Barnes</b>	659	<i>v. Merriken</i>	561, 606
<b>Ehwell v. Burnside</b>	813	<i>v. Montgomery</i>	689
<b>Eilleam v. Moore</b>	148	<i>v. Reed</i>	394
<b>Eland v. Eland</b>	470	<i>v. Roberts</i>	17
<b>Elder v. Rouse</b>	6, 549	<i>v. Thomas</i>	570
<b>Eldredge v. Forestal</b>	144	<b>Evarts v. Mason</b>	459
<b>Eldridge v. Knott</b>	458	<b>Evelyn v. Evelyn</b>	628
<i>v. Preble</i>	123, 132	<b>Evers v. Challis</b>	703
<b>Elfe v. Cole</b>	560	<b>Evertson v. Booth</b>	601
<b>Elison v. Airey</b>	475	<i>v. Sutton</i>	391
<b>Elkins v. Edwards</b>	586	<b>Ewer v. Hobbs</b>	653, 824
<b>Ellicott v. Pearl</b>	63, 66, 74	<i>v. Lovell</i>	814
<i>v. Welch</i>	674	<b>Ewing v. Arthur</b>	596
<b>Ellig v. Naglee</b>	472, 473, 474, 476	<i>v. Beauchamp</i>	674
<b>Elliot v. Smith</b>	770	<i>v. Burnett</i>	72, 74
<b>Elliott v. Armstrong</b>	428, 432, 450, 454	<b>Exton v. Greaves</b>	549, 552
<i>v. Edwards</i>	677	<b>Eyler v. Crabbs</b>	674
<i>v. Elliott</i>	445	<b>Eyrick v. Hetrick</b>	455, 459
<i>v. Maxwell</i>	548		
<i>v. Piersoll</i>	126, 127		
<i>v. Sleeper</i>	611		
<i>v. Stewart</i>	149		
<i>v. Stone</i>	390		
<b>Ellis v. Diddy</b>	169, 170	<b>F.</b>	
<i>v. Guavas</i>	594	<b>Fain v. Garthright</b>	71
<i>v. Higgins</i>	547	<b>Failing v. Schenck</b>	261
<i>v. Martin</i>	602	<b>Fairclain v. Shackleton</b>	815
<i>v. Page</i>	385	<b>Fairfax v. Montague</b>	586
<b>Ellison v. Daniels</b>	560, 595	<b>Fairman v. Farmer</b>	654
<b>Ellithorp v. Dewing</b>	572, 608	<b>Faley v. Craig</b>	328, 329, 332, 337, 357, 358
<b>Ellsworth v. Cook</b>	112	<b>Falls v. Torrance</b>	459, 460
<b>Else v. Osborn</b>	743	<b>Fanning v. Dunham</b>	641
<b>Elsworth v. Mitchell</b>	599	<i>v. Kerr</i>	557
<b>Elwell v. Sylvester</b>	827	<b>Farley v. Thompson</b>	257
<b>Elwes v. Maw</b>	31	<b>Farmer v. Chauffette</b>	28
		<b>Farmier, &amp;c. v. Edwards</b>	525, 607
		<b>Farnham v. Clements</b>	423, 442

# INDEX TO CASES CITED.

xxxvii

	PAGE		PAGE
Farnum v. Bontelle	610	Finney v. Watkyns	32
v. Platt	273, 300	Fisher v. Barrett	290
Farrant v. Lovel	564	v. Dewerson	824
Farrar v. Chaffetete	39	v. Dixon	31
v. Eastman	65	v. Fielor	415, 424
v. Winterton	49	v. Glover	7
Farrell v. Hutis	675, 677	v. Johnson	812, 675
Farrington v. Barr	433, 440	v. Milliken	250
Farris v. Walker	41	v. Mossman	586
Farrow v. Farrow	585	v. Saffer	34
v. Rees	616	v. Tucker	460
Farson v. Goodale	247, 387	v. Wigg	788
Farwell v. Murphy	657	Fisk v. Chandler	531, 535
Fassett v. First Parish, &c.	6	v. Eastman	144, 197
Faulkner v. Burr	390	v. Framingham	269
v. Daniel	97	v. Larher	486
v. Folsom	610	v. Stubbs	490
Faviell v. Gaskoin	21	Fitch v. Fitch	774
Fawver v. Fawver	517	v. Mann	66
Fay & Brewer	561, 564	Fitchburg, &c. v. Boston, &c.	303
v. Fay	52, 824	v. Melven	258, 343, 344, 345
v. Hunt	218	Fitchet v. Adams	519, 530
v. Valentine	587, 665	Fite v. Doe	77
Pears v. Lynch	472	Fitzgerald v. Urton	14
Felder v. Murphy	658	Fitzgibbon v. Scanlan	481
Fellows v. Fellows	481, 482	Fitzhugh v. Foote	159
v. Lee	58	Flag v. Mann	549
v. Mitchell	472	Flagg v. Flagg	562
Feltham v. Cartwright	304	Flaherty v. Andrews	331
Felton v. Deall	269	Flanders v. Barstow	611
Fenner v. Hepburn	266	v. Lampher	562
Fenwick v. Macey	75, 584, 587	Flanniken v. Lee	73
v. Milforth	410	Fleming v. Chunn	334
Fereday v. Wightwick	13	v. Donahoe	423
Ferguson v. Cornish	273	Fletcher v. McFarland	254, 342
v. Kimball	603	v. Morey	677
v. Miller	682	v. Peck	58
v. Tallmadge	460	v. Robinson	453
Ferrall v. Kent	309	v. Stone	639
v. Simplot	198	Flinn v. Calow	260, 321
Ferrers v. Fermor	408	Flint v. Hatchett	460
Ferris v. Crawford	601	v. Sheldon	642
v. Ferris	551	v. Steadman	415
Festing v. Allen	726	Flournoy v. Johnson	458, 462
Fetter v. Wilson	686	Flower v. Hartopp	256, 315
Field v. Arrowsmith	479	Floyer v. Lavington	554
v. Hallowell	709	Fobes v. Shattuck	307
v. Hanscomb	827	Foley v. Addenbrooke	32
v. Pelot	811	Follett v. Tyrter	116
v. Swan	344, 566, 567	Follin v. Coogan	329
v. Wilson	585	Folsom v. Moore	801, 384
Fifty Associates v. Howland	253, 331	Folts v. Huntley	292
Filbert v. Hoff	812	Fonda v. Sage	509, 523, 530
Fillman v. Divers	448, 466	Foot v. Dickinson	374
Finch v. Brown	591	Foote v. Colvin	16
v. Finch	432	Forbes v. Hall	464
v. Riseley	530	v. Moffatt	614
v. Throckmorton	281	v. Ross	473
v. Winchelsea	465, 678	v. Smith	50
Findlay v. Smith	364, 367	Forbush v. Willard	634
Finlay v. Hosmer	610	Ford v. Cobb	26
v. King	506, 507, 523, 525	v. Dangerfield	442
Finn v. Sleight	149	v. Erskine	109
Finney v. Cockran	459	v. Ford	143



# INDEX TO CASES CITED.

xxxix

	PAGE		PAGE
Garner v. McClure	672	Giles v. Gullion	134
v. Sheldon	692	v. Moore	170
Gardners v. Miles	173	v. O'Toole	240
Garner v. Byard	240	v. Spencer	326
v. Hannah	329	Gilholey v. Washington	240, 334, 348
Garrard v. Lauderdale	413	Gill v. Fauntleroy	128
Garret v. Evers	595	Gilleland v. Failing	643
Garrett v. Dewart	307	Gillespie v. Cunningham	58
v. Garrett	482	Gillet v. Mason	16
Garris v. Garris	197	v. Stanley	818
Garson v. Green	677	Gillett v. Balcom	563
Garth v. Cotton	380, 729, 741, 742, 747	v. Eaton	607
Gary v. May	477	v. Treganza	13
Gaskill v. Line	602	Gillies v. Longlands	50
v. Moore	683, 688	Gillis v. Bailey	5
v. Trainer	332, 683, 724	v. Brown	164
Gates v. Green	353	v. McKinney	811
v. Hunter	50	Gillispie v. Walker	455
v. Jacob	557, 585	Gillman v. Bird	5
Gault v. McGrath	611	v. Brown	674, 677
Gay v. Baker	7	v. Hadden	661
v. Brown	684	v. Moody	582
v. Minot	594	Gilman v. Stetson	814
Gee v. Gee	430	Gilmore v. Johnson	480
v. Young	19	v. Wilbur	302
Geeckie v. Monk	292	Given v. Marr	141
Geer v. Hamblin	146	v. McCalmont	364, 589, 590
Geheebe v. Stanley	293	Gladding v. Warner	588
Gentry v. Woodson	143	Glasgow v. Ridgeley	313
George v. Baker	593	Glass v. Ellison	597
v. Morgan	91	Glasscock v. Glasscock	675
v. Putney	345	v. Robinson	674
v. Wood	621	Glassington v. Rawlins	272
George's, &c. v. Detmold	375	Glegg v. Glegg	226
Germond v. Jones	80	Glengall v. Barnard	98
Gerrish v. Mace	638	Glenn v. Bank, &c.	175
v. Mason	654	Glenorchy v. Borville	86
Gervoye's case	236	Glick v. Gregg	824
Getman v. Getman	436	Glidden v. Andrews	659
Ghiselin v. Fergur	675	v. Blodgett	420
Gibbes v. Smith	490	v. Hunt	605
Gibbons v. Dillingham	17, 321	Glisson v. Hill	548
Gibbs v. Ross	257	Globe v. Lansing	668
Gibson v. Tyson	12	Glover v. Archie	322
Gibson v. Bailey	594, 661	v. Fisher	465
v. Cooke	464	v. Payn	555
v. Crehore	193, 246, 575, 577, 589	Godard v. Bolster	39
v. Gibson	232, 294	v. Chase	34
v. Kirk	333	v. Divoll	482
v. Perry	351	v. Lawyer	581
Giddings v. Cox	116	v. R. R. Co.	385
v. Eastman	485	Godfrey v. Rodgers	550, 551
Gifford v. Barker	773	v. Watson	596
v. Manley	474	Godwin v. Gregg	809
Gilbert v. Carter	480	Goff v. Kilts	16
v. Dyneley	475	Golson v. Hook	66
v. Morrill	637	Gomber v. Hackett	332
Gilbertson v. Richards	315, 318, 406	Goodall v. Rowell	637, 639
Gilchrist v. McLaughlin	73	Goodburn v. Stevens	19, 784
v. Stevenson	488	Goodell v. Jackson	58
Giles v. Baremore	585	Goodenough v. Goodenough	200
v. Comstock	322, 341, 343, 344	Goodhue v. Barnwell	622, 835
v. Ebsworth	326, 327	v. Berrien	602
		Goodman v. Goodman	131

	PAGE		PAGE
Goodman v. Grierson	549, 555	Grandison v. Pitt	231
v. King	564	Granger v. Collins	283
v. Noble	271	Grant v. Chase	100
v. White	657	v. Gill	333
Goodrich v. Jones	41, 384	v. Mills	677
Goodright v. Cornish	721	v. U. S. Bank	580
v. Davids	281	Grantham v. Hawley	18, 22
v. Forester	70	Gratton v. Gratton	135
v. Richardson	236, 271, 272, 273	Gravar v. Berdan	352
v. Wells	416	Graves v. Bemis	687
Goodtitle v. Billington	752	v. Hampden, &c.	598
v. Dodge	707	v. Porter	250, 256
v. Knot	457	v. Weld	18
v. Way	267	Gray v. Baldwin	564
v. Whitby	707, 708	v. Bates	66, 817
Goodwin v. Hubbard	63, 437, 491	v. Blanchard	512, 526, 530
v. Lawyer	64	v. Jenks	580, 607
v. Richardson	798	v. Schenck	659
v. White	561	Grayson v. Moncure	200
Gordon v. Graham	581	Greber v. Kleckner	362
v. Hobart	585, 642, 661, 664	Green v. Cartright	24
v. Lewis	591	v. Chelsea	63
Gore v. Brazier	158	v. Chester	580
v. Jenness	564, 570	v. Cook	545
v. Wright	248	v. Crockett	656
Gorham v. Daniels	79, 145, 189	v. Davis	661
v. Gorham	829	v. Demoss	674, 675
Goring v. Shreve	575	v. Fowler	674
Gorson v. Blakey	557	v. Fox	682
Gosberger v. Badway	291	v. Green	184, 232
Gosling v. Warburton	179	v. Harvey	142
Goss v. Singleton	487, 492	v. Kemp	642
Gossen v. Tucker	129	v. Liter	65
Gossin v. Brown	602	v. London, &c.	333
Gott v. Cook	48, 495, 498	v. Massie	323
Goudy v. Shank	834	v. Otter	118
Gould v. Bugbee	329	v. Putnam	144, 191
v. Kemp	781, 787, 790	v. Putney	477
v. Newman	596	v. Rutherford	492
v. Tancred	588, 591	v. Spicer	422
v. Thompson	383	v. Tanner	557
v. Webster	19	v. Thomas	506
v. Womack	221	v. Tyler	642
Goundie v. Northampton, &c.	128, 831	v. Winter	477, 484
Gourdier v. Cormack	238	Greene v. Ely	687, 689
v. Thorp	689, 751	v. Greene	168
Gourdine v. Davis	354	v. Waggener	248
Gouverneur v. Bibby	528	Greening v. Fox	476
Governors, &c. v. Harrild	315	Greenlow v. King	479
Gowing v. Rich	455	Greeno v. Munson	297
Grace v. Hunt	598	Greenup v. Sewall	823
Grady v. Baily	149	Greenwood v. Coleman	420
Graff v. Castleman	467	v. Rothwell	659
Graffius v. Tottenham	69	v. Taylor	610
Grafton v. Grafton	73	Greer v. Baughman	432
Grafton, &c. v. Doe	610	Gregory v. Gregory	577
Graham v. Dickenson	50	v. Paul	151
v. Donaldson	423, 426	Gretton v. Howard	181
v. Dunigan	214	Gridley v. Rowland	689
v. Roberts	97	Grieverson v. Kissopp	48, 463
v. Stevens	544	Griffin v. Bixby	15
Grand, &c. v. Knox	29	v. Ford	473
Grandin v. Anderson	674	v. Macaulay	488
		v. N. J. &c.	582



	PAGE		PAGE
Goodman v. Grierson	549, 555	Grandison v. Pitt	281
v. King	564	Granger v. Collins	283
v. Noble	271	Grant v. Chase	100
v. White	657	v. Gill	333
Goodrich v. Jones	41, 384	v. Mills	677
Goodright v. Cornish	721	v. U. S. Bank	580
v. Davids	281	Grantham v. Hawley	18, 22
v. Forester	70	Gratton v. Gratton	135
v. Richardson	236, 271, 272, 273	Gravar v. Berdan	352
v. Wells	416	Graves v. Bemis	687
Goodtitle v. Billington	752	v. Hampden, &c.	598
v. Dodge	707	v. Porter	250, 256
v. Knot	457	v. Weld	18
v. Way	267	Gray v. Baldwin	564
v. Whitby	707, 708	v. Bates	66, 817
Goodwin v. Hubbard	63, 437, 491	v. Blanchard	512, 526, 530
v. Lawyer	64	v. Jenks	580, 607
v. Richardson	798	v. Schenck	659
v. White	561	Grayson v. Moncure	200
Gordon v. Graham	581	Greber v. Kleckner	362
v. Hobart	585, 642, 661, 664	Green v. Cartright	24
v. Lewis	591	v. Chelsea	63
Gore v. Brazier	158	v. Chester	580
v. Jenness	564, 570	v. Cook	545
v. Wright	248	v. Crockett	656
Gorham v. Daniels	79, 145, 189	v. Davis	661
v. Gorham	829	v. Demoss	674, 675
Goring v. Shreve	575	v. Fowler	674
Gorson v. Blakey	557	v. Fox	682
Gosberger v. Badway	291	v. Green	184, 232
Gosling v. Warburton	179	v. Harvey	142
Goss v. Singleton	487, 492	v. Kemp	642
Gossen v. Tucker	129	v. Liter	65
Gossin v. Brown	602	v. London, &c.	333
Gott v. Cook	48, 495, 498	v. Massie	323
Goudy v. Shank	834	v. Otter	118
Gould v. Bugbee	329	v. Putnam	144, 191
v. Kemp	781, 787, 790	v. Putney	477
v. Newman	596	v. Rutherford	492
v. Tancred	588, 591	v. Spicer	422
v. Thompson	383	v. Tanner	557
v. Webster	19	v. Thomas	506
v. Womack	221	v. Tyler	642
Goundie v. Northampton, &c.	128, 831	v. Winter	477, 484
Gourdier v. Cormack	238	Greene v. Ely	687, 689
v. Thorp	689, 751	v. Greene	168
Gourdine v. Davis	354	v. Waggener	248
Gouverneur v. Bibby	528	Greening v. Fox	476
Governors, &c. v. Harrild	315	Greenlow v. King	479
Gowing v. Rich	455	Greeno v. Munson	297
Grace v. Hunt	598	Greenup v. Sewall	823
Grady v. Baily	149	Greenwood v. Coleman	420
Graff v. Castleman	467	v. Rothwell	659
Graffius v. Tottenham	69	v. Taylor	610
Grafton v. Grafton	73	Greer v. Baughman	432
Grafton, &c. v. Doe	610	Gregory v. Gregory	577
Graham v. Dickenson	50	v. Paul	151
v. Donaldson	423, 426	Gretton v. Howard	181
v. Dunigan	214	Gridley v. Rowland	689
v. Roberts	97	Grieverson v. Kissopp	48, 463
v. Stevens	544	Griffin v. Bixby	15
Grand, &c. v. Knox	29	v. Ford	473
Grandin v. Anderson	674	v. Macaulay	488
		v. N. J. &c.	482

## xii

	PAGE	Hall v. Byrne	PAGE
Griffith v. Beecher	51	v. Chaffee	541
v. Dicken	65	v. Cushman	755
Griffith's case	369	v. Dench	657
Grimes v. Ballard	89	v. Dewey	560
v. Doe	653	v. Hall	297
Grimston v. Bruce	528	v. McDuff	176, 667
Grimstone v. Carter	545	v. Sands	672
Grinnell v. Baxter	549, 597	v. Savill	644
Griswold v. Johnson	808	v. Sayre	560
Groff v. Levair	21, 22	v. Seabright	130
Grogan v. Mayor, &c.	684	v. Tufts	264
Grosvenor v. Atlantic, &c.	598	v. Vanness	80, 510
Groton v. Boxborough	566	v. Wadsworth	466
Groat v. Townsend	101, 120	v. Young	382, 393
Grover v. Flye	638	Hallen v. Runder	434
v. Howard	8	v. Wilie	38
v. Thatcher	618	Hallett v. Collins	265, 352
Grow v. Albee	642	Halligan v. Wade	466, 774
Growning v. Behn	674	Hallock v. Smith	342, 345
Grugcon v. Gerrard	580	Halsey v. Reed	674
Gruges v. Gerard	611	Ham v. Ham	622, 624
Crughler v. Wheeler	67	Hamblett v. Hamblett	827
Grundv. Grundy	206	Hamblin v. Bank, &c.	181
Grymes v. Boweren	32	v. Hamblin	196, 787
Gabbins v. Creed	556	Hamburgh, &c. v. Edsall	453
Gaier v. Kelly	481	Hamilton v. Bishop	473
Guild v. Rogers	325	v. Crosby	493
Gainer v. Wilson	194	v. Elliott	464
Gally v. Ray	162	v. Ely	522, 532
Gann v. Scovil	333	v. Hempsted	376
Ganning v. Gunning	368	v. Hughes	90
Ganther v. Jakes	426, 478, 489	v. Mohun	162
Gathrie v. Gardner	448	v. O'Niel	193
v. Kahle	543	v. Wright	184, 186
v. Owen	207	Hamlin v. Hamlin	280
v. Sorrell	659	Hammond v. Hopkins	452
Gayon v. Anderson	112, 122	v. Washington	544, 550
Gwynn v. Jones	281	Hampshire, &c. v. Willard	605
Gwyne v. Cincinnati	161	Hampton v. Brown	583
		v. Hodges	685
H.		v. Spencer	564
Hackerbury v. Carlisle	483	Hanbury v. Hussey	425, 547
Hackett v. Richard	348	Hancock v. Day	822
Hadde v. Healey	584	Hancorn v. Jaques	811
Hadley v. Chapin	614	Handy v. Leavitt	261
v. Havens	391	Hanley v. Sprague	828
Hadlock v. Bulfinch	606, 611	Hannah v. Swarner	466
Haggard v. Rout	48, 707	Hannan v. Osborn	49
Haggarty v. Allaire	551	Hanson v. Derby	712
Haggin v. Haggin	823	Hapgood v. Houghton	570
Hagthorp v. Hook	428, 440, 466	Harcourt v. Pole	506
Haight v. Keokuk	58	Hard v. Wadham	320
Hail v. Reed	26	Hardeman v. Shumate	' 526
Hains v. O'Connor	436	Harden v. Harden	311
Halcombe v. Ray	544	Harding v. Springer	430, 433, 443
Hale v. Glidden	74	Hardon v. Hasketh	786
v. Hill	181	Hardrop v. Gallagher	334
v. James	159, 160	Hardy v. Commercial, &c.	238
v. Mann	151	v. Reeves	611
Hales v. Petit	86	v. Seyer	588
v. Risley	729, 735, 737	v. Summers	716
Hall v. Bell	599	Hare v. Groves	832
		Harger v. Edmonds	353
			287



	PAGE		PAGE
Hargrave v. King	513, 514	Haslett v. Glen	19
Harker v. Bickbeck	13	Hasting v. Goldsmith	640
v. Conrad	683, 724	Hastings v. Clifford	184, 187
Harkins v. Coalter	493	v. Dickenson	175, 221, 225, 232
Harlan v. Harlan	41	Hasty v. Wheeler	366
v. Lehigh, &c.	13	Hatch v. Dwight	593
v. Smith	664	v. Kimball	613
Harmon v. Cummings	683, 724	v. Morris	130
v. Short	561	v. Smith	73
Harney v. Harney	292	v. White	666, 667
Harrell v. Harrell	835	Hatcher v. Hampton	375
Harriett, &c.	593	Hathaway v. Persons, &c.	827
Harrington v. Barton	827	Hatton v. Landman	432, 442
v. Wise	265	v. Weir	131
Harris v. Barnett	423	Hauptman v. Catlin	687
v. De Graffenreid	466	v. Halsey	687
v. Doe	58	Haven v. Adams	564
v. Evans	273	v. Foster	626
v. Fly	663	v. Hemmingway	503
v. Gallingham	10	v. Low	561
v. Haynes	561	Hawkins v. Kelly	356
v. Jones	288	v. May	581
v. McElroy	742	v. Page	197
v. McKissack	58	v. Skeggs	519
v. Miller	2	Hawks v. Sawyer	588
v. Preston	835	Hawley v. Bradford	577
v. Riding	12	v. James	47, 81, 177, 187, 489, 497, 499
v. Shaw	504	v. Northampton	89
v. Stone	480	v. Palmer	187
Harrisburg, &c. v. Tyler	466	v. Soper	827
Harrison v. Battle	455	Hawn v. Norris	457
v. Belsey	734	Haworth v. Herbert	143
v. Eldredge	202, 653	v. Wallace	683
v. Lemon	543	Hay v. Cumberland	240
v. Mennony	432	Hayden v. Bradley	285
v. Phillips	553	v. Patterson	809
v. Trustees, &c.	544	v. Stoughton	505, 523
Harsand v. Hardy	580	Haydon v. Ewing	167
Harshaw v. Davis	200	Hayer v. Pruett	624
Hart v. Chalker	582	Haynes v. Powers	199
v. Dougherty	505	Hays v. Dorsey	658
v. Finney	385	v. Ward	602
v. Gregg	814	Hayter v. Rod	244
v. Hart	288, 292	Hayward v. Ellis	477
v. Hawkins	434	Haywood v. Ensley	469, 480, 483
v. Johnson	317	v. Miller	269
v. Rubertson	819	Haxtun v. Corse	495
v. Ten Eyck	660	Hazlet v. Powell	348
v. Windsor	285, 353	Head v. Egerton	599
Hartison v. Feth	580	Heap v. Barton	37
Harton v. Harton	418	Heard v. Lockett	253
Hartshorne v. Hubbard	562	v. March	473
v. Watson	326	Hearle v. Greenbank	451
Harvey v. Aston	510, 517	Heath v. Dendy	185
Harvy v. Dame, &c.	521	v. Page	605, 640
v. Green	187	v. Williams	560
Harwel v. Lucas	732	Heaton v. Findlay	27
Harwell v. Tufts	631	Hebron v. Centre, &c.	541
Hasbrook v. Paddock	503, 521, 534	Heckhart v. McKee	299
Hascall v. The Madison, &c.	505	Hedge v. Holmes	653, 654
Haskell v. Haskell	607	Hcency v. St. Peter's, &c.	6
v. Monmouth	596	Heermance v. Vernoy	17
Haskins v. Tate	701	Hefner v. Yount	504
Haslaw v. Haslaw	27		

# INDEX TO CASES CITED.

xlili

	PAGE		PAGE
Hegeman v. McArthur	249, 344	Hill v. Smith	613
Heighway v. Pendleton	561, 653	v. Wentworth	27, 29, 33, 44
Heimershits v. Bernhard	134, 187	v. Woodman	285
Heimstreet v. Howland	270	Hill's case	317
Heiser v. Richle	65	Hillary v. Pollock	688
Helfeinstine v. Garrard	405	v. Waller	458, 459
Helfield v. Newton	642	Hilliard v. Binford	178, 187
Helfrich v. Obermeyer	172	Hills v. Doe	805
Hellawell v. Eastwood	33	Hilton v. Catherwood	602
Helmhold v. Man	613	v. Granville	376
Helps v. Hereford	301	Hinchman v. Graham	683, 724
Helser v. Pott	266	v. Lybrand	690
Hemphill v. Eckfeldt	344	v. Stiles	573
v. Flynn	385	Hinde v. Gray	285
Henderson v. Lowry	664	Hinds v. Ballou	573, 577, 613, 618
Hennings v. Brabason	241	Hingham v. Sprague	267, 767
Henry v. Fullerton	631	Hinman v. Cevanway	64
v. McCloskey	49	v. Leavenworth	631
v. Tupper	527	Hinton v. Hinton	187, 790
Henry's case	573	Hitchcock v. Carpenter	152
Henshaw v. Wells	566	v. Harrington	198, 199, 574
Henson v. Coope	300	v. Skinner	829
Hepburn v. Dubois	127	Hitchins v. Hitchins	145, 147, 179, 182
Herbert v. Wren	176, 182, 200	Hitchmam v. Walton	42, 235, 564, 763, 770
Herrington v. Herrington	444	Hitner v. Egere	572
Hesler v. Pott	329	Hoare v. Harris	462, 463
Hesseltine v. Seavey	247	Hoatz v. Patterson	684
Hester v. Wilkinson	474	Hobart v. Abbot	659
Heth v. Cocke	209	v. Hanrick	73
v. Richmond, &c.	466	v. Sanborn	561
Hatberington v. Graham	142	Hobbs v. Fuller	661, 668
Hewitt v. Huling	573	v. Harney	159
v. Isham	303	v. Norton	647
Heyden v. Smith	361	Hobby v. Pemberton	164
Heyden's case	95	Hobson v. Bell	557
Heyer v. Pruyn	586, 597	Hoby v. Hoby	212, 214
Heyward v. Cuthbert	137, 198, 210	Hockley v. Bantock	672
Heywood v. Heywood	307	Hodgdon v. Naglee	596, 605
Hickox v. Lowe	549	v. Shannon	540
Hickman v. Mechin	345	Hodge v. Atty.-Gen.	672
v. Quinn	555	Hodges v. Croydon	584
Hicks v. Bell	14	v. Gates	383
v. Bingham	580, 611	v. Green	5
v. Cockran	511	v. Hodges	512
v. Hicks	96, 550, 555	v. Pingree	811
Hidden v. Jordan	548	v. Shields	298
Hiern v. Mill	672	Hodgkinson v. Wyatt	640
Hiester v. Maderia	549, 550	Hodgson v. Shaw	602
Higbee v. Rice	802	Hodson v. Treat	659
v. West Lake	210, 211	Hoffar v. Dement	793
Higginbotham v. Cromwell	179, 184	Hoffman v. Stone	14
Higgins v. Breen	138	Hogan v. Stone	588
Higglesworth v. Dallison	21	Hogeboom v. Hall	509, 524, 533
Hilborne v. Browne	7	Hogg v. Wilkins	478
Hildreth v. Conant	387	Hoggard v. Wade	674, 675
v. Jones	573	Hogins v. Arnold	538, 546
v. Thompson	190	Hogle v. Stuart	207
Hill v. Barclay	528	Hohly v. German, &c.	307
v. Bishop	349	Hollabird v. Birre	588, 599, 602
v. George	311	Holbrook v. Finney	148
v. Grange	536	v. Thomas	661
v. Jordan	387, 566	v. Worcester, &c.	604
v. Josselyn	488	Holcomb v. Coryell	819
v. Payson	650		

	PAGE		PAGE
Holcomb v. Holcomb	659	Horton v. Sledge	823
Holcombe v. Corgell	51, 462, 491	v. Whitaker	705
Holder v. Coates	15	Hosford v. Merwin	822
Holderness v. Carmarthen	85	Hoskins v. Featherstone	370
Holdich v. Holdich	178	v. Rhoades	270
Holdship v. Abercrombie	682	Hough v. Birge	364
Hole v. Escott	733	v. De Forest	617
Holeridge v. Gillespie	480, 481, 550, 556	v. Doyle	653
Holford v. Hatch	251	Houghtailing v. Houghtailing	8
Holgate v. Kay	341	Houghton v. Bartholomew	631, 639
Holliday v. Marshall	254	v. Blake	687
v. West	528	v. Cooper	369
Hollifield v. Still	706	v. Hapgood	117
Hollingsworth v. Snyder	387	v. Mariner	659
Hollis v. Hayes	428, 430	Houston v. Jamison	198
v. Pool	396	v. Spruance	506
Holly v. Brown	64	v. Stanton	785
Holm v. Low	187	Hovey v. Bartlett	638
Holman v. Bailey	606, 611	v. Blanchard	389
v. Bank, &c.	603	v. Holcomb	423, 548
v. Exton	105	v. Smith	28, 326
Holmes v. Blogg	282	How v. Woodruff	613
v. Fisher	568	Howard v. Ayry	670
v. Godson	510	v. Candish	214
v. Grant	543	v. Carpenter	267, 274, 279
v. McGee	134	v. Dill	325
v. Stockton	336	v. Ellis	249, 256
v. Tremper	37, 40	v. First Parish, &c.	7
v. Trent	428	v. Gresham	657
Holt v. Robertson	811	v. Halsey	603
Holton v. Brown	665	v. Harris	550
Holtpraffell v. Baker	353	v. Howard	644
Homey v. Goings	822	v. Lincoln	16
Hommick v. Brinson	786	v. Robinson	560, 682, 724
Hone v. Fisher	549	v. Shaw	334
v. Van Schaick	495	v. Terry	324
Honore v. Bakewell	674, 675	v. Turner	507
Honywood v. Honywood	754	Howe v. Blanden	123, 809, 827
Hood v. Phillips	613	v. Bishop	437
Hoogland v. Watt	573	v. Lewis	606, 610
Hooker v. Hooker	735	v. Russell	334, 547
v. Hudson	639	v. Wildes	62
Hooper v. Bailey	555	Howell v. Baker	479, 483
v. Cummings	508, 533, 536	v. Howell	387, 388
v. Dundas	517	v. Rice	588
v. Ramsbottom	599	v. Webb	333
Hoot v. Sorrell	177	Howey v. Goings	120, 823
Hoover v. Wheeler	682	Howland v. Coffin	251, 256, 300
Hopkins v. Carey	448, 455	v. Heckscher	180
v. Frey	162	Hoxie v. Carr	429
v. Garrard	674	v. Hoxie	493
v. Helmore	322	Hoxsie v. Ellis	190, 826
v. Hopkins	409, 416	Hubbard v. Ascutney, &c.	378
v. Ward	457	v. Austin	65, 66
Hopkinson v. Ferrand	381	v. Bagshaw	30, 37
Hopper v. Childs	683	v. Brown	686
v. Hopper	198, 199	v. Cummings	643
v. Sisco	580	v. Hubbard	812
Hopwood v. Schofield	766	v. Norton	301
Horlock v. Smith	590	v. Rawson	432
Horsey v. Horsey	127, 275, 507	v. Savage,	583
Horsfall v. Key	25, 27	v. Shaw	588, 589
Horstman v. Jerker	604	Hubbell v. Clark	301, 335
Horton v. Buskirk	828	Hubert v. Parsons	229

## xlv

	PAGE		PAGE
Huff v. M'Donald	810	Iddings v. Bruen	468, 479, 484, 495
v. Walker	343	v. Nagle	264, 270
Hughes v. Edwards	510, 584, 654	Ilderton v. Ilderton	139
v. Hughes	707	Illingworth v. Miltenberger	328
v. Kearney	677	Inches v. Leonard	586
v. Trustees, &c.	298	Incedon v. Northcote	183
v. Watson	176	Inge v. Boardman	184
Huganin v. Starkweather	611	Ingersoll v. Sergeant	357
Hulbert v. Grant	485	v. Sawyer	639
Hulet v. Soullard	542	Ingraham v. Baldwin	121
Huling v. Drexell	550	Ingram v. Freley	441
Hull v. Lyon	657, 659	v. Hartz	525
Hulse v. Wright	413	v. Morris	149
Hultain v. Munigle	387, 390	Ipswich, &c. v. Story	617
Humbert v. Rector, &c.	584	Ireson v. Denn	580
Hummerston's case	411	Irving v. De Kay	498
Humphreys v. Brogden	12	Irwin v. Irwin	441
v. Harrison	564	v. Phillips	14
v. Phinney	158	v. Tabb	600
v. Snyder	544	Ives v. Harris	418
Hunt v. Cobb	391	v. Legge	699, 703
v. Comstock	261	Ivie v. Ivie	96
v. Dorsett	699	Ivory v. Delore	834
v. Hazleton	263	Izard v. Bodine	810, 816
v. Hunt	75, 531, 593, 618, 652	v. Izard	89
v. Mallamphy	31, 32		
v. Maynard	572		
v. Stiles	668	J.	
v. Watkins	97, 98		
Hunter v. Blanchard	687	Jack v. Woods	816
v. Brown	834	Jackman v. Ringland	436
v. Chrisman	67	Jackson v. Agan	516
v. Grant	657	v. Aldrich	387
v. Hunter	631	v. Andrews	368
v. Macklew	687	v. Aspell	206
v. Osterhoudt	322, 537	v. Bowen	642
Huntington v. Cotton	581	v. Brownell	270, 516
v. Mountjoy	13	v. Brownson	250, 281, 362, 364
v. Smith	360, 397	v. Brush	258
Hurd v. Cass	130	v. Cairns	122
v. Coleman	584, 661, 668	v. Cator	361
v. Cushing	94	v. Claw	138
v. Darling	266	v. Cobbin	283
v. Grant	196	v. Colden	640
v. Miller	334	v. Crafts	525
Hurlbut v. Post	237, 240, 277, 278	v. Cryslar	537
Husband v. Davis	472	v. Davis	258, 606
Huston v. Wickerham	246, 457	v. Delacroix	266
Hutchins v. Dixon	418	v. Delancey	258, 568, 593, 594
v. Hutchins	474	v. Dewitt	204
v. Lee	441	v. Dominick	641
v. Shaw	8	v. Durland	709
Hutchinson v. M'Nutt	537	v. Eddy	346
Huth v. City	332	v. Edwards	213, 495
Hyde v. Dallaway	586	v. Fuller	564, 566
v. Hyde	205	v. Gardner	249
Hyland v. Stafford	643	v. Harrison	514
Hyndman v. Hyndman	557	v. Henry	641
Hyzer v. Stoker	210	v. Hopkins	566
		v. Ingraham	58
		v. Jackson	547
		v. Johnson	72, 111, 112, 771
		v. Keisselbrach	265
		v. Kipp	332

	PAGE		PAGE
Jackson v. Laughhead	566	Jenkins v. Quincy, &c.	560, 597, 598
v. Leed	122	v. Young	405, 407
v. Leek	786	Jenks v. Alexander	447
v. Marsh	643	v. Backhouse	92
v. Matsdorf	443, 446	v. Ward	631
v. McConnell	797	Jenner v. Tracy	585
v. Moncrief	266	Jenney v. Alden	437, 444
v. Moore	458	Jennings v. Alexander	251
v. O'Donaghy	195	v. Ward	551
v. Packard	640	v. Wood	606
v. Patterson	395	Jenny v. Jenny	166
v. Pesked	767	Jermin v. Arscott	509
v. Pierce	458	Jervis v. Bruton	86, 513
v. Rounseville	6	Jesser v. Gifford	765
v. Rowland	297	Jew v. Thirdwell	345
v. Schoonmaker	770	Jewett v. Davis	613
v. Sellick	77, 112, 771	v. Miller	480
v. Sheldon	336	v. Partridge	7
v. Sisson	457	v. Stockton	808
v. Slater	586	v. Ware	70
v. Sloan	687	John v. Jenkins	266
v. Stevens	797	v. Turner	550, 585
v. Sublett	693	Johns v. Bolton	687, 690
v. The State	30	v. Church	297
v. Topping	509, 534	v. Johns	47, 154
v. Van Hoesen	94	Johnson v. Bartlett	593, 597
v. Waldron	752	v. Beauchamp	334
v. Warner	387	v. Bowie	581
v. Weldon	296	v. Carter	397
v. Willard	560, 595, 597	v. Corbett	48, 488
v. Winne	709	v. Donnell	656
v. Woodman	63	v. Elliott	159
Jacobs v. Graham	272	v. Farlow	65, 71
Jacques v. Trustees, &c.	131	v. Goslett	12
James v. Dean	481	v. Hart	595, 786
v. Fisk	127	v. High	255
v. Johnson	247, 605, 608, 614	v. Johnson	226, 405
v. Morey	247, 581	v. Jones	568
v. Roberts	644	v. Neil	204, 207, 213, 216
v. Scott	59	v. Parks	15
Jameson v. Bruce	361	v. Perley	157
v. Glascock	482	v. Reed	507
v. M'Credy	303	v. Shields	189, 191
Janney v. Sprigg	117	v. Somers	263
Jaques v. Elsler	643	v. Stewart	387
v. Gould	287, 319, 324	v. Thomas	201
v. Morris	688	v. Valentine	699, 706, 711, 712
v. Weeks	543, 546, 550	v. White	603
Jarrot v. Vaughn	53	Johnston v. Union, &c.	676
Jarvis v. Prentice	451	Johnstone v. Baber	792
Jason v. Eyres	547, 550	Jones v. Brewer	215, 216
Jasper v. Howard	131	v. Bruce	630
v. Maxwell	462	v. Bush	414
Jebb v. Abbet	468	v. Clark	568
Jeffers v. Radcliff	805	v. Denore	172
Jefferson v. Durham	370	v. Felch	324
Jemmot v. Cooley	329	v. Flint	17
Jenison v. Graves	428, 432	v. Hancock	682
v. Hapgood	482, 626	v. Hill	370
v. Lexington	319	v. Jackson	41
Jenkins v. Church	279	v. Jones	383, 386, 555
v. Eldredge	264, 439, 475, 476, 479, 591	v. Morgan	86, 97
v. Keymes	88	v. Patterson	125, 196
		v. Pereira	330

## xlvii

	PAGE		PAGE
Tones v. Phelps	599	Kelly v. Johnson	430
v. Quinpiack, &c.	602	v. Payne	675
v. Read	332	v. Stinson	182
v. Reynolds	266	v. Thompson	543
v. Roe	52	v. Weston	307
v. Sherrard	98, 122	Kelsey v. Hanmer	121
v. Snelson	41, 77	Kemp v. Earp	548
v. Slubey	435	Kenada v. Gardner	298, 300
v. Smith	484, 486, 580, 647	Kendall v. Carland	277
v. Stanton	815	v. Henry	200
v. Steinbergh	659	v. Moore	288, 295
v. St. John	659	v. New England, &c.	475
v. Stockett	462, 477, 481	Kenege v. Elliot	315, 328
v. Thomas	479, 563, 631	Kennaird v. Adams	645
v. Todd	176	Kennedy v. Fury	457
v. Weathersbee	818	v. Kennedy	181, 415, 485
Jordan v. Corey	127	v. McCartney	58
v. Savage	225	v. Mills	180, 181
Joslin v. Wyman	668	v. Nedrow	137
Journey v. Brackley	251	Kennerly v. Missouri, &c.	158
Joyner v. Vincent	551, 564	Kenrick v. Beaclerc	422
Judd v. Fulton	236	Kent v. Harpool	735
Jadson v. Emanuel	659	Kernocham v. N. Y. &c.	598
Jamel v. Jamel	624	Kerr v. Day	51
Junk v. Canon	148	v. Kitchen	315
Justice v. Carroll	455	Kestin v. Campbell	82
Juvenal v. Jackson	845	Keteltas v. Coleman	254, 329
		Ketsey's case	282
		Keyes v. Keyes	140
		Kidd v. Dennison	380
		Kiddall v. Trimble	198, 200, 201
		Kidder v. Blaisdell	150, 196
		Kier v. Peterson	307
		Kilborn v. Robbins	603
		Killick v. Fleaney	481
		Killinger v. Reidenhauer	646
		Kilpatrick v. Kilpatrick	674, 675
		Kimball v. Lockwood	561, 564
		v. Rowland	390
		v. Second, &c.	7
		Kimmell v. Willard	599
		Kinch v. Ward	86, 244
		King v. Axbridge	72
		v. Boys	405
		v. Bromley	553
		v. Billock	819
		v. Cotton	746
		v. Dickerman	810
		v. Donnelly	489
		v. Duntz	558
		v. Fowler	22
		v. Hamlet	775, 776
		v. Johnson	34
		v. King	549, 708
		v. McVickar	607, 658
		v. Murray	299
		v. Paddock	105
		v. Sharp	99
		v. State, &c.	598
		v. The Merchants', &c.	571
		v. Wilcock	37
		v. Wilcomb	35, 784
		Kingdome v. Bridges	447
		Kingman v. Sparrow	77, 150

	PAGE		PAGE
Kings, &c. v. Pelham	509	Lancaster v. Allen	486, 487
Kingsbury v. Collins	385	v. Eve	30
Kingsley v. Ames	396, 557	Landers v. Beauchamp	392
v. Sch. Dir's, &c.	277	Landis v. Scott	473, 474
Kinley v. Hill	618, 614	Lane v. Dixon	35
Kinney v. Ensign	617	v. Dobbys	819
Kinsell v. Daggett	72	v. Erskin	659
Kintner v. McRea	162	v. Gould	72
Kinzie v. Trustees, &c.	263	v. Hitchcock	565
Kip v. Deniston	472	v. King	23, 569
Kirby v. Lead	685	v. Losee	640
Kisler v. Kisler	423, 429, 434	v. McKeen	128
Kitchen v. Sheets	833	Lanfair v. Lanfair	549
Kite v. Brown	65	Langan v. Henderson	597
Kittredge v. Locks, &c.	818	Langdon v. Keith	596
v. Rockingham, &c.	598	v. Paul	564, 668
v. Woods	18	Langworthy v. Chadwick	376
Klapworth v. Dressler	603	Lanoy v. Duke, &c.	601
Kloiser v. Scott	674, 675	Lansing v. Goelet	667
Kline v. Beebe	112, 276	v. Pine	828
v. Lewis	675	Large's case	693
Klock v. Kronkite	608, 618	Larrabee v. Lambert	598
Kneider v. Kneider	172	Larcom v. Cheever	123
Knetzer v. Wyson	767	Lasher v. Lasher	136, 179, 181
Knickerbacker v. Boutwell	603	Lassell v. Reed	384
Knight v. Frampton	453	Lasselle v. Barnett	647
v. Mains	151	Latham v. Atwood	18
v. Selby	406	v. Latham	194
Knight's case	317	Lathrop v. Gilbert	448
Knowles v. Maynard	566	Laughlin v. Ferguson	608
v. Spence	585	Laughter's case	525
Knox v. Moatz	602	Law v. Patterson	817
Kramer v. Bank, &c.	581, 602	Lawrence v. Bayard	752
v. Cook	291, 342	v. Boston	549
Kratemayer v. Brink	383	v. Brown	168, 219
Kren v. Watson	328	v. Fletcher	668
Krider v. Lafferty	264	v. Kemp	36, 44
Kruger v. Day	120	v. Knight	341, 343
Kuhin v. Kaler	157	v. Lawrence	179
Kunkle v. Wolfersberger	550	v. Miller	133, 173
Kynaston v. Clark	774	v. Wardwell	240
		v. Williams	251, 328
		Lawson v. Morton	158, 200, 213
		Lawton v. Lawton	29
		Layman v. Thorp	391
		Layton v. Butler	189, 198
		Leach v. Trollope	228
		Leader v. Homewood	37
		Leake v. Randall	179
		Leavitt v. Lamprey	147, 199
		Lechmere v. Carlisle	463
		v. Lechmere	225
		Leeompte v. Wash	183, 142, 196
		Ledbetter v. Gash	821, 835
		Lee v. Alston	378
		v. Arnold	317
		v. Chambers	684
		v. Evans	548
		v. Lee	442
		v. Munroe	647
		v. Risdom	35
		Leeds v. Cameron	581
		Leeland v. Loring	668
		Leese v. Clarke	58

# INDEX TO CASES CITED.

xlix

	PAGE		PAGE
Leffler v. Armstrong	557	Litchfield v. Cudworth	122, 637, 638
Leggett v. Dubois	437	v. Ready	564
v. Hunter	491	Little v. Palister	384, 388, 389
v. Perkins	495	Littlefield v. Crocker	178, 573
Lehigh, &c. v. Harlam	13	v. Kimball	634
Leigh v. Bean	682, 724	Livermore v. Aldrich	430, 431, 432
Leighton v. Leighton	377	Livingston v. Haywood	767
Leitch v. Little	812	v. Livingston	129
Lekeux v. Nash	251	v. Mott	770
Leland v. Gassett	30	v. Potts	243
Leman v. Newnham	628	v. Reynolds	376, 381
v. Whitby	436	v. Stickles	338, 510, 515
Lemar v. Miles	32	v. Tanner	105, 396
Lemon v. Lemon	179	Llewellyn v. Mackworth	460
Leach v. Leach	433	Lloyd v. Baldwin	467
Lemoir v. South	66	v. Brooking	733, 736
Leonard v. Leonard	412, 817	v. Currin	459, 541
v. McCool	385	v. Hough	333
v. Morris	596	v. Lloyd	94, 519
v. Steele	180	v. Lynch	816
Leonard, &c.	748	v. Read	444
Leroy v. Platt	41	v. Spillett	430, 433
Lance v. Sayre	809	Lock v. De Burgh	320, 355
Letchworth's, &c.	700	Lockhart v. Hardy	666
Leshrierllier v. Tracey	704	v. Reilly	488
Leverett v. Harris	472	Lockwood v. Mitchell	640
v. Redwood	663	v. Sturdevant	119
Levering v. Heighe	225	Logan v. Anderson	250
Levi v. Lewis	251	v. Green	248
Levy v. Bend	288, 349, 350	v. Moore	301
Lewis Bowles' case	379	v. Steele	297
Lewis v. Baldwin	795	v. Walton	109
v. Cook	128	Lokerson v. Stillwell	540, 548
v. De Forest	581, 590, 602	Lomax v. —	228
v. Effinger	293	London, &c. v. Drake	44
v. James	159	v. Faircleugh	436
v. Lewis	187	v. London	201
v. Lyman	271	Long v. Dennis	518
v. Moorman	162	v. Fitzsimmons	289
v. Payn	344, 345	Longfellow v. Quimby	319
v. Smith	180, 659	Longstaff v. Meagoe	35, 45
v. Starke	247	Longstreet v. Ketcham	530
Lewisburg v. Augusta	507	v. Shipman	608
Lewthwaite v. Clarkson	672	Longvills' case	244
Lexington v. Bridges	459	Longwith v. Butler	557
Libbey v. Tolford	282	Loomer v. Wheelwright	614
Lichty v. Hagar	126	Loomis v. Butler	287
Life v. Lecrest	323	v. Wilbur	368, 371
Lift v. Walker	543	Loonie v. Hogan	684
Liford's case	15, 41, 86, 361	Lord v. Brown	828
Lilhawever v. Strever	170, 172	Lord Dorchester v. Edgingham	223
Lill v. Neafie	490	Lord, &c. v. Lumley	248
Lincoln v. College	221	Lorillard v. Coster	493
v. Edgecomb	72	Loring v. Bacon	5
Lincoln, &c. v. Drummond	532	v. Cooke	580
Linden v. Hepburn	254	v. Manufacturers, &c.	598
Lindsey v. Platner	430	v. Melendy	292
v. Pleasants	47	v. Steineman	105
v. Stephens	98	Losey v. Simpson	604
Lining v. Peyton	467, 470, 490	Lothrop v. Arnold	819
Liptrot v. Homes	421	Loud v. Lane	613
Liscomb v. Root	824	v. Penniman	824
Lister v. Lister	822	Lounsbury v. Purdy	430
v. Zoble	284	Love v. Edmondston	298, 383



## INDEX TO CASES CITED.

	PAGE		PAGE
Lovell v. Luland	668	Mahorner v. Harrison	430
Lovering v. Fogg	547, 560	Main v. Schwarzwadde	42
v. Lovering	361	Major v. Ward	557
Low v. Burrow	104, 162, 338	Malin v. Malin	431, 432, 435
Lowber v. Childs	686	Mallett v. Bancroft	825
Lowe v. Morgan	658	Malone v. Majors	186, 187
Lowell v. Daniels	652	Manchester v. Doddridge	383
v. Mutual, &c.	678	Mandeville v. Welch	672
v. Spaulding	289	Manengill v. Baylis	239
Lowell, &c. v. Hilton	506	Mangle v. Stiles	315
Lowrie, &c.	476	Manhattan, &c. v. Greenwich, &c.	663
Lowry v. Drake	524	Manly v. Slason	674
v. Steele	113	Mann v. Cooper	659
Loyd v. Fox	254	v. Richardson	579
Lucas v. Dennison	586	Manners v. Charlesworth	830
v. King	823	Manning v. Laborer	146, 158, 174, 196
v. Lockhart	414	v. Manning	475
Luckett v. White	527	v. Sixth Parish	466
Luckey v. Frantzkee	347	Manse v. Buchanan	167
v. Holbrook	561	Mansell, &c.	630
Luddington v. Kyne	701	Mansell v. Mansell	743, 746
Ludlow v. Grayall	678	Mansfield v. Blackburne	32, 35
Lufkin v. Curtis	174	v. Dugard	707
Lull v. Matthews	541	Mansfield's case	226
Lund v. Lund	543, 544	Mansony v. U. S., &c.	567
v. Woods	573	Mantz v. Buchanan	573
Luning v. Brady	659	Manuf'rs, &c. v. Bank, &c.	543
Lunn v. Gage	284	Maples v. Howe	210
Lunt v. Brown	768	v. Medlin	466
Lusk v. Lewis	442	March v. Berrier	51
Lutroch v. Winford	472	Marcy v. Darling	9
Lyddel v. Weston	11, 458, 474	v. Marcy	818
Lyle v. Richards	742	Marden v. Babcock	644
Lyman v. Hale	15	Margrave v. Le Hooke	580
v. King	683, 724	Marine, &c. v. Brays	590
v. Lyman	603	Marker v. Marker	380
Lynam v. Green	674	Marks v. Marks	522
Lynch v. Utica, &c.	445, 462	Marney v. Byrd	252
Lynde v. Hugh	253	Marquart v. La Farge	264
Lyon v. Hunt	376	Marquis, &c. v. Higgins	561
v. Lyon	163	Marriott v. Givens	457
Lyster v. Holland	575	Marsailles v. Kerr	333
Lytle v. Pope	426	Marsellis v. Thalheimer	114, 726
		Marsh v. Austin	597
		v. Current	360
		v. Rice	615
		Marshall v. Anderson	198, 200
		v. Billingsley	605
		v. Conrad	315
		v. Crehore	824, 826
		v. Lovelass	493
		v. Maury	652
		v. Stephens	485
		v. Stewart	553
		v. Wood	619
		Marston v. Brackett	644, 647
		Martin v. Bowker	585
		v. Gilham	360
		v. Harrison	659
		v. Knowlly	813
		v. Martin	125, 130, 131
		v. McReynolds	658
		v. Mowlin	593, 605
		v. O'Conner	251
<b>M.</b>			
Machell v. Clarke	87		
v. Clerk	87		
Mack v. Grove	657		
Mackell v. Eichelberger	611		
Mackey v. Brownfield	643		
v. Proctor	113		
Macklot v. Dubrieriel	70, 73		
Mackreth v. Symmons	676, 677, 678		
Maddox v. Goddard	40, 812		
Maden v. Ververs	813		
Magaw v. Lambert	352		
Magee v. Fisher	277		
Magennis v. McCullough	249		
Magill v. Hinsdale	568		
Magoun v. Lapham	63		
Mahar v. O'Hara	414		
Mahoney v. Young	158		

# INDEX TO CASES CITED.

li

	PAGE		PAGE
Martin v. Rapelye	547	McConnell v. Willcox	57
v. Roe	36	McCormick v. Digley	570, 611
Martineau v. McCollum	615	v. Gibson	184
Marwood v. Darrill	416	McCorry v. King	111, 113
Mary Vernon's case-	222	McCosker v. Brady	417, 495
Mason v. Allen	191	McCraney v. Alden	640
v. Finch	817	v. McCraney	140
v. Hearne	548	McCrea v. Marsh	301
v. Luke	824	McCreary v. Cloud	198
v. Mason	456, 495	v. Ross	819
Mason, &c.	630	McCroory v. Foster	482
Mass. &c. v. Wilson	344, 566	McCullough v. Caldwell	682, 686
Massina v. Bartlett	656, 663	v. Cox	288, 306
Masters v. Pollie	15	v. Gilmore	512
Masury v. Southworth	251, 260	v. Irvine	362
Matthew Manning's case	227, 707	McDaniel v. Colvin	581
Matthews v. Aikin	602	v. Douglas	188
v. Bennett	113, 191, 205	v. Lapham	591
v. Matthews	830	v. McDaniel	212
v. Temple	727, 731, 780	v. Zelf	444
v. Wallwyn	604	McDermott v. Bank, &c.	602
v. Ward	64, 457	McDonald v. Arten	137
Mathewson v. Hardwicke	626	v. Black	598
v. Smith	573	v. McLeod	555
Matice v. Lord	332	v. Simms	457
Mattock v. Lee	191, 192	McDougal v. Hepburn	161
v. Stearns	114, 120	McDougald v. Capron	575
Maul v. Rider	809, 816	McDowell v. Brown	512
Maurice v. Miller	336	v. Simpson	385
Mauzy v. Mason	459	McElderry v. Flannegan	341, 343
Maverick v. Gibbs	297	McElroy v. Wathen	198
Maxwell v. McClintock	707	McEwen v. Welles	667
v. Montacute	547	McFadden v. Haley	819
May v. Calder	276	McFarlan v. Watson	251
v. Eustin	548, 550	McFarland v. Chase	387
v. Hook	790	McGarrity v. Byington	15
v. May	191, 198	McGee v. Gibson	307
v. Parker	819	McGill v. Ash	812
Mayer v. Milton	169, 285	McGinnis v. Foster	708
Mayhew v. Handerty	251	McGivens v. Wheelock	611, 613
Mayo v. Fletcher	395, 560, 562, 563	McGlashan v. Tallmadge	284
Mayor, &c. v. Pearl	325	McGready v. McGready	551
v. Stuyvesant	539	McGreary v. Osborne	40
McArthur v. Franklin	573, 577, 590	McGregor v. Brown	363
v. Porter	149	v. Toomer	713
McBall v. Eastwick	684	McGuffey v. Finley	659
McCaffrey v. Fisher	66	McGuire v. McGower	432
McCall v. Lenox	560, 564, 566	v. Ramsay	434
McCallister v. Brand	187, 188	McIntyre v. Humphreys	547
McCalloch v. Cowber	436	v. Whitfield	561
McCants v. Bee	482	McIvor v. Cherry	143, 573, 659
McCarron v. Cassidy	588	McKee v. Jones	423
McCartee v. Teller	221, 226	v. Pfant	100
McCarthy v. Graham	663	McKeon v. King	390
McCartney v. Bostwick	437, 490	v. Whitney	335
McCarty v. Ely	350	McKildoe v. Darracott	332
McCaskle v. Amarine	313	McKinley v. Irvine	484
McCauley v. Grimes	148	McKinney v. Peck	395
McClanahan v. Porter	160	v. Reader	255
McClowry v. Croghan	280	McKinstry v. Cronly	550
McClure v. Durthitt	129	McKircher v. Hanley	569
v. Harris	147, 173	McKissack v. Bullington	261
McCombs, &c.	251	McKissick v. Pickle	504, 509
McConnell v. Holobush	590	McLacklan v. McLacklan	525

	PAGE		PAGE
McLanahan v. McLanahan	545	Miellish v. Robertson	555
McLaren v. Watson	262	Migner v. Munroe	387
McLaughlin v. McLaughlin	135	Miles v. Smith	659
McLaurin v. McCall	20, 21	Millay v. Millay	71
McLean v. Lafayette, &c.	603, 607	Miller v. Bates	152
v. Towle	102	v. Beates	105
McMahan v. Kimball	136, 200, 454	v. Beverly	196
McMechen v. Marman	455	v. Beverleys	496
McMellen v. Farnham	653	v. Bonsadon	298
McMillan v. Richards	660, 664	v. Cotten	423
v. Robbins	101	v. Donaldson	617
McMullin v. McMullin	495	v. Ewing	771
McMurphy v. Minot	245 256, 330, 568	v. Hamblet	543
McMurray v. Rawson	810	v. Helm	597
McNish v. Guerard	491	v. Hixon	204
v. Pope	484	v. Hull	640
McPheters v. Lumbert	686, 690	v. Lincoln	588
McQuerney v. Hiester	315	v. Lockwood	581
McTaggart v. Thompson	560	v. McGalligan	657
McTilvaine v. Harris	39	v. Miller	101, 212, 801, 826
McWilliams v. Nisby	81	v. Moore	689
Meacham v. Stearns	475	v. Musselman	602
Mead v. Mitchell	830	v. Oliver	683
v. York	612	v. Plumb	40
Means v. Welles	69	v. Stayner	321
Mechanics', &c. v. Edwards	247, 642	v. Stokeley	430
v. Scott	283, 342	v. Stump	573, 674
v. Williams	637, 638	Milner v. Harewood	185
v. Wixon	537	Mills v. Heeney	681
Mehaffey v. Dobbs	817	v. Mills	178, 550
Mellor v. Lees	549, 554	v. Van Voorhees	148
Melny v. Cooper	674	Millsbaugh v. McBride	619
Melvin v. Proprietors, &c.	121	Milton v. Colby	8
Mendenhall v. West	660	v. Hogue	819
Menifoe v. Menifoe	125, 787	Mims v. Macon, &c.	674
Mennell v. Delaire	555	v. Mims	658, 659
Menville's case	111	v. Weatherbee	75
Meraman v. Caldwell	110	Minsker v. Morrison	457
Merced, &c. v. Tremont	14	Miner v. Stevens	564
Mercer v. Selden	111	Mirick v. Bashford	284
Meredith v. Ames	815	Mitchel v. Reynolds	510
v. Jones	407	Mitchell v. Berry	472
Merriam v. Merriam	660	v. Billingsley	16
Merrick v. Lewis	264	v. Burnham	605
Merrifield v. Cobleigh	520	v. Coates	325
Merrill v. Brown	455	v. Com.	261
v. Emery	186, 525	v. De Roche	457
Merrills v. Swift	586	v. Hazen	806
Merritt v. Horne	112, 834	v. Mitchell	172, 221, 420
v. Hosmer	816	v. Preston	640
v. Lambert	525, 542, 662	v. Site	72
Methodist, &c. v. Jacques	446	v. Speedley	38
v. Stewart	488	v. Thompson	584
Metropolitan, &c. v. Brown	560	v. Warner	3
Meux v. Bell	647	v. Woodson	226
Meyer v. Campbell	561	Mix v. Cowles	581
Miami Ex. Co. v. Bank of U. S.	428, 548, 560, 594, 601	v. Ely	685 687, 688, 689
Michael v. Michael	479	v. Hotchkiss	590
Michle v. Miles	307	Moffatt v. Smith	286, 335
Mick v. Mick	154	Monell v. Monell	472
Mickles v. Townsend	613	Montague v. Gay	355
Middlebury, &c. v. Lawson	391	v. Hayes	424
Middlesex, &c. v. Minot	558, 610	Monteith v. Evans	684
		Montgomery v. Braere	541, 560, 561, 573

# INDEX TO CASES CITED.

lii

	PAGE		PAGE
Montgomery v. Chadwick	584, 590, 664	Morris v. Oakford	603
v. Culton	413	v. Way	640
v. Ives	113	Morrison v. Buckner	654
v. Petriken	711, 747	v. Kelly	490
v. Tuft	657	v. Minot	690
v. Wymms	397	v. Tenney	389
Monypenny v. Dering	92	Morse v. Clayton	611
Moody v. Flemming	70	v. Gallimore	218
v. King	116, 136, 163	v. Goddard	344
v. Moody	812	Morton v. Barrett	416
v. Walters	746	v. Morton	694
Mooney v. Miller	382	v. Southgate	462
Mooney v. Evans	695	Mosely v. Baker	525
Moor v. Campbell	63, 74	Moses v. Murgatroyd	49, 557, 591
v. Hawkins	754	v. Ross	810
Moore v. Beason	575, 668	v. Wait	378
v. Beason	575, 576	Mosher v. Mosher	157, 160, 213
v. Cable	589, 590	v. Riding	264
v. City, &c.	151, 172	Moshier v. Knox	464
v. Deene	3	Moss v. Barton	292
v. De Graw	588	v. Walkley	572
v. Ellsworth	372	Mott v. Clark	575, 605
v. Esty	150	Moulton v. Norton	268, 327, 328
v. Fletcher	4	Moxley v. Shepard	687
v. Frost	207	Moyse v. Giles	790
v. Gilliam	149, 190	Mugford v. Richardson	331
v. Green	459	Muirhead v. Muirhead	205
v. Harrisburg, &c.	613	Muller v. Henderson	659
v. Hussey	271	Mulliday v. Machis	337
v. Jones	131	Mulligan v. Wade	344
v. Luce	101	Mulrey v. Barrow	689, 751
v. Lyons	708	Mumford v. American, &c.	640, 642
v. Madden	543	v. Brown	289
v. Moberly	602	v. Whitney	301
v. Moore	424, 796	Mumma v. Mumma	443, 446
v. Parker	723	Mundy v. Vanter	469
v. Raymond	675	Munigle v. Boston	943
v. Robbins	155	Munro v. Merchant	831
v. Rollins	148	Munroe v. Allaire	557
v. Shultz	619	v. Gates	827
v. Spellman	457	Munsell v. Carew	308
v. Waller	196, 206	Murdock v. Gifford	43
v. Ware	595	v. Hughes	430, 459
Moore's, &c.	605	Murphy v. Calley	549, 550, 555
Moraney v. Buford	505	v. Murphy	197, 448
More's case	513	v. Nathans	443
Morehouse v. Cathcat	362, 369	Murray v. Armstrong	382
Morgan v. Arthurs	45	v. Ballou	466
v. Ballard	301	v. Cargill	6
v. Davis	585, 606	v. De Rottenham	477
v. Larned	113, 373	v. Fishback	585
v. Moody	308	v. Walker	547
v. Moore	421	Murrill v. Roberts	772
v. Upton	640	Musgrave v. Dashwood	790
v. Woodward	653	Muskett v. Hill	302, 530
Moring v. Ward	264	Musselman v. Eshleman	484
Morrall v. Sutton	93	Mutton's case	731
Morris v. Day	661	Myers v. Daviess	508
v. Floyd	642	v. Davis	182
v. Kiffin	322		
v. McConnaughy	625		
v. Morrison	577		
v. Mowatt	568		
v. Nixon	548		
		N.	
		Nagle v. Macy	664
		Naglee v. Ingersoll	97, 301, 341

Naglee v. Macy	PAGE 593	Noel v. Noel	PAGE 432
Nairn v. Rouse	677	Norforth v. Browne	440
Nance v. Hooper	173, 197	Norman v. Cunningham	105, 786
Napier v. Elam	647	Norris v. Clark	178, 181
Naples v. Minier	631	v. Milner	533
Napper v. Sanders	696, 701	v. Morrison	573, 613
Nash v. Cutler	708	v. Wilkinson	673
v. Spofford	129	North v. Belden	583
Nason v. Grant	63	v. Crowell	581
Natchez v. Minor	643	Northampton, &c. v. Ames	566
Ncale v. Hagthorp	438, 589	v. Whiting	437
Neate v. Pink	463	Northcraft v. Martin	479
Neefus v. Vanderveer	640	Northcut v. Whipp	143
Neely v. Butler	111, 112	Northern v. State	17
Negley v. Morgan	251	Northrop v. Wright	65
Neil v. Kinney	675, 676	Northy v. Northy	562, 650
Neilson v. Lagow	560	Norton v. Coons	602
v. Neilson	810	v. Leonard	418
Neligh v. McMenor	540	v. Norton	406, 421
Nellis v. Lathrop	299	v. Soule	629
Nelson v. Campbell	683, 724	v. Stone	496
Nerhooth v. Althous	297	v. Warner	598
Nettleton v. Sikes	15	Norwood v. Marrow	150, 167, 195, 228, 219
Nevil's case	85	Nott v. Foster	491
Nevis v. Scott	415	Nottingham v. Calvert	148
Nevit v. Saunders	418	Nourse v. Finch	449
New, &c. v. Fair Haven	602	Noyes v. Anderson	240, 351
Newall v. Wright	569, 601	v. Dyer	65, 70
Newcastle v. Vane	378	v. Sturdivant	546, 564, 585
Newcomb v. Smith	124	Noys v. Clark	605
v. St. Peter's, &c.	585	v. Mordant	594
Newell v. Gibbs	297		
v. Sanford	395		
v. Woodruff	816		
v. Wright	344		
Newhall v. Wheeler	415, 474		
Newkirk v. Newkirk	52, 511		
v. Same	506		
Newman v. Jenkins	105		
v. Mackin	391		
v. Rutter	260		
v. Warner	489		
New Orleans, &c. v. Hogan	549		
Newton v. Griffith	91		
v. Hunt	774		
v. Newton	653		
v. Reid	512		
Nicholls v. Peak	466		
Nichols v. Casset	640		
v. Dusenbury	288, 328		
v. Reynolds	70		
v. Williams	390		
Nicholson v. Halsey	456		
v. Manigle	343, 387		
Nicoll v. Miller	472		
v. New York, &c.	508		
Nicolls v. Walworth	422		
Nightingale v. Burrell	91		
Niles v. Nye	573		
Noble v. Bosworth	40		
v. Cromwell	418, 828		
Nodine v. Greenfield	712		
Noel v. Bewley	756		
v. Ewing	135		

# INDEX TO CASES CITED.

lv

	PAGE		PAGE
Orleans v. Chatham	424	Pardee v. Van Asken	659
Orvis v. Newell	580, 602	Parham v. Thompson	16
Osborn v. Horin	175	Paris v. Vail	310
Osborne v. Ballew	65	Parish v. Gilmanton	360
v. Endicott	424, 430	v. Rhodes	443
v. Humphrey	242	Park v. Baker	41
v. Tunis	659	Parker v. Barker	644
Osterhout v. Shoemaker	150	v. Bodley	436
Ostrander v. Kneeland	197	v. Bragg	423
v. Livingston	255	v. Brown	67
v. Spichard	182	v. Carter	111
Otis v. Moulton	72	v. Chambers	99
v. Parshley	144	v. Converse	490
v. Sill	783	v. Elder	278
Odley v. McAlpine's Heirs	835	v. Gibbins	352
Ottaway, &c. v. Murray	551	v. Harvey	226
Ouseley v. Anstruther	630	v. Kane	132
Outlaw v. Yell	173	v. Lincoln	523
Overbagh v. Patrie	316	v. Nichols	509
Overdser v. Lewis	395	v. Obear	207
Overton v. Williston	27, 38	v. Parker	20, 158, 191
v. Woolfolk	823	v. Prop'rs, &c.	818
Oves v. Oglesby	32, 41	v. Raymond	376
Owen v. Hyde	364	v. Slainland	17
v. Robbins	161	Parkins v. Cox	364
Owings v. Emery	367	Parkman v. Aicardi	238
Oxenham v. Eadaile	678	Parks v. Boston	284
Oxford v. Benson	113	v. Brooks	161
		v. Hardey	205, 214
		v. Parks	493
		Parsons v. Camp	302
		v. Freeman	628
		v. Miller	307
		v. Mumford	543
		v. Smith	24
		v. Welles	541, 595, 606, 607, 660
		v. Winslow	519
		Partington v. Woodcock	561
		Partridge v. Bere	561, 564
		v. McKinney	14
		Parvis v. Brown	575
		Pasley v. English	74
		Pasteur v. Jones	289, 366
		Patch v. King	607
		Patchin v. Dickerman	250
		v. Pierce	547
		Patterson v. Boston	351
		v. Esterling	647
		v. Lang	317
		v. O'Hara	322
		v. Silliman	250, 784
		v. Yeaton	550, 551
		Pattison v. Horn	436
		Patton v. Axley	237
		Patty v. Pease	603, 609, 616
		Pawlet v. Clark	278
		Pawlett v. Atty.-Gen.	571, 594
		Paxon v. Paul	649
		Paxton v. Harrier	603
		Payne v. Atterbury	678
		v. Payne	452
		v. Sale	405
		Peabody v. Eastern, &c.	690
		v. Fenton	605
P.			
Packard v. Packard	704, 710		
Packer v. Heaton	15		
Padelford v. Padelford	362, 364, 371		
Padine v. Jane	351		
Page v. Broom	282		
v. Elsworth	251		
v. Foster	555		
v. Hill	398		
v. Page	174, 199, 215, 430		
v. Robinson	570		
Paget v. Gee	356		
Page v. Prown	591		
Paine v. French	595		
v. Gupton	133		
v. Samms	335		
v. Webster	466		
Paine's case	115		
Painter v. Henderson	481, 482, 484		
Palmer v. Carlisle	658		
v. Eyre	586		
v. Foote	575		
v. Fowley	601		
v. Gurnsey	541		
v. Horton	165		
v. Jackson	586		
v. Mead	645		
v. Voorhis	187		
v. Wetmore	347		
Pangoud v. Tourne	342		
Panton v. Robart	35		
Papillon v. Voice	96		
Paradine v. Jane	351		

	PAGE		PAGE
Peabody v. Patten	130	Perry v. Davis	332, 366
v. Tarbell	69, 437	v. Hayward	631, 638
Peaceable v. Reed	815	v. McHenry	430
Pearce v. Colden	5, 298	v. Meddowcroft	555
v. Ferris	254	v. Pearson	548
v. Savage	607	v. Philips	439
Pearsall v. Kingsland	640	Peter v. Beverly	48
Pearse v. Killian	89	Peters v. Goodrich	583
Pearson v. Pearson	183	Peterson v. Clark	564
Pease v. Bancroft	634	v. Edmonson	347, 352
v. Benson	660, 665	v. Willing	547
v. Hixon	134	Petrie v. Dawson	40
v. Owens	94	Pettengill v. Evans	46, 566
Peay v. Peay	163	Pettibone v. Griswold	582
Peck v. Hapgood	650	v. Stevens	601
v. Hensley	686, 688	Pettman v. Bridger	7
v. Hiler	347	Petty v. Styward	782
v. Northrop	321	Phares v. Walters	200
Peebles v. Lassiter	311	Pharis v. Lachmere	193
Pest v. Beers	675	Phelps v. Butler	631, 639
Pegues v. Pegues	436	v. Chesson	531
Peirce v. Goddard	7, 8	v. Jepson	795
Peirson v. Doe	72	v. Sage	649
Pell v. Ulmar	550	Philbrook v. Delano	440
Pellenz v. Bullerdrick	38	Phillips v. Allen	363
Pells v. Brown	719	v. Bustard	476
Pelt v. M'Graw	564	v. Cramond	464, 487, 439
Peltz v. Clarke	620	v. Gress	443
Pemberton v. Pemberton	181, 185	v. Humphrey	414
Pendergast v. Young	395	v. Rhodes	24
Pendlebury v. Meade	684	v. Sinclair	585
Pendleton v. Fay	466	v. Stevens	289
v. Pomeroy	544	v. Tudor	806
Penhallow v. Dwight	17	Phillipson v. Mullanphy	41
Penkay v. Hurrell	410, 729	Phipps v. Akers	707
Penn v. Lord Baltimore	492	v. Budd	542
Pennant's case	281	Phyfe v. Wardell	291
Penniman v. Hollis	549, 651	Piatt v. Oliver	469, 464, 465
Pennington v. Hanbey	550	v. Smith	550, 551
v. Yell	189, 191	v. Vattier	584
Pennock v. Hoover	688, 684, 687	Pibus v. Mitford	411
Penrhyn v. Hughes	98	Pickard v. Perley	367
Penton v. Roberts	32	v. Sears	647
People v. Brown	530	Pickens v. Wilson	197
v. Conklin	708	Pickering v. De Rochemont	474
v. Davison	360	v. Pickering	524
v. Folsom	38	Pickett v. Peavey	181, 186
v. Gillis	94, 266	Pidge v. Tyler	63
v. Haskins	314	Pierce v. Faunce	605
v. Livingston	56	v. Kneeland	664
v. Robertson	253	v. Oliver	825
v. Stiner	263	v. Pierce	333, 335, 434
People, &c. v. Soc'y, &c.	510	v. Potter	595
Peppercorn v. Peacock	692	Piercepont v. Bernard	302
Perkins v. Cartwell	459	Pierson v. Armstrong	406
v. Dibble	544, 560, 594, 606	v. Merrick	658
v. Drye	550, 551, 553	v. Thompson	477
v. Hays	442	Pifer v. Ward	687
v. Pitts	610, 613	Pigot v. Bullock	161, 379
v. Wood	659	Pike v. Irwin	684
Perring v. Brooke	266	Pilkington v. Bayley	441
Perry v. Adams	634	Pillsbury v. Pillsbury	436
v. Aldrich	355	v. Smith	637
v. Barker	667	Pimb's case	405

## INDEX TO CASES CITED.

lvii

<b>Pindar v. Ainsley</b>	<b>PAGE</b>	<b>PAGE</b>	<b>Powell v. Smith</b>	<b>PAGE</b>
<b>v. Upton</b>	<b>289</b>		<b>v. Triplett</b>	<b>27</b>
<b>Pineo v. Judson</b>	<b>510</b>		<b>Powlett v. Duchess of Bolton</b>	<b>327</b>
<b>Pingree v. Comstock</b>	<b>264</b>		<b>Powsely v. Blackman</b>	<b>379</b>
<b>Pinson v. Ivey</b>	<b>3</b>		<b>Pratt v. Felton</b>	<b>561</b>
<b>Piston v. Cater</b>	<b>425</b>		<b>v. Thornton</b>	<b>186</b>
<b>Pitt v. Petway</b>	<b>283</b>		<b>Preble v. Hay</b>	<b>478, 479</b>
<b>Pitts v. Waugh</b>	<b>480, 483</b>		<b>Prentice v. Elliott</b>	<b>395</b>
<b>Planters' Bank v. Davis</b>	<b>434</b>		<b>Presbyterian Ch. v. Andrus</b>	<b>341</b>
<b>Planters', &amp;c. v. Dodson</b>	<b>113</b>		<b>v. Picket</b>	<b>5</b>
<b>v. Farmers, &amp;c.</b>	<b>674, 675</b>		<b>Prestars v. McCall</b>	<b>297</b>
<b>v. Walker</b>	<b>460</b>		<b>Preston v. McCall</b>	<b>249</b>
<b>Plato v. Roe</b>	<b>17</b>		<b>Prettyman v. Walston</b>	<b>338</b>
<b>Platt v. Sleep</b>	<b>550</b>		<b>Prevost v. Gratz</b>	<b>294</b>
<b>v. Sprigg</b>	<b>246</b>		<b>Prewett v. Dobbs</b>	<b>425</b>
<b>Playford v. Playford</b>	<b>744</b>		<b>Price v. Blakemore</b>	<b>326</b>
<b>Pleasants v. Higham</b>	<b>552</b>		<b>v. Cleghorn</b>	<b>459</b>
<b>Plak v. Chambers</b>	<b>266</b>		<b>v. Lyon</b>	<b>484</b>
<b>Plummer v. Neile</b>	<b>70</b>		<b>v. Methodist</b>	<b>5</b>
<b>Planket v. Holmes</b>	<b>537</b>		<b>v. Price</b>	<b>7</b>
<b>v. Penson</b>	<b>735</b>		<b>v. Williams</b>	<b>47</b>
<b>Plunkett v. Lewis</b>	<b>574</b>		<b>Pride v. Boyce</b>	<b>266</b>
<b>Peckley v. Pockley</b>	<b>443</b>		<b>Priest v. Cummings</b>	<b>178</b>
<b>Poignard v. Smith</b>	<b>627</b>		<b>Prime v. Stebbing</b>	<b>153, 154, 176</b>
<b>Poindexter v. McCannon</b>	<b>77, 634</b>		<b>Prindle v. Anderson</b>	<b>230</b>
<b>Point v. Scott</b>	<b>541, 552</b>		<b>Pritchard v. Brown</b>	<b>386, 390, 393</b>
<b>Police, &amp;c. v. Reeves</b>	<b>307</b>		<b>Pritts v. Ritchey</b>	<b>455, 466</b>
<b>Pollard v. Shonffer</b>	<b>504</b>		<b>Probert v. Morgan</b>	<b>62, 144, 161</b>
<b>v. Somerset, &amp;c.</b>	<b>289, 351</b>		<b>Proctor v. Fenebee</b>	<b>226, 230</b>
<b>Pollerfen v. Moore</b>	<b>560, 598</b>		<b>v. Keith</b>	<b>48</b>
<b>Polyblank v. Hawkins</b>	<b>676</b>		<b>Proffit v. Henderson</b>	<b>247</b>
<b>Pomeroy v. Winship</b>	<b>122</b>		<b>Prop'rs, &amp;c. v. City, &amp;c.</b>	<b>360, 363</b>
<b>Pemfret v. Recroft</b>	<b>631, 660</b>		<b>v. Day</b>	<b>5</b>
<b>Pemroy v. Rice</b>	<b>361</b>		<b>Prosens v. McIntyre</b>	<b>72</b>
<b>Pond v. Clarke</b>	<b>612</b>		<b>Prouty v. Edgar</b>	<b>444</b>
<b>Peole v. Bentley</b>	<b>583</b>		<b>Pulling v. The People</b>	<b>472</b>
<b>v. Hathaway</b>	<b>265</b>		<b>Punderson v. Brown</b>	<b>236</b>
<b>Peole's case</b>	<b>613</b>		<b>Purcell v. Thomas</b>	<b>631</b>
<b>Peoley v. Budd</b>	<b>27, 513</b>		<b>v. Wilson</b>	<b>326</b>
<b>Popkin v. Bumstead</b>	<b>413, 466</b>		<b>Purdie v. Whitney</b>	<b>815</b>
<b>Porter v. Bank, &amp;c.</b>	<b>618</b>		<b>Purefoy v. Purefoy</b>	<b>464</b>
<b>v. Dovy</b>	<b>418</b>		<b>v. Rogers</b>	<b>580</b>
<b>v. Gordon</b>	<b>415</b>		<b>Purrington v. Pierce</b>	<b>733, 734, 749</b>
<b>v. Hill</b>	<b>385</b>		<b>Purser v. Anderson</b>	<b>198</b>
<b>v. Millett</b>	<b>805, 808</b>		<b>Purson v. Williams</b>	<b>7</b>
<b>v. Nelson</b>	<b>635</b>		<b>Pusey v. Clemson</b>	<b>217</b>
<b>v. Porter</b>	<b>549</b>		<b>v. Desbouvrie</b>	<b>473, 476</b>
<b>v. Stuart</b>	<b>459</b>		<b>Putnam v. Fisher</b>	<b>185</b>
<b>Portland, &amp;c. v. Fox</b>	<b>523</b>		<b>v. Putnam</b>	<b>65, 70</b>
<b>Portmore v. Taylor</b>	<b>588, 653</b>		<b>v. Wise</b>	<b>670</b>
<b>Post v. Dart</b>	<b>775</b>		<b>Putney v. Dresser</b>	<b>270</b>
<b>v. Hover</b>	<b>642</b>		<b>Pye v. George</b>	<b>779, 808</b>
<b>v. Kearney</b>	<b>495</b>		<b>Pyle v. Pennock</b>	<b>743, 746</b>
<b>v. Leet</b>	<b>254</b>		<b>Pynchon v. Stearns</b>	<b>40</b>
<b>v. Vetter</b>	<b>663</b>			<b>246, 359</b>
<b>Potter v. Everett</b>	<b>285</b>			
<b>v. Potter</b>	<b>192</b>			
<b>v. Wheeler</b>	<b>169</b>			
<b>Potts v. Blackwell</b>	<b>213</b>			
<b>Powell v. McAshan</b>	<b>615</b>			
<b>v. M. &amp; B. Manuf. Co.</b>	<b>134</b>			
<b>v. Monson, &amp;c.</b>	<b>158</b>			
<b>v. Powell</b>	<b>175, 200, 201</b>			
	<b>834</b>			



R.		PAGE		PAGE
Rabe v. Tyler		788	Reese v. Waters	115
Rackleff v. Norton	639, 650		Reeve v. Long	733
Rackley v. Sprague		40	Regina v. Fogossa	87
Radburn v. Jervis	2, 85		v. Haslam	28
Radcliffe v. D'Oyly		370	Rehoboth v. Hunt	16
Rafferty v. King		657	Reid v. Bank, &c.	724
Railroad v. Boyer		768	v. Kirk	34
v. Kidd		378	v. Stoney	323
Raine v. Alderson	13, 239, 367, 767		Reilly v. Mayer	603
Rains v. Ware		59	Reinhard v. Bank, &c.	602
Rainsford v. Rainsford	474, 576		Requa v. Holmes	834
Ralls v. Hughes		206	Reves v. Herne	517
Ralph v. Bayley		66	Rex v. Mattingley	560
Ralston v. Hughes		560	v. Minchin	362
v. Wain		418	v. Williams	781
Rambo v. Bell		193	Reynard v. Spence	182, 213
Ramirez v. Murray		334	Reynish v. Martin	518
Ramsay v. Dozier		207	Reynolds v. Clark	124
Randall v. Alburdis		347	v. Monkton	5
v. Cleaveland	375, 768		v. Reynolds	146
v. Hazelton		557	v. Shevler	27
v. Mallett	501, 609		v. Williams	767
v. Phillips		799	Rhines v. Baird	549
v. Rich	246, 248		Rhoades v. Canfield	601
v. Rigby		253	v. Parker	562
Randolph v. Carlton	296, 297		Rice v. Adams	30
Rands v. Kendall	162, 574		v. Barnard	783
Rangeley v. Spring	126, 128, 647, 661		v. Evans	486
Rank v. Rank		307	Rich v. Baker	377
Rankert v. Clow		541	v. Loud	824
Rankin v. Oliphant		198	v. Waters	707
v. Tenbrook		258	Richards v. Carl	538
Ranlett v. Cook		292	v. Chace	561
Razor v. Qualis		20	v. Cooper	659
Rathbun v. Clark		609	v. Folsom	64
v. Colton	476, 478		v. McClelland	125
v. Hayford		690	v. Richards	167, 292
v. Rathbun		479	v. Worthley	640
Ravarty v. Fridee		174	Richardson v. Baker	674
Rawley v. Adams		48	v. Copeland	45
v. Holland		412	v. Field	643
Rawson v. Eicke	266, 567		v. Richardson	301
v. Inhabitants, &c.		503	v. Ridgely	674
v. Uxbridge		505	v. Skolfield	167
Ray v. Armstrong		390	v. Spencer	479, 485
Raymond v. Holden	127, 129		v. York	362, 378
Raynham v. Snow		652	Richie v. McCauley	312
v. Wilmarth		573	Rickard v. Rickard	817
Read v. Errington		410	v. Talbird	198, 206
Reading v. Blackwell	48, 49		Rickett v. Tullick	386
v. Royston		817	Ricketts v. Montgomery	469
Ream v. Harnish		307	Riddick v. Walsh	122, 151
Reaves v. Garrett	181, 184		Riddle v. Emerson	430
Rector of Cheddington's case		754	Riddleberger v. Mentner	167
Rector, The, &c.		236	Ridgeley v. Inlehart	674
Redington v. Fry		690	v. Johnson	488
Reed v. Campbell	167, 184		v. Rawling	361
v. Davis		561	v. Stillwell	322, 393
v. Dickerman		186	Rigden v. Vallier	782
v. Diven		631	Riggs v. Dooley	71
v. Kennedy		787	v. Sally	91, 92
v. Reed		590	Right v. Cuthell	274
Rees v. Baker		308	v. Proctor	264
			Righter v. Statt	640

# INDEX TO CASES CITED.

lix

	PAGE		PAGE
Rigler v. Cloud	117, 490	Roe v. Ashburner	268
Riker v. Darke	828	v. Couch	575
Riley v. McCord	593, 653	v. Galliers	513, 516
Rinehart v. Harrison	49	v. Harrison	414
v. Olwine	308, 384	v. Hodgson	276
Ring v. Argand	384	v. Popham	410
v. McCoun	435	v. Reade	457
Ringgold v. Ringgold	474, 478, 485	v. Soley	580
Rintch v. Cunningham	197	v. Tranmer	731
Ripley v. Aetna, &c.	537	v. York	249
v. Waterworth	102, 104	Rogers v. Colt	450
v. Wightman	351	v. De Forest	495
v. Yale	72, 298	v. Grazebrook	561
Rising v. Stannard	384, 387, 388	v. Grider	797
Ritchie v. Williams	617	v. Ludlow	418
Rives v. Watson	358	v. Maule	672
Roach v. Cosine	547	v. Phillips	685
Roarty v. Mitchell	557	v. Ross	493
Robb v. Ankeny	92	v. Skillicorne	468
Robbins v. Robbins	164	v. Tucker	834
Roberts v. Barber	21, 25	v. Woodbury	9
v. Barker	383	Rohie v. Flanders	206
v. Bozen	557	Rolfe v. Harris	528
v. Davey	531	Rollestone v. Morton	672
v. Lesly	417	Rollins v. Movers	386
v. Long	67	v. Riley	506
v. Roberts	178	Rooney v. Gillespie	387
v. Tennel	393	Root v. Bancroft	652
v. Walker	514	v. Collins	612
Robertson v. Campbell	555, 640	v. Stow	602
v. Robertson	72	v. Yeomans	642
v. Stevens	113, 523	Roper v. Radcliffe	49
Robins v. Crutchley	139	Roscarrick v. Barton	542
v. Kitchen	300	Rose v. Griffin	58
Robinson v. Bates	176	v. Hayes	372
v. Brown	67	Roseboom v. Van Vichten	54, 94
v. Collier	645	Rosenbaum v. Gunter	283
v. Comyns	518	Ross v. Barker	457
v. Cropsey	555	v. Durham	818
v. Guild	641	v. Dysart	344
v. Johnson	819	v. Hegeman	496
v. Kettletas	292	v. Overton	353
v. Leavitt	613, 614	v. Ross	88, 218
v. Leeroyd	397	v. Tremain	523
v. Litton	380	Rosse v. Wainman	12
v. Loomis	551	Rossiter v. Cossit	573
v. Miller	101, 102, 147, 207	Rothwell v. Dewees	442
v. Perry	251	Rowan v. Lytle	396
v. Pett	473	v. Sharps, &c.	581
v. Preswick	42	Rowbotham v. Wilson	11, 12
v. Roberts	819	Rowe v. Grenfel	13
v. Robinson	651	v. Johnson	208
v. Turner	659	v. Powers	212
v. Urquhart	611, 613	v. Table, &c.	664
v. Wheelwright	510	v. Young	610
Robison v. Codman	144, 450	Rowland v. Rowland	768
Robson v. Hazwell	423	Rowton v. Rowton	162
Roby v. University	683	Royston v. Royston	835
Rochford v. Hackman	99, 539	Ruby v. Abyssinian, &c.	563, 588
Rockingham v. Penrice	324	Ruckman v. Astor	323, 588, 663
Rockwell v. Bradley	564	Ruebns v. Prindle	551
v. Hobby	672, 678	Ruggles v. Barton	618
Rodgers v. Lathrop	307	Runlet v. Otis	547
v. Rawlings	536	Rung v. Shoneberger	72



# INDEX TO CASES CITED.

lxi

	PAGE		PAGE
Sewall v. Lee	165	Sherwood v. Waller	503
Seward v. Jackson	430	Shields v. Batts	191
Seymour v. McDonald	511	Shineley v. Jones	659
Seymour's case	82, 89	Shinn v. Roberts	506, 527
Seys v. Price	225	Shirkey v. Honna	658
Shackleford v. Smith	65, 389	Shirras v. Caig	583
v. Stockton	659	Shoemaker v. Smith	434
Shaeffer v. Weed	173	Shoker v. Hanser	315
Shafelt v. Guston	291	Shouffler v. Coover	211
Shafts v. Shafts	625	Shrepnel v. Vernon	449
Shaner v. Woodward	548	Shrewsbury v. Shrewsbury	86
Shannon v. Bradstreet	606	Shrewsbury's case	388
v. Burr	248	Shrieve v. Summers	65
Shapland v. Smith	417	Shryock v. Waggoner	492
Shapley v. Rangeley	660	Shumway v. Collins	238, 253, 343
Sharon v. Simonds	414	Shunk's, &c.	476
Sharp v. Carlile	245	Shurtliff v. Witherspoon	476
v. Ingraham	818	Shurtz v. Thomas	173
v. Mayor, &c.	263	Shury v. Brown	322
v. Pettit	198	Shute v. Harder	455
Sharpe v. Kelley	69	Shuttleworth v. Laycock	580
Sharpley v. Jones	189	Sidmouth v. Sidmouth	443
Shattuck v. Gragg	157, 216	Sidney v. Sidney	119
Shaver v. Radley	432	Siemon v. Schurck	437
Shaw v. Barnes	688	Siglar v. Van Riper	191, 206
v. Erskine	543	Sigourney v. Eaton	633
v. Hearsey	794, 797	v. Stockwell	652
v. Hoadley	578, 653	Sillick v. Booth	106
v. Russ	175	Silloyay v. Brown	559
v. Shaw	96	Silvester v. Jarman	572
v. White	160	v. Wilson	417
Shawe v. Boyd	196	Simers v. Saltus	566
Sheafe v. O'Neil	197	Simonds v. Brown	599
Shean v. Withers	382	v. Simonds	522
Sheckell v. Hopkins	551	Simmons v. Gooding	117
Sheffield v. Collier	305	v. Rose	51
Shelburne v. Biddulph	773	v. Tongue	205
Shelby v. Perrin	676	Simpson v. Ashworth	49
v. Shelby	459, 752	v. Bowden	362
Sheldon v. Ferris	543	v. Clayton	253, 292, 311
v. Purple	505	v. Kelso	48, 49
Shelley's case	402, 696	v. Seavey	814
Shelton v. Atkins	651, 661	Sims v. Aughtery	94
v. Carroll	193	v. Helling	672
v. Codman	244	v. Humphrey	390
v. Deering	177	Singleton v. Cox	659
v. Shelton	24	v. Gayle	674
Shepard v. Philbrick	23	v. Moore	459
v. Pratt	635	v. Singleton	193, 217
v. Shepard	582, 602	Sisson v. Seabury	712
v. Spaulding	38, 247	Sistare v. Sistare	142
Sheperd v. Adams	603	Siter v. McClanahan	49, 419
v. McEvers	489	Skagg v. Nelson	675
Shepherd v. McIntire	678, 812	Skeats v. Skeats	443
Shepperson v. Shepperson	126	Skeel v. Spraker	603, 609, 624
Sherburne v. Jones	387	Skinner v. Cox	541
Sherlock v. Thayer	322	Skirving v. Neufville	621
Sherman v. Abbott	650	Slade v. Van Vechten	479
v. Champlain, &c.	297	Slainford v. Fullerton	806
v. Gassett	640	Slater v. Jepherson	74
Sherrill v. Shurford	476	Slaughter v. Foust	595, 657
Sherry v. Frecking	4	Slaymaker v. St. John	428
Sherwood v. Seaman	284	Slee v. Manhattan, &c.	556, 558, 585
v. Vanderburgh	144, 148	Slocum v. Catlin	613, 631

	PAGE		PAGE
Slocum v. Slocum	48, 94	Snelling v. Utterback	433
Sloo v. Law	490	Snow v. Cutler	723
Smack v. Duncan	657	Snowden v. McKinney	389
Small v. Attwood	678	Snyder v. Snyder	490
v. Jones	479	Soggins v. Heard	480
v. Proctor	92	Soher v. Kemp	601
Smalley v. Corliss	307	Sohier v. Williams	96
Smallwood v. Lewin	643	Sollee v. Croft	476
Smart v. Hunt	586	Solomon v. Wilson	556
Smartle v. Penhallow	338	Sonders v. Van Sickle	564, 569
Smeathman v. Bray	657	Soule v. The Union, &c.	640
Smiley v. Van Winkle	245, 251	Souley v. Clockmakers', &c.	493
v. Wright	162, 168, 454	South v. Alleine	418
Smith v. Atkins	310	South, &c. v. Blakeslee	72
v. Bailey	662	Southard v. Central, &c.	521, 553
v. Baldwin	182	v. Parker	260
v. Benson	7, 805	v. Wilson	661, 667, 668
v. Bovin	557	Southerin v. Mendum	595
v. Brannan	248, 489, 533	Southerland v. Jones	372
v. Burtis	72	Southern v. Bellasis	324
v. Follansbee	371	Southgate v. Taylor	668
v. Fyler	307	Sowell v. Barrett	548
v. Gage	678	Sowers v. Vie	244
v. Garth	436	Spader v. Lawler	582
v. Goodwin	564, 567	Spalding v. King	689
v. Ingalls	150	v. Shalmer	467, 472
v. Ingram	66	Spangler v. Stanlee	152, 163, 242
v. Kelly	542, 578, 661	Spann v. Jennings	421
v. Lane	426	Sparks v. State, &c.	43
v. Manning	598, 665	Sparrow v. Kingman	150
v. Marrable	285	Spaulding v. McOsker	382
v. Metcalf	420	Spear v. Fuller	513
v. Monmouth, &c.	546	v. Hubbard	647
v. Moore	560	Speckles v. Sax	349
v. Niles	268	Spence v. Etter	682
v. Parker	772	Spencer v. Austin	793, 810
v. Parkhurst	697	v. Roper	106
v. Patton	457	v. Weston	207
v. Paysenger	137, 151	Sperry v. Miller	250
v. Paythress	131	v. Pond	530
v. People's, &c.	549	v. Sperry	247, 332
v. Poyas	368, 377	Spiller v. Spiller	664
v. Prince	583	Sprague v. Graham	644
v. Ramsey	460	Spraker v. Cook	383
v. Rome	390	Spring v. Cæsar	732
v. Sackett	430	v. Haines	585
v. Saratoga, &c.	336	v. Tradesmen's, &c.	605
v. Shepard	343, 344, 567	Springer v. Keyser	687
v. Smith	140, 141, 187, 194, 198, 209, 212, 222, 830	Springle v. Shields	193
v. Stanley	611	Spurgeon v. Collier	550
v. Strahan	444, 446, 447	Squibb v. Wynne	243
v. Snoman	15	Squire v. Harder	435
v. Tarlton	783	Stabback v. Leat	559
v. Taylor	561, 566	St. Albans v. Shore	526
v. Vincent	607	St. Andrews, &c. v. Tompkins	582
v. Warren	738	Stafford v. Buckley	85
v. Webb	659	Stagg v. Beekman	493
v. White	278	Staimbaugh v. ———	17
Smitheal v. Gray	423	Stamford v. Benedict	607
Smoot v. Lecatt	112, 119	Stamper v. Johnson	548
Smyth v. Oliver	490	Stane v. Huxford	506
Snales v. Dall	817	Stanhope v. Manners	551
Sneed v. Ward	314	v. Stanhope	97
		Stanley v. Gilmer	455

# INDEX TO CASES CITED.

lxiii

	PAGE		PAGE
Stanley v. Hays	284	Steward v. Lombe	10, 29, 42
v. Kochler	248	Stewart v. Brown	434
v. Stanley	710	v. Chadwick	11, 190, 461, 466
v. Tuesgood	289	v. Chew	377
Stansbury v. Taggart	72, 383	v. Doughty	18, 20, 308
Stansell v. Roberts	675	v. Jenkins	132
Stansfield v. Portsmouth	515	v. McMartin	191, 500
Stanwood v. Dunning	147, 148	v. McQuaid	689, 690
Staples v. Emery	283	v. Pettus	489
Stapp v. Phelps	640	v. Preston	602
Stark v. Hunton	181	v. Roderick	301
v. Miller	766	v. Stewart	167
Starnes v. Quin	819	Stier v. Surget	334
Starr v. Ellis	247, 613	Stileman v. Ashdown	446
v. Jackson	767	Stiles v. Cowper	280
v. Pease	119	Stillman v. White, &c.	72
State v. Campbell	599	Stimpson v. Thomaston Bank	150
v. Canatoo	13	Stinson v. Ross	560
v. Curtis	270	v. Sumner	176
v. Foreman	58	Stiver v. Cawthorn	203
v. Guilford	488	St. John v. Benedict	436
v. Laval	572, 631	Stoakes v. Barnett	14
v. Stewart	385	Stockard v. Stockard	469, 602
Stacy v. Rice	420	Stockbridge v. Nute	389
Stadman v. Palling	118	Stockett v. Watkins	333
Stearns v. Godfrey	72, 639	Stocking v. Fairchild	544
v. Palmer	65	Stockman v. Wither	370
v. Stearns	204	Stoddard v. Gibbs	113
Stedfast v. Nicoll	726	Stody v. Johnson	278
Stedman v. Gasset	564	Stokes v. McAllister	195
Steed v. Crogh	243	v. McKibbin	117, 297
Steedman v. Weeks	822	Stomey v. McMurray	555
Steel v. Black	548	Stone v. Buckner	429
v. Cook	774	v. Ellis	528, 533
v. Steel	544, 593	v. Knight	259
Steele v. Maumder	659	v. Lane	581
v. Wright	303	v. Lincoln	147
Stegall v. Stegall	142	v. Matthews	328
Steiger v. Hiller	198, 200	v. Stone	263
Stelle v. Carroll	573	Stoney v. American, &c.	640
Stephens v. Hume	112	Stoppani v. Richards	251
v. Smith	162	Storm v. Mann	377
v. Westwood	58	Storrs v. Barker	649
Stephenson v. Doe	67	Story v. Saunders	72
v. Richmond	297	Stover v. Cone	49
v. Thompson	544	Stowell v. Pike	567
Sterling v. Penlington	804	Strachey v. Francis	370
Sterricker v. Dickenson	495	Strachn v. Foss	611
Stert v. Platel	709	Stratton v. Best	780
Stetson v. Gulliver	546	Straw v. Jones	64
v. Veazie	75	Strong v. Blanchard	590, 602, 668
Stevens v. Cooper	547	v. Bragg	192
v. Ely	441, 442	v. Clem	191, 192
v. Enders	828	v. Dennis	109
v. Lodge	326	v. Hunt	811
v. North	652	v. Skinner	131
v. Owen	156, 175	v. Stewart	547
v. Reed	149, 199	v. Waterman	58
v. Stevens	304	v. Willis	489
v. Wells	687	Strohecker v. Barnes	286
v. Winship	100, 791	Strout v. Notama, &c.	245
Stevenson v. McReary	138, 149	Stuart v. Kissam	416, 418, 486
v. Stonehill	683	v. Mellich	474
Steward v. Allen	631	Stubbs v. Sargon	441

[illegible]

# INDEX TO CASES CITED.

lxv

	PAGE		PAGE
Thomas v. Cleaves	640	Tisdale v. Essey	285
v. Connell	315, 321	Titley v. Davis	580
v. Hatch	68, 814, 818	Titus v. Neilson	573
v. Hayden	332	Tobey v. Webster	767
v. Howell	525	Tobias v. Frances	32
v. James	418	Toby v. Reed	22, 563
v. Moody	22	Tod v. Baylor	160, 198
v. Simpson	204	Todd v. Beatty	192
v. Thomas	143	v. Campbell	547
v. Van Kapp	598	v. Hall	267
v. Walker	430	v. Jackson	331
v. Wood	48, 184	Toll v. Miller	610
Thomaston, &c. v. Stimpson	642	Tollemache v. Tollemache	379
Thompson v. Barber	806	Tolley v. Greene	180
v. Bostick	811	Tompkins v. Elliott	506
v. Boyd	573	Tomlinson v. Degraw	687
v. Branch	423	Tonchard v. Crow	819
v. Bright	506, 537	Tooke v. Hardeman	184, 185, 206
v. Chandler	600	Tooker v. Squier	264
v. Cochran	162	Tooley v. Dibble	775
v. Craignyle	17	Torrey v. Bank, &c.	479, 581, 609, 663
v. Finch	475	v. Torrey	396, 786
v. Gibson	405	v. Wallis	251, 290
v. Leach	783	Towers v. Craig	93
v. Mack	550	v. Davys	228
v. McGaw	187	v. Tuscarora, &c.	575
v. Milford	65	Towers, &c.	631
v. Morrow	158, 160	Towle v. Forney	462
v. Parker	631	v. Hait	579
v. Peebles	175	Townsend v. Albers	248
v. Renoe	484	v. Lawton	745
v. Sprinks	308, 311	v. Townsend	203, 221
v. Thompson	19, 24, 506, 582	v. Ward	603
Thomson v. O'Sullivan	132	Tracey v. Talbot	5
Thornbrough v. Baker	593	Tracy v. Hereford	98
Thorne v. Thorne	560	Tralock v. Robey	586, 588
Thorneycroft v. Crockett	590	Trappes v. Harter	29
Thornton v. Ellis	47	Trash v. White	584
v. Foss	76	Trask v. Patterson	124
v. Knox	674	v. Wheeler	280, 509
v. Payne	265	v. Wilder	643
v. Pigg	654, 659	Travell v. Danvers	490
v. Wood	597	Treadwell v. Bruder	318
Thorp v. McCullum	479, 485	v. Bulkley	782
v. Thorp	506	v. Roderick	73, 74
Thorpe v. Garside	671	Treat v. Liddell	328
Thredgill v. Pintard	674	v. Peck	276, 388
Throop v. Williams	697, 712	Trenchard v. Warner	599
Throp v. Johnson	159, 532	Trimble v. Trimble	138
Thunder v. Belcher	565	Trimmer v. Hiaggy	125, 127
Tice v. Annin	574	Tripp v. Vincent	624
Tiernan v. Henman	551	Troth v. Hunt	682, 724
Tift v. Verden	311	Trott v. Dawson	477
Tilford v. James	602	Trotter v. Blocker	415
Tilghman v. Cruson	767	Trudear v. M'Vicar	631
v. Little	297	True v. Merrill	5
Tillinghast v. Fry	573, 579	v. Ramsey	140
Tilly v. Tilly	416	Truesdall v. Callaway	675
Tilson v. Thompson	205	Trull v. Fuller	30, 40
Tindall v. Den	298	v. Owen	554
Tinker v. Geraghty	689	v. Skinner	546, 551, 553
Tinney v. Tinney	223, 225	Truscott v. King	581
Tippin v. Coson	410	Trustees, &c. v. Bigelow	6
Tipping v. Pigot	742, 743	v. Clough	253





## INDEX TO CASES CITED.

lxvii

	PAGE		PAGE
Vessey's, &c. v. Graham	486	Walker v. Physic	315
Vechte v. Brownell	663	v. Schuyler	160
Venables v. Morris	416	v. Sedgwick	674
Vermilyea v. Austin	344	v. Snediker	681
Vermont s. Society, &c.	522, 533	v. Walker	547
Verner v. Winstanley	555	Wall v. Hill	149
Vernon v. Bothell	550	v. Hinde	252, 277
v. Smith	598	v. Williamson	58
s. Vernon	356	Wallace v. Associate, &c.	479
Vernon's case	221, 224	v. Coston	132
Verplanck v. Wright	510	v. Doe	194
Verry v. Richardson	638	v. Hall	190
Very v. Watkins	654	v. Harmstad	62, 315
Vick v. Edwards	750	v. Harrison	304
Vickers v. Stone	708	Waller v. Campian	241
Vickery v. Dickson	640	v. Morgan	264
Victory v. Stroud	334	v. Tate	575
Viles v. Moulton	615	Walling v. Aiken	581
Villa Real v. Galway	182	Wallingford v. Hearl	771
Villers v. Handley	772	Walsingham's case	53
Vincent u. Godson	336	Walter v. Bould	87
v. Spooner	232	v. Jackson	274
Viner v. Vaughan	366	Walters v. Jordan	142
Vinton v. King	642	Walton v. Coulson	459, 491
Vischer v. Conant	197	v. Crowley	547
Viscount, &c. v. Morris	572	v. Withington	588
Vizard v. Longdale	223	Wamburger v. Kennedy	413
Voelckner v. Hudson	194	Warbass v. Armstrong	476
Voluntine v. Godfrey	352	Warburton v. Lanman	599
Voorhees v. The Presbyterian, &c.	6	Ward v. Amory	125
v. Stoothof	479	v. Carlton	483
Voorhis v. Freeman	40, 41	v. Fuller	63
Vorley v. Richardson	699	v. Smith	484
Voss v. Handy	606, 607	v. Wandell	313
Vredenberg v. Morris	244	Warden v. Adams	595
		Wardens, &c. v. Rector, &c.	479
W.		Ware v. Hunnewell	827
		v. Polhill	86
Waddle v. Cureton	619	Waring v. Clow	15
Wade s. Green	647	v. Ward	627
v. Howard	650	v. Waring	422
v. Johnston	44	Warner v. Gouverneur	640
v. Merwin	634	v. Hitchins	289
v. Paget	456	v. Page	388
Wade's case	541	Warren v. Childs	631
Wadleigh v. Glines	128	v. Davies	784
Wadsworth v. Soranger	547	v. Leland	15, 299
Wafer v. Mocato	528	v. Twilley	171, 212
Wager v. Wager	713	Warring v. Darrall	476
Waggoner v. Hastings	65, 491	Warrington v. Warrington	796
Wainscott v. Silvers	366	Wartenby v. Moran	329, 532
Wainwright v. Hardisty	97	Warwick v. Bruce	17
Wakeman v. Banks	564, 566	Washburn v. Goodwin	575
v. Roache	206	v. Washburn	527
Walcop v. McKinney	561	Washburne v. Sproat	7
Waldo v. Hall	251, 255	Washington v. Abraham	50
Walker v. Anshutz	683	v. Conrad	818
v. Baxter	610	v. Emery	469
v. Brungard	487	v. Titus	547
v. Fitts	270	Waterfall v. Penistone	33, 44
v. Hallett	662	Waterman v. Curtis	590, 642
v. Hatton	283	v. Matteson	570
v. Locke	438	v. Soper	15
		Waters v. Bailey	481

	PAGE		PAGE
Waters v. Gooch	159	Wellborn v. Rogers	474
v. Mynn	545	v. Williams	674
v. Randall	548, 550, 553	Welles v. Cowles	47
v. Sagewell	420	Wells v. Bannister	8
v. Stuart	631	v. Beale	200, 206, 207
v. Waters	489	v. Chapman	817
Watherell v. Howell	36	v. Haynes	75
Watkins v. Gregory	632	v. Martin	65
v. Hill	611	v. Morse	578
v. Holman	65, 383, 415	v. Smith	527
v. Stockett	548	v. Thompson	112, 119
v. Williams	507	Wendell v. Crandale	91, 699
v. Worthington	205	v. N. H. &c.	547, 661, 665
Watrous v. Chalker	128	v. Van Rensselaer	647
Watson v. Bonney	131	Wentworth v. Wentworth	216
v. Dickens	548, 581	Wentz v. Dehaven	606
v. Gregg	69, 824	West v. Blakeway	35
v. Hill	819	v. Chamberlin	653
v. Hunkins	259	v. Chester	619
v. Le Row	450	v. Lanier	77
v. Watson	118, 185, 199	Western, &c. v. Kyle	329, 537
Watts v. Ball	449, 451	Westfall v. Lee	195
v. Clardy	89	Westlake v. De Grave	347
v. Coffin	350	Weston v. Foster	713, 824
v. Lee	780	Wetherby v. Foster	39
v. Lymer	580	Wetherell v. Hamilton	423
v. Wadelle	125	Whaler v. Story	209
v. Watts	477	Wharf v. Howell	547, 549
Way v. Patty	674	Wharton v. Wharton	88
v. Reed	280, 291	Wheatley v. Best	145
Weale v. Lower	301, 696, 724, 752	Wheeler v. Brancomb	566
Wease v. Pierce	643	v. Cowan	395
Weathersford v. Weathersford	121, 122	v. Earle	330
Webb v. Dixon	272	v. Hill	253
v. Evans	184	v. Hotchkiss	119
v. Flanders	606, 607	v. Montefiore	42, 542
v. Hearing	707	v. Ruston	544
v. Mexan	657	v. Schroeder	690
v. Russell	250	v. Stone	76
v. Sturtevant	65	v. Thorogood	342
v. Townsend	156	v. Wood	386
Webber v. Mallett	806	Wheelwright v. Freeman	652
v. Shearman	385	v. Loomer	603
v. Webber	594	Whelan v. Hill	690
Webster v. French	466	Whelpdale v. Cookson	490, 483
v. Gillman	62, 88, 740	Whetstone v. Bury	416
v. Vandeventer	473, 659	Whichcote v. Lyle's Executors	414
Wedderburn v. Wedderburn	459	v. Lawrence	479
Wedge v. Moore	578	Whillock v. Hall	823
Weed v. Beebe	657	Whipley v. Dewey	36
v. Crocker	265	Whipple v. Hook	23
Weeks v. Hoas	448	Whitaker v. Sumner	631
v. Patten	181	v. Whitaker	243
v. Weeks	818	Whitbeck v. Cook	128
Weeton v. Woodcock	37	v. Skinner	288
Wegg v. Villiers	736	Whitbred v. Lyall	657
Weimer v. Henitz	656	Whitbred's case	672
Weir v. Tate	143, 144, 145	White v. Arnot	38
Weisinger v. Murphy	121, 122	v. Bayley	269
Welch v. Allen	457	v. Bond	631
v. Anderson	185, 210	v. Brown	590
v. Buckins	148	v. Cutler	156
Weld v. Peters	784	v. Ewer	585
Welland v. Gray	581	v. Hillacre	580

# INDEX TO CASES OPENED.

lxix

	PAGE		PAGE
White v. Knapp	616	Willcox v. Wood	272
v. Molyneux	352, 353	Willet v. Beatty	257
v. Story	204, 216	v. Winnell	550
v. Wagner	375	Williams v. Birbeck	605
v. White	97, 459	v. Bishop	555
v. Willis	156	v. Bozanquet	568
Whitehead v. Mallory	166, 167	v. Buchanan	66
Whitfield v. Bewitt	367, 378	v. Casten	104
v. Faussett	755	v. Cheshire	407
v. Paylor	228	v. Conrad	492
Whiting v. Brastow	32	v. Cowden	519
v. Whiting	87	v. Cox	145
Whitmarsh v. Cutting	21	v. Duke of Bolton	379
v. Walker	35, 302	v. Fullerton	454
Whitney v. Allaire	241	v. Garrison	298
v. Cockran	333	v. Halbert	337
v. French	593	v. Hilton	659
v. Gordon	392	v. Hollingsworth	490, 469
v. Holmes	302, 303	v. Kelsey	645
v. Meyers	249	v. Little	611
v. Spencer	510	v. Morgan	204
v. Whitney	697	v. Morris	308
Whittemore v. Shaw	826	v. Owen	555, 580
Whittick v. Kane	545, 547	v. Pope	124
Whittier v. Dow	652	v. Powell	479
Whitlock v. Duffield	292	v. Roberts	674
v. Horton	264	v. Robson	175
v. Huntwell	787	v. Stevens	605
Whittome v. Lamb	94	v. Tearney	688
Whitton v. Whitton	437, 448, 521, 531	v. Thurlow	606, 607
Wickendon v. Reyson	660	v. Williams	448
Wickerley v. Wickerley	228	v. Wood	313
Wickersham v. Irwin	252	Williamson v. Berry	713
Wickham v. Hawkes	302	v. Champlin	663
v. Wickham	279	v. Curtis	468
Wickliffe v. Clay	10	v. Field	658, 669, 712
v. Ensaw	66, 77	v. Richardson	324
Wicks v. Clarke	118	v. Seaver	478, 479
Wigg v. Wigg	530	Willington v. Gale	560, 634, 635
Wiggin v. Wiggin	778, 793	v. Willington	83
Wigley v. Blackwal	525	Willink v. Vandever	436
Wilbur v. Almy	488	Willion v. Barkley	692, 764
v. Wilbur	377, 810	Willis v. Astor	292
Wilcox v. Howell	644	v. Willis	430, 433
v. Morris	549	Williston v. White	405
Wilcoxon v. Bowles	307	Willoughby v. Jenks	1
Wild v. Wells	200	Wills v. Gibson	315
Wildes v. Houghton	566	Willson v. Leonard	282
Wilder v. Smith	679	Wilson v. Anderson	284
Wiley v. Bridgeman	693	v. Bailes	420
v. Pinson	659	v. Burrell	581
Wilford v. Rose	375	v. Chalfant	304
Wilhelm v. Tolmer	454	v. Cheshire	456
Wilkerson v. Daniels	659	v. Colleshaw	815
Wilkins v. French	560, 576, 578, 595	v. Gatz	520
v. Trashbinder	17	v. Gibbs	245
v. Wilkins	647	v. Graham	699
Wilkinson v. Flowers	586, 607	v. Hall	62
v. Hall	561, 562, 595	v. Hardesty	641
Willard v. Fiske	665	v. Hayward	641
v. Harvey	600, 615	v. Mason	466
v. Henry	530, 532, 537	v. McLenaghan	206
Willcox v. Tillman	259	v. Oatman	158, 160
Wilcox v. Randall	168	v. Pennock	492



# THE AMERICAN LAW OF REAL PROPERTY.

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## CHAPTER I.

### REAL PROPERTY IN GENERAL.

- |   |                                   |
|---|-----------------------------------|
| 1, 4. Lands, tenements, and hereditaments.        | 10. Mines.                        |
| 2. Heir-looms.                                    | 12. Trees.                        |
| 5. Real estate—definition; Land—what it includes. | 14. Growing Crops.                |
| 6. Water.   | 15. Emblements                    |
| 6 a. Chamber of a house.                          | 28. Sea-weed; wreck, &c.          |
| 7. Pewa.  | 29. Manure.                       |
| 8. Building on another's land.                    | 31. Fixtures.                     |
|   | 51. Shares in Corporations.       |
|   | 52. Money to be laid out in land. |

§ 1. REAL PROPERTY, in the technical phraseology of the law, consists of *lands, tenements and hereditaments*. The first of these terms is the least comprehensive, including only *corporeal*, or *tangible* property, while the two last embrace also *incorporeal* property. Thus a rent or right of common, though not *land*, is still *real property*, being both a tenement and an hereditament.<sup>(a)</sup> The term *hereditament*, which is the most compre-

(a) A *public way*, says Mr. Justice Cowen, if not an hereditament in every sense, is certainly a *quasi* hereditament. *Willoughby v. Jenks*, 20 Wend. 99. A road was laid out over land, which had been taken by a turnpike company, improved by them, and afterwards sold to an individual. Held, the old way of the company was not *land*, within the meaning of the Road Acts and the Constitution of New Jersey. In the Matter, &c. 2 N. J. 293.

A water company, which has laid pipes in a land-tax division, under a statutory power, but owns no land within the di-

vision, is not assessable there to the land-tax; the right in question being in the nature of an *easement*, and not *land* or an *hereditament*. *Chelsea, &c. v. Bowley*, 7 Eng. Law and Eq. 876.

The grant of a whole mineral stratum, under the soil of the grantor, is a grant of a *real hereditament*. *Stoughton v. Leigh*, 1 Taun. 402. "Lands, tenements and hereditaments" is the phrase commonly used in American statute law, to denote real estate. But in Delaware, Massachusetts, Maine and New Hampshire, it is provided, that the words "land" or "lands," and "real estate,"

hensive of the three, besides including the others, applies also even to articles of personal property, provided they are such as *pass to the heir* and not to the executor; as, for instance, an annuity, limited to heirs, or the *condition in a bond*. So the *visitatorial power*, vested in the visitors of a corporation, has been termed an hereditament. So also a *land-warrant*. So the right of permanently overflowing the land of another by a mill-dam below it, and a corporate right to select and acquire land for a corporate purpose. So a ferry.<sup>1</sup>

§ 2. In England, the most frequent example of a personal hereditament is an *heir-loom*. Heir-looms are certain chattels that accompany the inheritance; such as deer in a park, doves in a dove-house, or the ancient jewels of the crown. So an ancient horn, which had gone immemorially with the estate, and been delivered to the plaintiff's ancestors to hold their land by.<sup>2</sup> It has been suggested, that nothing is strictly an *heir-loom*, which passes by the general law, and not by special custom. The instances mentioned are said to be merely *in the nature of* heir-looms.<sup>3</sup>

§ 3. In the United States, heir-looms, as such, are for the most part unknown. They are, however, recognized by the statute

<sup>1</sup> Co. Litt. 6 a; 1 Cruise, 37; 2 Black. 17; Mitchell v. Warner, 5 Conn. 518; Canal, &c. v. Railroad, &c. 4 Gill & J. 1.; Allen v. M'Keen, 1 Sumn. 301; Dunlap v. Gibbs, 4 Yerg. 94; Harris v. Miller, 1 Meigs, 158; Sacket v. Wheaton, 17 Pick. 108; Bowman v. Wathen, 2 McL. 376; Radburn v. Jervis 3. Beav. 450; Bridges v. Purcell, Dev & B. 192.

<sup>2</sup> 1 Cruise, 38; Co. Lit. 9 a, n. 1; Pusey v. Pusey, 1 Vern. 273; Ibbetson v. Ibbetson, 5 My. & C. 26; Conduit v. Soane, 1 Coll. 285; N. H. Rev. Stat. 45; Maine Ib. 45; Verm. Ib. 240, 294. See 1 Washb. R. P. 9 n.

<sup>3</sup> Amos on Fix, 161, *et seq.* See Webb v. Byng, 39 Eng. L. & Equ. 241.

when used in a statute, shall include "lands, tenements and hereditaments, and all rights thereto and interests therein," unless the legislature manifestly intend otherwise. So in New York with the terms "real property." And, in Missouri, "real estate," when spoken of in the statute concerning executions, is declared to mean lands, tenements, &c.; and, in the statute relating to conveyances, to include chattels real. So, in Arkansas, in the statute relating to estates, &c. Mass. Rev. Sts. 60 (see Gen. Sts.), Ib. 418; Missou. Sts. 124, 262; Ark. Rev. Sts. 189, 331; N. H. Rev.

Sts. 45; Maine Sts. 45; Verm. Sts. 240, 294; N. Y. Code (1851) 144; Dela. Rev. Sts. 7.

The word *tenement* is frequently used for *house* or *building*; but also, in a much more enlarged sense, as signifying land, or any corporeal inheritance, or any thing of a permanent nature which may be holden. And where it was used in a statute, providing a summary remedy for landlords to recover possession; held, as the act was a *remedial* one, the latter sense of the word should be adopted. Sacket v. Wheaton, 17 Pick. 105.

law of Maryland,<sup>1</sup> and excepted from the general disposition of personal property upon the death of the owner. And *the principle* applies to *title deeds*,<sup>(a)</sup> which Lord Coke calls "the sinews of the inheritance;" the chests and boxes containing them; and to the keys of a house—all of which undoubtedly pass with the land to which they pertain. So also, in England, to family pictures.<sup>2</sup>

§ 4. *Lands, tenements and hereditaments*, have been held to include a reversion expectant upon a life-estate, and also equitable estates. So an insolvent debtor's assignment of "all his lands, and tenements, and hereditaments," will pass all his real estate.<sup>3</sup> *Water* is neither *land* nor a *tenement*; and is not demandable in a suit, except as *so many acres of land covered with water*. It is a movable, wandering thing, and must of necessity continue common by the law of nature. The air which hovers over one's land, and the light which shines upon it, are as much land as water is.<sup>4</sup>

§ 5. It will be seen hereafter, that a subject of ownership, though in its nature *real*, may be owned in such a way as to constitute a *chattel interest*, or *personal estate*. Thus an *estate for years* in land is personal property; so is every other estate, less than *freehold*. The terms real estate and personal estate, therefore, denote sometimes the *nature of the property*, and sometimes the *particular interest in that property*. The former is the popular, and the latter the technical use of those expressions. In conformity with the latter, *things real* are said to be "permanent as to place, and perpetual as to duration."<sup>5</sup> The *real estate* required to gain a settlement has been

<sup>1</sup> Anthon's Shep. 428.

<sup>2</sup> Liford's Case, 11 Co. 50—an interesting and valuable case. See Colegrave v. Dias Santos, 2 B. & C. 76; House v. House. 10 Paige, 162.

<sup>3</sup> Cook v. Hammond, 4 Mas. 488; Dunlap v. Gibbs, 4 Yerg. 94. See Moore v.

Deene, 7 Bro. P. C. 607, 213; 2 B. and P. 247; Doe v. Allen, 8 T. R. 502; Pingree v. Comstock, 18 Pick. 46.

<sup>4</sup> Mitchell v. Warner, 5 Conn. 497; Co. Litt. 4 a.

<sup>5</sup> 1 Swift, 73.

(a) It will be seen hereafter (see ch. 4), that important questions may arise between parties holding distinct interests in the same land—as, for instance,

tenant for life and the owner in fee, or feoffee and *cestui que use*—in regard to possession of the title deeds.



held to mean a freehold interest, either rightful or wrongful.<sup>1</sup> *Land* includes not only the ground or soil, but everything attached to it above or below, whether by the course of nature, as trees, herbage, stones, mines and water, or by the hand of man, as houses.<sup>2</sup>(a) The legal maxim is, "*cujus est solum, ejus est usque ad coelum.*"(b)

§ 6. The rule above mentioned is well settled as a general principle of law; subject, however, to many qualifications or exceptions, which require to be distinctly considered. We propose, accordingly, to state the various cases in which movable things, connected with or attached to land, are subject to a peculiar ownership; and the respective rules of law applicable to those cases.

§ 6 a. It was anciently held, that there could be no freehold estate in *the chamber of a house*, because it must fail with the foundation; and, therefore, that it would pass without livery. But it seems to be now settled otherwise. Ejectment will

<sup>1</sup> *Charlestown v. Ackworth*, 1 N. H. 62. See *City, &c. v. Dedham*, 4 Met. 179-80.

<sup>2</sup> 14 H. 8, fol. 12; Com. Dig. Grant

E. 8; Co. Litt. 4 a; *Adams v. Smith*, Bre. 221; *Greanleaf v. Francis*, 18 Pick. 177; 4 Y. & Coll. 408.

(a) Where the agents of the State are empowered to take certain "lands" for the construction of a canal, they have the authority to take the *stones* contained therein. *Baker v. Johnson*, 2 Hill, 342. The projection of a building over a piece of ground purchased will justify the purchaser in rescinding the sale. *Pope v. Garland*, 4 Y. & Coll. 403. A space occupied by the overhanging of a wall, over land belonging to the plaintiff, may be recovered by him in an action under the Code of New York, to recover possession of real property. *Sherry v. Freckling*, 4 Duer, 452.

If a man devises a lot of land having a building upon it, the building will pass with the land without being named, even though other buildings are named in the devise. But it is usual to insert the clause, "with all the buildings thereon." A man conveys to A. his daughter, for the consideration of love and affection, a lot of land with *one-half of the buildings thereon*. The same day he conveys to B, for the consideration of £300, one-half of the buildings standing

on the land *this day conveyed to A*. There was nothing but the last clause to show which was the prior deed. Held, inasmuch as the time, person, consideration, subject and purpose of the two deeds were different, and, as they were not given in pursuance of any joint contract, one could not qualify the effect of the other, but A took the whole land and buildings, and B took nothing. It might have been otherwise, had both deeds been delivered simultaneously. *Isham v. Morgan*, 9 Conn. 374. *Williams, J.*, dissented. (This case probably carries the principle stated in the text to as great length as any one to be found in the books.) See *Moore v. Fletcher*, 4 Shepl. 63. Land, upon which were a well and pump, was conveyed by metes and bounds, without mentioning them; and the following words, "with pump and well of water," were afterwards interlined. Held, as the words did not change the legal effect of the deed, the alteration was an immaterial one. *Brown v. Pinkham*, 18 Pick. 172.

(b) *Usque ad orcum*, 1 Washb. R. P. 2.

sometimes lie for a house without any land. So, where land has a house on it, occupied by several tenants, who rent different apartments, they are joint occupants of the land, and may be proceeded against jointly in an action of ejectment. And where the chamber belongs to one person, and the rest of the house, with the land, to another, the two estates are regarded in law as separate but adjoining dwelling houses.<sup>1</sup> So, if a house contain several rooms, with an outer door to each, and not communicating with each other, they are held to be distinct houses. But if the owner lives in the house, the unoccupied rooms are a part of it.<sup>2</sup> But a lease, even of the cellar and lower room of a building of several stories, passes no interest in the land. Upon the destruction of the building, the whole right of the lessee is gone. It would be so with the lease of a *cave*.<sup>3</sup>

§ 7. A *pew* in a meeting house is in general deemed real estate.(b.) In England, the right to a pew is a *franchise*, depending either on a grant from the ordinary, or on prescription.<sup>4</sup> The parson has the freehold of his church, and the right in a pew is a mere easement annexed to a particular messuage. Pews are subject to the control of the church-wardens, under the Ordinary.<sup>5</sup> In Maine, Michigan and Connecticut,<sup>6</sup> pews are declared by statute to be real estate. So in Massachusetts,<sup>7</sup> except in Boston, where they have been treated as personal property. In Vermont<sup>8</sup>, a pew is real estate. But

<sup>1</sup> *Pearce v. Colden*, 8 Barb. 522. *Bro. Abr. Demand.* 20; *Co. Litt.* 48 b; *Otis v. Smith*, 9 Pick. 297; *Loring v. Bacon*, 4 Mass. 575; *Aldrich v. Parsons*, 6 N. H. 555; *Doe v. Burt*, 1 T. R. 701. See *Prop'rs, &c. v. City, &c.*, 1 Met. 538; *Gillman v. Bird*, 2 Ired. 280; *Browning v. Dalesme*, 3 Sandf. 13; *Gillis v. Bailey*, 1 Fost. (N. H.) 149.

<sup>2</sup> *Tracey v. Talbot*, 6 Mod. 214.

<sup>3</sup> *Winton v. Cornish*, 5 Ohio, 478; *Kerr v. Merchants, &c.*, 3 Edw. 815.

<sup>4</sup> 2 Black. 428; 3 Kent, 402 n.

<sup>5</sup> See *Reynolds v. Monkton*, 2 Carr. & K. 885.

<sup>6</sup> 1 Smith's St. 145; Conn. L. 482; *Price v. Lyon*, 14 Conn. 279; Mich. R. S. 266.

<sup>7</sup> *Bates v. Sparrel*, 10 Mass. 323; Mass. Rev. Stat. 413. (See Gen. Sts.)

<sup>8</sup> *Hodges v. Green*, 2 Wms. 358; *True v. Merrill*, 28 Vermont, 672.

(b) A suit against a pew-holder for rent, the pew having been granted to him and his heirs by a church corporation, is an action in which the title to real estate comes in question. It being necessary for the plaintiffs to show title

in the defendants, in order to recover the rent; therefore the plaintiffs, in such a suit in the (New Jersey) circuit, are entitled to full costs if they prevail, though the verdict is for less than \$100. *Presbyterian Ch. v. Andruss*, 1 New Jersey, 325.

it is no part of a homestead. In New Hampshire,<sup>1</sup> pews are personal estate. In New York,<sup>2</sup> the precise nature of this kind of property has been a subject of frequent discussion.

It is held to be such *an interest in real estate* as comes within the Statute of Frauds, though the contract relate to a meeting-house not yet erected. But a statute, requiring authority from the chancellor to empower a religious corporation to sell its *real estate*, was held not applicable to a sale of the pews. In the same State, it has been held that a pew-holder has no interest in the soil. The freehold is in the trustees, who may sell the property, notwithstanding the rights of pew-owners.<sup>3(a)</sup> The property in a pew, whether the owner be a member of the society or not, is not absolute, but qualified and usufructuary; an exclusive right to occupy a certain part of the meeting-house for the purpose of attending public worship, and no other; and is necessarily subject to the right in the parish or town to remove, take down, repair, &c., unless these acts be done wantonly. If the house is burned, or destroyed by time, the right ceases. In Massachusetts and Vermont it has been held, that, if the taking down of a meeting-house is *necessary*, the parish is not bound to indemnify the pew holders; otherwise, if merely *expedient*.<sup>(b)</sup> A subsequent case in Massachusetts decides, that,

<sup>1</sup> N. H. L. 186; Rev. Stat. 869.

<sup>2</sup> *Elder v. Rouse*, 15 Wend. 218; *Trustees, &c. v. Bigelow*, 16 Ib. 28. See *Brick, &c.*, 8 Edw. 155; *Baptist, &c. v. Witherill*, 3 Paige, 802; *Shaw v. Bever-*

*idge*, 8 Hill, 26; *Heeney v. St. Peters, &c.*, 2 Edw. 608; *Voorhees v. The Presbyterian, &c.*, 8 Barb. 185.

<sup>3</sup> *Freligh v. Platt*, 5 Cow. 494; *Fassett v. First Parish, &c.*, 19 Wend. 361.

(a) Where a meeting-house was conveyed to trustees to be used *for public worship only*, and the deeds of pews referred to this conveyance; held, a pew-owner had the exclusive right to his pew *at all times*, and might use any means to shut out others, which would not annoy other pew-owners. *Jackson v. Rounseville*, 5 Met. 127. A tenant in common of a meeting-house may maintain trespass for an injury to a pew against one having no title either in the pew or house. *Murray v. Cargill*, 32 Maine, 517; *Kellogg v. Dickinson*, 18 Vermont, 66. A pew-owner may sustain an action of trespass on the case against one who unlawfully disturbs him in the possession of his pew. *Ib.*

(b) So in New York, whenever it is necessary or proper, the trustees may take down the old edifice, and rebuild on the same spot, or elsewhere, and may alter the form and shape of the building, for the purpose of making it more convenient and spacious. *Voorhees v. The Presbyterian, &c.*, 8 Barb. 185.

In doing this, they may take down and remove the pews, when necessary. And the pew-holders cannot maintain either trespass or ejectment. *Ib.*

But if a pew is destroyed for convenience only, or if the trustees have been guilty of a wanton and malicious abuse of their power in destroying it, the owner may recover damages. *Ib.*

if the parish abandon the meeting house as a place of worship, though still fit for that purpose, but without proof of its acting wantonly, or with intent to injure a pew-owner, and erect a new one elsewhere; it does not thereby incur any liability to such pew-owner. The Revised Statutes provide for compensation to pew-holders, in such cases, according to an appraisement, except where the house has become unfit for public worship. (a) It has been held, that, where a parish proceeds legally in destroying a pew, a tender of the value to the owner is a good plea to an action for damages.<sup>1</sup>

§ 8. If one man *erect buildings upon the land of another*, voluntarily and without any contract, they become a part of the land, and the former has no right to remove them. Such buildings are, *prima facie*, part of the realty. So, if one man take another's timber wrongfully, and use it in erecting or repairing buildings upon his own land, it becomes his property.<sup>2</sup> And the same rule applies, where the timber consists of the materials of a building taken down by one man and belonging to another.<sup>3</sup> But if A cut down B's trees, and make them into shingles and short logs, these articles belong to B. So with coals made from another's wood.<sup>4</sup>

§ 8 a. On the other hand there are many cases, where one man may own, as *personal property*, a building erected upon the land of another.<sup>5</sup>

<sup>1</sup> Gay v. Baker, 17 Mass. 438; Howard v. First Parish, &c., 7 Pick. 188; Mass. Rev. Stat. 205; Fisher v. Glover, 4 N. H. 180; 5 Cow. 494; Price v. Methodist, &c., 4 Ohio, 515; Kimball v. Second, &c., 24 Pick. 347; Pettman v. Bridger, 1 Phill. 316. See First, &c. v. Spear, 15 Pick. 144; Second, &c. v. Waring, 24 Ib. 804; Stat. 1841, 206; Kellogg v. Dickinson, Law Rep., May, 1846, p. 32; 18 Verm. 266.

<sup>2</sup> Amos on Fixt. 9, n. a.

<sup>3</sup> Peirce v. Goddard, 22 Pick. 559.

<sup>4</sup> Betts v. Lee, 5 John. 848; Chandler v. Edson, 9, 362; Curtis v. Groat, 6 168.

<sup>5</sup> Russell v. Richards, 2 Fairf. 371; Hilborne v. Browne, 3, 162; Jewett v. Partridge, Ib. 243; Osgood v. Howard 6 Greenl. 452.

(a) By Statute of 1853, 959, a parish may sell the house, without taking down pews, for the purpose of building a new one. (See Gen. Sts.)

A husband erected a dwelling house and joiner's shop upon land belonging to his wife, and died. Held, as no binding contract, in regard to such erection, could

have been made with the wife during coverture, the buildings belonged to her, and could not be applied to payment of his debts. Washburne v. Sproat, 16 Mass. 449. See Smith v. Benson, 1 Hill, 176; Brown v. King, 5 Met. 173; Baltimore v. McKim, 8 Bland, 455.

A built a rail fence on B's land. B

As where a house is erected upon the land of another by his assent, and with an agreement or understanding that the builder may remove it when he pleases.<sup>1</sup>

So where a son, by permission, erected a house upon the land of his father, under the mutual expectation that the land would be devised to the son, but with no agreement that the father should own the house, or be accountable for its value; held, the house belonged to the son as personal property.<sup>2</sup>

So where a town-house was built on land of the town, under a contract with the builder that the town should occupy part of

<sup>1</sup> Dame v. Dame, 88 N. H. 429.

<sup>2</sup> Wells v. Bannister, 4 Mass. 514.

moved and kept the rails without breach of the peace. Held, trover did not lie against him. Wentz v. Fuicher, 12 Ired. 297.

A agreed with B to convey land to B, when B should erect a house thereon, and B agreed to erect such house and mortgage the premises to A. Held, the house did not belong to B till he received a deed of the land, and he could not mortgage the house as personal property. Milton v. Colby, 5 Met. 78.

Where a reversioner erects and occupies a building on the land with the assent of the tenant for life, and conveys it to a third person; the grantee cannot hold it against the tenant for life. Cooper v. Adams, 6 Cush. 87.

A erects a building on the land of B, taking a bond from B to convey the land to him on the payment of a certain sum within a certain time. Held, a mortgage of the building from A to B need not be recorded, as against A's creditors; nor was the building forfeited in sixty days after breach of condition. Eastman v. Foster, 8 Met. 19.

Although buildings are erected on land by license of the owner, if the owner thereafter, in a conveyance of the land to the person erecting them, call them his (the grantor's) new buildings, and convey them as part of the estate; such person, having accepted such a conveyance, cannot establish a title to them as personal property. Grover v. Howard, 81 Maine, 546.

An exception, in a levy on real estate, of "buildings," includes by implication the land underneath, and such other land and easements as may be necessary for their enjoyment, if there be nothing in the description of the premises to

rebut such an implication; and parol evidence is not admissible to explain or vary the officer's return. Ib.

In trespass *quare clausum fregit*, the plaintiff complained of an injury to the house on the land, as well as to the land itself; the trial was had on the question of title, and a verdict found for the plaintiff. Held, the plaintiff in error could not insist that the house was personal property, and that trespass would lie for its destruction. Houghtailing v. Houghtailing, 5 Barb. 379.

It is no defence to a writ of entry, that the tenant owns a building upon the land, erected by her intestate with the owner's consent; for, if so, whether the demandant recover or not, she is entitled to a reasonable time to remove it. And such tenant cannot defend the action, on the ground that her intestate's conveyance of the building to the owner under whom the demandant claims, by a subsequent conveyance, was fraudulent as against creditors, whom she represents as administratrix. She has simply a power to sell. Bullen v. Arnold, 81 Maine, 583; Hutchins v. Shaw, 6 Cush. 58.

After a mortgage of land, with a dwelling house thereon, to A, the mortgagor removed the building, used a part of the materials, with others, in erecting a house upon other land, and afterwards conveyed the land and building last named, for valuable consideration, to B. A brings *trover* against B for the new house and the materials used upon it. Held, such materials became a part of the freehold, and B became the owner of them by the conveyance to him; and that the action would not lie. Peirce v. Goddard, 22 Pick. 559.

it at a certain rent, and have the right to purchase the house at an appraised value; held, the house belonged to the builder as personal property.<sup>1</sup> So, in trespass, for taking and carrying away the plaintiff's "small fish-house or camp," and burning up and destroying his "wooden camp or small house," upon an island in another State; the evidence showed that the injury was done to a building without a cellar, about nineteen feet square, used by the plaintiff and his men as a dwelling, in the spring, while catching salmon. Held, neither the declaration nor evidence showed the property to be real estate.<sup>2</sup>

So a bathing house was erected by an individual, on piles driven into the bed of a navigable river, below low water mark, and afterwards mortgaged by him. Held, as he had no interest in the soil, the building was a chattel, and no equity of redemption remained in him, liable to be taken on execution.<sup>3</sup> And on the other hand a building so erected may be sold on execution as personal property; the purchaser may legally enter on the land

<sup>1</sup> *Ashmun v. Williams*, 8 Pick. 402.

<sup>2</sup> *Marcy v. Darling*, 8 Pick. 283.

<sup>3</sup> *Rogers v. Woodbury*, 15 Pick. 156;  
*Curtis v. Hoyt*, 19 Conn. 154.

In an action of trespass for an injury to a building, owned by and in the possession of the plaintiff, the defendants justified the acts complained of, on the ground that they did them by the direction of A, who owned the land on which the building stood, subject to a right of way in the public. the building constituting an incumbrance on the land of A; also that, the building being an obstruction in the highway, the defendants removed it for the plaintiff, after he had been requested and had neglected to remove it; also, that such highway needed to be graded and made, and the defendants removed the building on the plaintiff's account, in order to grade and make the road. The plaintiff, to show that he was the owner and in possession of the building, offered in evidence a deed of it to the plaintiff, executed by certain individuals, as a committee of a fire-engine company; a vote of such company, signed by all its members, authorizing the sale and transfer of the building by said committee; proof that the company erected the building with their own funds; that, up to the time of

the sale, they had used it exclusively for an engine-house, and for their library; that all the members of the company, at the time of the sale, delivered, each one, his key of the building to the plaintiff; that all prior members had, on leaving the company, left the building to their successors, making no claim to it thereafter; that the avails of the sale to the plaintiff were appropriated by the company to procure for them another engine house; and that no other person had objected to the sale, or made any claims to the avails thereof. Held, such evidence was admissible for the purpose for which it was offered; and, thereupon, it was further held: 1. That the members of the company had property in the building. 2. That, though not incorporated, they, as individuals, could hold the property. 3. That the vote of the company, with the assent of each individual member in writing, was binding, and imparted authority to their committee. 4. That the building, under the circumstances of the case, was personal estate, and might be transferred without sale. *Curtiss v. Hoyt*, 19 Conn. 154.



to remove it; and the occupant has the right of passing over the close of the owner of the land, to and from the highway.<sup>1</sup> And such building will pass by bill of sale, and not with a deed of the lands; nor can it be extended upon or recovered in a real action. So trover will lie for it as for other chattels, and it may be validly attached, like real estate, without taking actual possession.<sup>(a)</sup><sup>2</sup> So the owner of the land will not gain a title to the building merely by neglect on the part of the owner of the latter to occupy or claim it. Thus A erected a saw-mill on the land of B, with his permission. The building was sold to C, upon an execution against A, and B afterwards sold the land to D. The building remained vacant three years, and D made no objection to its being on the land. Held, the purchaser of the building had not waived his right to it.<sup>3</sup>

Upon the same principle, where one in possession of land, *bona fide* as his own; has erected buildings upon it, he or his grantee may remove them without incurring any liability to the true owner of the land.<sup>4</sup>

§ 9. There are other things connected with or attached to land, and therefore *prima facie* subject to the same ownership with it, which, by special acts or agreements, may be in point of title separated from the land.

<sup>1</sup> Doty v. Gorham, 5 Pick. 487.

<sup>2</sup> Aldrich v. Parsons, 6 N. H. 555; 2 Fairf. 871; 8 Pick. 402; Steward v. Lombe, 1 Brod. & B. 506; Tapley v. Smith, 5 Shepl. 12.

<sup>3</sup> 2 Fairf. 871; Harris v. Gillingham, 6 N. H. 9; 5 Shepl. 12.

<sup>4</sup> Wickliffe v. Clay, 1 Dana, 591.

Where a building is erected upon another's land, with an agreement that it may be removed by the builder; a recovery of the land in a real action by the owner or his assignee, with notice, does not impair this right to it.

The owner of the building may enter upon the land to remove it, within a reasonable time after notice given so to do, without becoming a trespasser; but, if he delays for an unreasonable time and then removes it, he will be liable in trespass for the damage to the land, but not for the value of the building.

If the owner of the land sell it, this operates as a revocation of the license to continue the building upon it, which will

not, however, affect the owner of the building, until a notice, express or implied. It is doubted whether a purchaser of the land, without notice of the agreement, acquires any interest in the building.

The right to erect the buildings and occupy them, without any reservation of rents, creates a tenancy at will, which is terminated by a sale of the property. Dame v. Dame, 38 N. H. 429.

(a) One claiming under a party, who has previously mortgaged such building as a chattel, cannot assert a title to it against the mortgagee as real estate, nor dispute the mortgagor's title. Smith v. Benson, 1 Hill, 176.

§ 10. It is said, there may be distinct ownerships in the *minerals* contained in the same parcel of land. One may own the iron, another the lime-stone. So one may own one vein of coal, and another a separate vein, if distinguishable, lying beneath or by the side of the other, within the same parcel of land.<sup>1</sup> So, upon severance of the surface and the minerals into separate tenements, to be held by separate owners; an arrangement may effectually be made, by which the owner of the surface may take it, with a qualified right to support from the subjacent strata.<sup>2</sup> So the minerals beneath may be conveyed distinct from the right to the surface. They are a corporeal hereditament, and pass by apt words in a deed, though not susceptible of livery of seisin; which, in Pennsylvania, is supplied by delivery and registration of the deed.

Thus, in Pennsylvania, a conveyance of a tract of land, with "the full right, title and privilege of digging and taking away stone coal, to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is a conveyance of the entire ownership of the coal in place, beneath the adjoining tract.<sup>3</sup>

So, in mineral lands, the surface, as adapted to cultivation, may be separated from the right to dig under the surface for ore; and one person may hold one of these rights, whilst another person is interested in the other.<sup>4</sup>

§ 11. In England, mines of gold and silver, by the royal prerogative, belong to the crown; which may, in a grant of land, reserve all mines. But this gives no right to the crown to enter in search of them, but only, after they are opened, to restrain the tenant from working them, work them itself, or license others to do it.<sup>5(a)</sup> It has been the practice of the

<sup>1</sup> 2 Washb. R. P. 85; Caldwell v. Copeland, 37 Penn. 427.

<sup>2</sup> Rowbotham v. Wilson, 36 Eng. L. & Eq. 236.

<sup>3</sup> Caldwell v. Fulton, 31 Penn. 475.

<sup>4</sup> Stewart v. Chadwick, 8 Clarke, 463.

<sup>5</sup> Lyddel v. Weston, 2 Atk. 19; 2 Inst. 577-8; Plow. 810, 836.

(a) The prerogative rests upon the ground, that the king is bound to defend the realm, and to coin and furnish the currency necessary therefor, and for the uses of trade and commerce. It em-

braces no other classes of mines than those of gold and silver.

In *the Case of Mines* (Plowd. 810, 836) it was held by a majority of judges, Plowden and others dissenting, that



United States, in the sale of the public lands, to reserve all salt springs and lead mines. The State of New York reserves to itself all gold and silver mines; also, all mines of other metals on lands of those who are not citizens of the United States; also, all mines of other metals on lands of citizens, if the ore contains

where gold or silver is mixed with other metals, the whole mine belongs to the crown. Otherwise by statutes (1 Wm. & M., ch. 30; 5 Ib., ch. 6), which, however, allow the crown to take the proceeds of such mine, upon paying the owner therefor. Stones cut from quarries are *minerals*, within the meaning of the terms *coals or minerals*, in an act of parliament. *Micklethwait v. Winter*, 5 Eng. L. & Eq. 526. See *Gibson v. Tyson*, 5 Watts, 84; *Rosse v. Wainman*, 14 Mees. & W. 859; *Allaway v. Wagstaff*, 4 H. & N. 807.

A paint stone, found in strata below the surface, distinct from the ordinary earth, and worked by the ordinary means of mining, will pass under the terms *mines and minerals*. *Hartwell v. Camman*, 2 Stockt., 128.

A deed may convey a distinct inheritance in mines, the fee of the land remaining in the grantor. When not thus severed, they will pass with the lands without being expressly mentioned in the deed. *Ib.*

A conveyance of all "mines and minerals" does not embrace anything in the mineral, as distinguished from the animal and vegetable kingdom, nor is such a grant confined to any one of the subordinate divisions into which the mineral kingdom is subdivided by chemists. *Ib.*

Parol testimony would be admissible to ascertain the technical and proper use of this term; but not to show that the parties intended any limited or definite meaning. *Ib.*

Where mines are reserved from a conveyance, the owner of them is still bound to leave a reasonable support for the surface of the soil. *Harris v. Riding*, 5 Mees. & W. 60. So, when the surface of land belongs to one man, and the minerals to another, no evidence of title appearing to regulate or qualify their rights; the latter cannot remove the minerals, without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unincumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mine-

ral strata; and if the surface subsides, and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, he may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 1 Eng. Law & Eq. 241. See *Rowbotham v. Wilson*, 86 Eng. Law and Eq. 236; *Robertson v. Haines*, 87 Ib. 1; *Johnson v. Goslett*, Ib. 308.

In Virginia, a statute (Code, 525) provides, that coal mines shall not be opened within twenty-five feet of adjoining land, without consent.

A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided, that nothing thereby granted shall injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but this would render it impossible to reach the alum. Held, the coal pillars could not be removed. *Earl, &c. v. Hurlet*, 8 Eng. L. & Eq. 18.

Lessors of a coal vein are liable as co-trespassers for the act of their tenant, in mining coal in the land of an adjoining owner; they having leased the particular vein of coal, authorized the sinking of the slope by which it was reached, and contributed to its expense, believing that it would not extend beyond their own line; and the tenant having, by means of this slope, taken out coal from the adjoining property, and paid for the greater part of it, to his lessors, a certain rent for each ton of coal mined by him. In such case the plaintiffs may waive the tort, and sustain an action for the value of the coal, as so much money had and received to their use. *Dundas v. Muhlenberg*, 85 Penn. 351.

In the case of a coal mine, it was held that a lease of the right to mine coal gives a title to the land, and is not a mere license; but that no implied covenant

less than two-thirds in value of copper, tin, iron or lead. But the owner of a gold or silver mine may enjoy its produce for twenty-one years, if he give notice of the discovery.<sup>1</sup>

§ 12. Similar questions arise in reference to *growing trees*, which, though standing upon and rooted in the soil, may be

<sup>1</sup> 1 N. Y. Rev. Stat. 281, 124; Walk. Intro. 43. See *Raine v. Alderson*, 4

Bing. N. 702; *Grubb v. Guilford*, 4 Watts, 223.

arises, upon the terms of a mining lease, that sufficient coal would be found to reimburse the lessees for the cost of opening the veins. *Lehigh, &c. v. Harlan*, 27 Penn. 429; *Harlan v. Lehigh, &c.*, 35 Penn. 287.

In a contract relating to mines, there is an implied reservation by the owner of a right to enter and inspect them. *Blakesley v. Whieldon*, 1 Hare, 176. See *Micklethwait v. Winter*, 5 Eng. L. & Eq. 526.

Where a mine, reserved or granted, is encroached upon, the proprietor's remedy is *trespass*, not *case*. *Harker v. Birkbeck*, 3 Burr. 1556.

In Wisconsin, a party holding a grant from the defendant, of the right of digging for ore, cannot, under the old practice, maintain an action of replevin for mineral not yet dug, as the grant passes no property in the mineral, except after the digging, and as incident to the right to dig. *Gillett v. Treganza*, 6 Wis. 343.

Where the owner of land brings an action for copper ore raised from under it, the presumption of his title to the ore may be rebutted by proof of non-user on his part, and a use by others. *Rowe v. Grenfel, Ry. & M.* 396.

A mining concern, erected by a lease to several persons, who work it jointly is *quasi* a partnership in trade, involving the usual partnership liability to creditors. *Fereday v. Wightwick*, 1 Tam. 250.

If a license to dig minerals does not clearly give an exclusive right, the grantor, or his assigns, may exercise the right in common with the grantee. *Chetham v. Williamson*, Eng. Law & Eq. 469; *Huntington v. Mountjoy*, 4 Leon. 147.

It has been held in Georgia, in the case of the State *v. Canatoo*, (3 Kent, 378, n.,) that a grant of lands by the government passes a perfect title to mines, unless expressly excepted. As to the reservations of *rents*, in consideration of mines contained in lands

granted by royal charters to the several States; see 1 Greenl. Cruise 88, n.; 8 How. 120.

Congress may authorize the president to lease lead mines in the State of Illinois. *United States v. Gratiot*, 1 M'Lean, 454.

In an action of trespass brought by the United States, a permit to enter on the lands, which contained lead ore, may be admitted in evidence to show the nature and object of the entry. *U. S. v. Geer*, 3 M'Lean, 571.

The following points have been decided in Maryland:

A lease granting the license, right and privilege of gauging, getting out, working and carrying away *granite stone*, does not confer the right of carrying away *rubble stone*. *Emery v. Owings*, 6 Gill, 191.

Gravel stone is a known article of commerce, sold by the cubic foot, and is called dimension stone; while rubble stone is sold in the mass, or by the perch. *Ib.*

On the 11th June, 1840, A leased to B, and B to C, a granite quarry, known by the name of D, with the license of quarrying and getting away stone, for the term of six years, from the 10th of November, following, and the lessees went into possession. On the 25th of July, 1836, E and F, who had title, leased to G all their estate and interest, being two-third parts of all that lot within the farm of A, called D, for five years, which, before action brought, came to B or C by assignment, as to one-half. The metes and bounds in both leases were the same. In an action by A for the rent due November 1, 1841, under the lease of June, 1840, it was held, that the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to quarry, as it was not opened at the date of that lease; that this case was not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil, that of 1840 a lease or license to quarry

the subject of a distinct ownership. But if the limbs of a tree overhang another man's ground, they still belong to the owner of the root. If the root extends into the ground of a neighboring owner, whether he is a tenant in common of the tree with the planter, or whether the whole tree belongs to the lat-

stone; that if a man has land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land; it shall be intended that his interest is as general as his lease; and that a declaration in a lease, dated 1840, that a quarry had been recently, or a short time ago, possessed and worked by W," could not be understood as meaning that the quarry was opened four years previously. *Ib.*

Numerous questions have arisen in the new State of California, with reference to the gold mines which constitute so important an element of its wealth and prosperity. See *Stoakes v. Barnett*, 5 Cal. 36. The State of California is sole owner, by virtue of its sovereignty, of all the gold mines on public lands within its limits, to the exclusion of the United States, and has alone the right to authorize their working, and to make regulations respecting them. *Hicks v. Bell*, 8 Cal. 219.

But though the fee of the land be in the government, the owner of a mining claim has, under the superior title, in practical effect, a vested title and exclusive right in the mine, that will enable him to protect it against all but the true owner, as if he had the fee in the land. *Hoffman v. Stone*, 7 Cal. 46; *Irwin v. Phillips*, 5 Cal. 140. See *Fitzgerald v. Urton*, 5 Cal. 308.

It is held that an injunction may be granted against one who is removing gold quartz, &c., and is not based upon the incapacity of the party to respond in damages, but upon the nature of the injury, affecting the substance of the freehold, and incapable of accurate estimation. *Merced. &c. v. Fremont*, 7 Cal. 317.

In disputes growing out of mining claims and ditches, where neither party owns the land; in the absence of special negligence in the use of the prior location, the subsequent party cannot complain of a continuance of the prior use. *Tenney v. Ditch Co.*, 7 Cal. 335

*Pay-dirt*, and the *tailings* of a miner, are certainly the production of his labor,

and he is justly entitled to them under proper circumstances. *Jones v. Jackson*, 9 Cal. 237.

Where a place for deposit for tailings is necessary for the fair working of a mine, the miner may appropriate such ground as may be reasonably necessary for this purpose; provided he does not interfere with pre-existing rights. His intention, however, should be clearly manifested by his acts. *Ib.*; 5 Cal. 395.

Mere posting notices is not enough; he must claim the place of deposit as such, or as a miner's claim.

If he suffers the tailings to flow where they list, without obstructions to confine them within the proper limits, it is conclusive evidence of abandonment unless there is some peculiarity in the locality, constituting an exception to the rule.

If no artificial obstructions are necessary, he is not required to create them.

The mingling of the tailings from different claims could not give a stranger any right to the mixed mass.

Whether the tailings are mingled or not, parties are entitled to them if they have flowed upon their own claims. *Ib.*

A party may use a natural ravine, &c., as a part of his ditch to conduct water for mining purposes, but has not its exclusive use, though his rights acquired by his appropriation are not to be interfered with. *Hoffman v. Stone*, 7 Cal. 46.

The actual abandonment of a mining dam and ditch for a year, with the intent to return, is not abandonment in law. *Partridge v. McKinney*, 10 Cal. 181.

The court told the jury, that leaving a mining claim, with the intent not to return, was an abandonment, whether the absence was for a minute or for a year; but that if there was an intent to return, the party might return within five years, unless there was some rule, usage or custom among the miners so notorious as to raise a presumption of an intent to abandon, as the intent alone should govern. Held, the question was fairly left to the jury.

That one tenant in common quits, leaving his co-tenants in possession, raises

ter, is a point somewhat doubtful. It has been decided, that, though both *the roots and branches of a tree* extend to the land of an adjoining owner, the whole tree, with all its fruits, belongs to the owner of the land upon which it stands.<sup>1</sup> But a tree, standing directly upon the line between adjoining owners, belongs to both alike; and either may maintain trespass against the other for cutting and destroying it.<sup>2</sup>

§ 13. It is said that a grant or devise of an interest in growing *wood* is (that of) an interest in the soil itself, though it is otherwise with a grant or reservation of *trees*.<sup>3</sup>(a) But where A

<sup>1</sup> 1 Swift, 104; *Waterman v. Loper*, 1 Lord Ray, 737; *Masters v. Pollie*, 2 Rolle's Rep. 141; *Holder v. Coates*, 1 Moo. & M. 112; *Lyman v. Hale*, 11 Conn. 177; See *Bank v. Crary*, 1 Barb. 542.

<sup>2</sup> *Griffin v. Bixby*, 12 N. H. 454.

<sup>3</sup> *Wright v. Barrett*, 13 Pick. 44; *Liford's Case*, 11 Co. 50. See Com. Dig. *Biens* G. 2; See *Nettleton v. Sikes*, 8 Met. 34; See *Smith v. Suvman*, 9 B. & C. 561; *Olmstead v. Niles*, 7 N. H. 522; *Briggs v. Richardson*, 4 Allen, 371.

no presumption of abandonment, as their possession is his also.

Nor does his refusal to pay his part of the expenses or assessments.

There must be a clear intent to abandon, or some suit on the part of the co-tenants to enforce a forfeiture.

If there has been no abandonment or forfeiture, the silence of the co-tenants, or their acquiescence in a sale of this interest, cannot confer title on the vendee.

These rules of property are part of the law of the land, and are not to be affected by any mere local customs. *Waring v. Crow*, 11 Cal. 366.

The right to a mining claim vests by a taking in accordance with the local rules, and the failure to comply with any one of the rules does not divest it. *McGarrit v. Byington*, 12 Cal. 426.

It is doubted whether mining claims must be recorded. See *Partridge v. McKinney*, 10 Cal.; *Ib.*, 13 Cal. 158.

As to the working of mines; see *Packer v. Heaton*, 9 Cal. 568; *O'Keiffe v. Cunningham*, *Ib.* 589.

Notice of claim of a vein, customarily posted, if substantially identifying it, need not notice all the bends. *Johnson v. Parks*, 10 Cal. 446.

The assignee of an equitable title or claim to mining rights stands in the place of his assignor, and possession by the assignor raises no warranty of ownership. *Clark v. McElvy*, 11 Cal. 154.

In ejectment to recover an undivided interest in a mining claim, only the person who interferes with the plaintiff's interest need be made defendant; the other joint tenants, against whom no relief is sought, need not be joined. *Waring v. Crow*, 11 Cal. 366.

The purchaser of a mining claim acquires what title the vendor had at the moment of sale.

The lessor of a coal mine, in Pennsylvania, is not liable for injuries to a house on the surface, occasioned by the working of the mine by his tenant. *Offernan v. Starr*, 3 Barr, 394.

And where the owner of a mine demised the right to mine, at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, &c.; held, he was a landlord, and thus not liable. *Ib.*

Where one in adverse possession severs a tree or other thing from the land, it becomes his. *Branch v. Morrison*, 6 Jones, 16.

(a) A conveyance of growing trees is not within the recording act of New York, and, though not recorded, is valid against a subsequent purchase of the land without notice. *Warren v. Leland*, 2 Barb. 613. And where land is so conveyed without any reservation of the growing trees, the owner of the trees

conveyed to B a lot of land in fee, and B, on the same day, reconveyed to A, his heirs and assigns, all the trees and timber standing and growing upon said land, forever, with free liberty to cut and fell said trees and timber, at all times, at their pleasure, forever; held, A retained an inheritance in the trees and timber, with an exclusive interest in the soil, so far as it might be necessary for the support and nourishment of the trees.<sup>1</sup> And though it was anciently held that trees, like the chamber of a house, could not be the subject of a freehold estate,<sup>2</sup> it has since been settled, that trees reserved from a conveyance for life are not personal estate, but real, and will therefore pass, without being named, with a subsequent grant of the reversion, notwithstanding such grant expressly refers to the reversion of that which was previously leased.<sup>3</sup>

§ 14. From what has been said, it may be seen that growing trees, though they may be disannexed from the soil by some act of the owner, are still, independent of any such act, a part of the soil, and owned accordingly. The same rule seems, in general, applicable to other vegetable productions. *Prima facie* they belong to the soil, and pass by a conveyance thereof, though, it is said, not under a judicial sale; but may be separated from it by some special transfer. (a)

<sup>1</sup> Clap v. Draper, 4 Mass. 266; Rehoboth v. Hunt, 1 Pick. 224; Howard v. Lincoln, 1 Shepl. 122. See Knotts v. Hydrick, 12 Rich. 341.

<sup>2</sup> Pro. Abr. Demand, 20.

<sup>3</sup> Liford's Case, 11 Co. 47.

may maintain replevin in the *cepit* against him. Ib.

(a) "By contract, custom or special rules of law." Calhoun v. Curtis, 4 Met. 415. See Foote v. Coivin, 3 John. 222; Bank, &c. v. Wise, 3 Watts, 394; Com. Dig. *Biens* H. 8. Growing fruit trees have been called, perhaps somewhat inaccurately, *fixtures*. Mitchell v. Billingsley, 17 Ala. 391. As to the ownership of *bees*, which take up their abode in a tree; see Goff v. Kilts, 15 Wend. 550. Mere finding a tree on another's land, which contains a swarm of bees, and marking it, does not give the finder a title to the bees. Gillet v. Mason, 7 John. 16.

But, by express statutes, in Kentucky,

a crop shall not be levied upon while growing, excepting corn, after the first of October. In Alabama, not till gathered. In Michigan there may be a levy, but no sale. And the creditor retains a lien thirty days after the crop is ripe or severed. In Mississippi, an unripe crop is not subject to execution, nor does the lien of a judgment attach to it. In Tennessee, a crop shall not be seized before the 15th of November, except for rent, where the tenant has absconded and left the country. In Kentucky and Georgia, the growing crop will pass with the land, where the latter is sold on execution. Ky. Rev. L. 657; Alabama L. 319; Tenn. Stat. 1833, ch. 20. See Craddock v. Reddlesbarger, 2 Dana, 206; Parham v.



It is to be observed, however, that corn, a crop of potatoes, or any other product of the soil, raised annually by labor and cultivation, when ripe, is personal estate, may in general be seized or sold on execution as such, and, upon the owner's death, passes to his executor.<sup>1</sup>

§ 15. In this connection, may properly be considered the subject of *emblems*. Emblems—from the French word *em-bleer*, (a) to sow—are *the crops growing upon land*. The word, however, is generally used, in law, to denote crops which are claimed by some person other than the general owner of the land, as incident to a particular estate therein. It is said, the doctrine of emblems is founded on the clearest equity and the

<sup>1</sup> *Planters, &c. v. Walker*, 8 Sm. & M. 409; *Coombs v. Jordan*, 8 Bland, 812; *Cassidy v. Rhodes*, 12 Ohio, 88; *Penhalow v. Dwight*, 7 Mass. 84. See *Clay*, 224; *Bradshaw v. Ellis*, 2 Dev. & B. 28;

*Bignold*, 2 Dea. & Ch. 398; *Debow v. Titus*, 5 Halst. 128; *Sanisbury v. Matthews*, 4 M. & W. 848; *Stalmbaugh v. Yates*, 2 Rawle, 161; *Oland's Case*, 5 Rep. 116 a.

*Thompson*, 2 J. J. Mar. 159; *Mich. St.* 1840, 224; *Planters, &c. v. Walker*, 8 Sm. & M. 409; *Miss. St.* 1804, 29; *Thompson v. Craghyle*, 4 B. Monr. 392; *Pitts v. Hendrix*, 6 Geo. 452.

It has been held in England, that, if a crop is mature—as, for instance, a crop of potatoes—the sale of it in the ground, to be gathered immediately, is not within the Statute of Frauds; that the ground is a mere warehouse, till the crop can be removed. It would be otherwise, if the potatoes were still growing. *Parker v. Stainland*, 11 E. 362; *Warwick v. Bruce*, 2 M. & S. 206; *Evans v. Roberts*, 5 B. & C. 829.

It is remarked by Mr. Chief Justice Savage, of New York, that the English cases on this subject seem not quite consistent; and, in the later decisions, the fact that the corn or potatoes were still growing has been held to make no difference. *Austin v. Sawyer*, 9 Cow. 42; *Carrington v. Roots*, 2 Mees. & W. 248; *Jones v. Flint*, 5 Per. & Dav. 594; 10 Ad. & Ell. 758; *Northern v. Slate*, 1 Carter, 133.

If the owner of the land sell the crop upon it by a parol contract, and afterwards convey the land to another purchaser, the crop does not pass to the latter. But a parol reservation of such crop to the grantor himself is void.

*Austin v. Sawyer*, 9 Cow. 39. But see *Heermance v. Vernoy*, 6 John. 5; *Gibbons v. Dillingham*, 5 Eng. 9.

Devise of lands in fee, with all the crops thereon, whether gathered or growing at the testator's death. Held, this included not only the crops of the year in which he died, but those of the preceding year, remaining on the land, and those brought there from other lands, to be stored. *Carnagy v. Woodcock*, 2 Munf. 234. A deed of land will pass the grain growing thereon, although the grantor subsequently takes charge of the crop and of the fences enclosing it, without objection from the grantee. *Wilkins v. Washbinder*, 7 Watts, 878. If a lessor reserves the growing crop and afterwards conveys the land, not mentioning the crop, it belongs to the purchaser. *Burnside v. Weightman*, 9 Watts, 46. Lease of land, reserving for rent a proportion of the crops. While these were growing, the lessor conveyed the land without reservation. Held, the deed passed the rent, and the tenant was bound to attorn; but the grantor could not maintain trespass against the grantor for entering and taking the crops. *Gibbons v. Dillingham*, 5 Eng. 9.

(a) Emblavence de bled. 1 Washb Real Prop. 101.

soundest policy, and ought to receive a liberal encouragement.<sup>1</sup> Where a person is in possession of land, under a title that may be determined by an uncertain event, not within his control, it is essential to the interests of agriculture that such a determination of his lease shall not prevent him from reaping what he has sown.<sup>2</sup>

§ 16. Emblements include only such vegetables as yield an annual profit, and are raised by annual expense and labor, or "great manurance and industry"—such as grain, but not trees, nor fruits, clover, grass, &c., though annual, because they are spontaneous. And even though grass be improved by labor, as by trenching or sowing hay-seed, it is not a subject of emblements.<sup>3</sup> (a) The right of emblements does not apply to a crop, which ordinarily does not pay the labor of producing it within the year in which such labor is expended, as, for instance, a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation.<sup>4</sup>

§ 17. Where a *tenant for life* dies before harvest time, his executors shall have the crops then growing, as a return for his labor and expense in tilling the ground; and, if sold after his death, they shall have the proceeds, deducting only the expenses of sale.<sup>5</sup> Where the estate is terminated in any other way than by

<sup>1</sup> Stewart v. Doughty, 9 John. 112.

<sup>2</sup> Bittenger v. Baker, 5 Cas. 66.

<sup>3</sup> Co. Litt. 55 b, and n. 2; Com. Dig. Biens G. 1; Latham v. Atwood, Cro. Car. 515; 1 Rolle, Abr. 728; Grantham v. Hawley, Hob. 132; Evans v. Inglehart,

6 Gill & J. 188; Kittredge v. Woods, 8 N. H. 504; 2 Dana, 206; Ladd v. Abel, 18 Conn. 518.

<sup>4</sup> Graves v. Weld, 5 B. & Ad. 105.

<sup>5</sup> 1 Cruise, 80; Hunt v. Watkins, 1 Humph. 498.

(a) Otherwise with *hops*, though growing on ancient roots; and the artificial grasses, as *clover*, *saintfoin*, &c.

Growing grass cannot be taken as chattels on execution, even though the defendant turns out the grass to the sheriff. But there may be a legal severance of trees or grass from the land, without an actual severance; as where the owner sells and conveys them in writing, and where he conveys the lands, reserving the trees and grass. A mortgage of such trees or grass will not work a severance, until the mortgage becomes absolute. Bank. &c. v. Crary, 1 Barb. 542.

Where A demised to B his farm for 999 years, B, in consideration thereof, covenanting to furnish A with "one-half of all the produce of the farm;" and B cut, carried off and sold wood and timber: in an action brought by A against B for one-half of the avails of such wood and timber, held, the expression "yearly produce," as used in this covenant, did not comprehend the wood and timber of the farm, but only such crops as are annually gathered. Ladd v. Abel, 18 Conn. 518. Emblements in case of *rack rent* are regulated by Stat. 14 and 15. Vict. c. 25, s. 1.

his death, either by act of God or act of law, the tenant himself has the emblements. But not if he terminates it by his own act.<sup>1</sup> Thus, where one is tenant *pour autre vie*, and the *cestui que vie* dies before harvest, the former shall have emblements. So if an estate be made to husband and wife during coverture, (which is a life-estate,) and they are afterwards divorced *causa præcontractus*, he shall have emblements; because the divorce, although *founded* on the application of a party, is itself the act of law. (a)

But if a woman, tenant during widowhood, marries again; or if a tenant forfeits by breach of condition; they have no emblements, because the estate is determined by their own act.<sup>2</sup> So, where a parson terminates his estate by his voluntary resignation, he has no emblements.<sup>3</sup> But if a parson, having sowed the parsonage land, sells the growing crop, and then dissolves his connection with the church, and leaves the land before harvest; the purchaser cannot maintain trover against one who carries away the crop, although the officers of the church disclaim all title to it.<sup>4</sup>

18. The right to emblements being founded upon the supposition of labor and expense incurred by the tenant, they are not allowed where this reason is wanting.<sup>5</sup> Thus, if A sows corn, and then conveys the land to B, remainder to C; upon B's death before harvest, C takes the crop.<sup>6</sup> So where the tenant dies before sowing, though after having prepared the ground for seed, emblements are not allowed.<sup>7</sup> Hence an agreement, to

<sup>1</sup> 1 Cruise, 80; Debow v. Colfax, 5 Hals. 128; 3 N. H. 504.

<sup>2</sup> Co. Litt. 55, b.; Com. Dig. *Biens* G. 2; Hawkins v. Skegg, 10 Humph. 81; Davis v. Eyton, 7 Bingh. 154.

<sup>3</sup> Bulwer v. Bulwer, 2 B. & A. 470.

<sup>4</sup> Debow v. Colfax, 5 Halst. 128.

<sup>5</sup> Haslett v. Glen, 7 Har. & J. 17; Thompson v. Thompson, 6 Mumf. 518.

<sup>6</sup> Hob. 188.

<sup>7</sup> Gee v. Young, 1 Hayw. 17.

(a) If a husband lease lands of the wife, and, during the term, she obtain a divorce *a vinculo*, the emblements belong to the tenant. Gould v. Webster, 1 Tyl. 409. Where lands are conveyed in trust for a husband and wife, during their joint lives and the life of the survivor, the crops growing at the husband's death, which were planted before the conveyance, survive to the wife. Other-

wise with those planted by the husband. Haslett v. Glenn, 7 Harr. and J. 17.

Where a wife rented land, and made corn on it, by the labor of slaves which were secured to her separate use; held, the corn belonged to the wife, and was not subject to the husband's debts. Young v. Jones, 9 Humph. 551.



allow a tenant "for preparing the ground for seed, and for any other extra labor," applies to the clearing, manuring and plowing of the land, and does not interfere with his implied right to emblements.<sup>1</sup>

§ 19. The *executor* of a deceased *joint tenant* cannot claim emblements, such tenant having had no *exclusive* title to the land. Nor can one tenant in common claim them, who, without leave or objection from the others, occupied the land exclusively, and sowed it, partition having been made while the grain was growing. He is neither a tenant for life nor at will, and acted with the knowledge that the land was at any time subject to partition.<sup>2</sup>

§ 20. At common law, a *dowress* was not entitled to emblements, the land being often sown when she came into possession of it after the husband's death. But by Statute of Merton, 20 Hen. 3, ch. 2, she may devise the growing corn; and if she does not, it passes to her executors.<sup>3(a)</sup>

§ 21. *Tenant for years* is not, in general, entitled to emblements, whether the lease is upon a pecuniary rent or upon shares; because, knowing the determination of his estate, it is his own folly to sow, where he knows he cannot reap.<sup>(b)</sup> This being the reason of the rule, it is not applicable where such estate is terminated by an event previously uncertain. Thus, if the tenant for years holds under a tenant for life, and the estate terminates by the death of the latter, the former shall have emblements. So, also, where one holds for so many years, if A live so long, and A dies before the end of the time, the former has emble-

<sup>1</sup> Stewart v. Doughty, 9 John. 112.

<sup>2</sup> Cro. Eliz. 61; Calhoun v. Curtis, 4

Met. 413. See McLaurin v. McCall, 3 Stobh. 21.

<sup>3</sup> 1 Cruise, 180.

(a) In New Jersey, South Carolina, Rhode Island, Virginia, Kentucky, it is provided, that widows may bequeath their crops. Anth. Shep. 255, 564; N. C. Rev. St. 615; 1 Vir. Rev. C. 171; 1 Ky. Rev. L. 575.

In Arkansas, the widow may bequeath her crop; if she does not, it passes to her administrator. Rev. St. 342.

In Pennsylvania, any tenant for life may bequeath them as personalty. Park & J. 467. If, before assignment of dower in certain land, the heir sow such land;

after assignment, but before acceptance of the commissioners' report, which, however, is subsequently accepted, the widow may cut and carry away the crops. Parker v. Parker, 17 Pick. 236.

(b) Upon the same principle, where one occupies by a pre-emption right, and sows the land, knowing that the crop cannot ripen before such right will terminate, a purchaser from government will hold the crop. Razor v. Qualis, 4 Blackf. 288.

ments.<sup>1</sup> But where a woman, tenant during widowhood, leases for years and marries, the lessee has no emblements.<sup>2</sup>

§ 22. But where the tenant terminates the estate by his own act—as by forfeiture—he has no emblements. So where he surrenders his lease.<sup>4</sup>(a) Thus where a lessor agreed to renew the lease, “if he did not want the farm for his own use;” and before its expiration the tenant surrendered, having previously sold the growing crops to a stranger: held, the landlord was entitled to the crop.<sup>5</sup>

<sup>1</sup> Co. Lit. 55 b, *Whitmarsh v. Cutting*, 10 John. 361; *Demi v. Bosaler*, 1 Penn. 224; *Davis v. Brocklebank*, 9 N. H. 73.

<sup>2</sup> *Oland's Case*, 5 Co. 116.

<sup>3</sup> *McLarin v. McCall*, 8 Strobb. 21.

<sup>4</sup> Co. Lit. 55 b.

<sup>5</sup> *Bain v. Clark*, 10 John. 424. See *Van Valkenburgh v. Peyton*, 2 Gilm. 44.

(a) A leased a farm to B at an advance rent, for a specified time, giving the lessee the right to go upon the premises and harvest and take away his crops, after the determination of the lease. B underlet to various persons, some of whom were to pay a part of the crop as rent; and one of them raised a crop of oats, which were stacked on the premises as the property of B, after he had surrendered the premises to A. During the following spring, A threshed and sold the oats, and B sued him therefor in trespass. Held, the action could be maintained; that A had no claim for a forfeiture, and that his remedy against B was on the covenants of the lease. *Van Valkenburgh v. Peyton*, 2 Gilm. 44.

In Pennsylvania, a tenant for years is by custom entitled to emblements, under the name of a *way-growing crop*. But the custom is limited to leases from spring to spring, where there is no crop in the ground at the commencement of the lease. And where A leased to B, for five years, three months' notice to be given in case of a sale during the term, and no rent to be paid for the year, and there was a winter crop in the ground at the time of leasing, and the tenant, after a sale by the lessor, left in the fall; held, he was entitled to emblements at common law, notwithstanding a knowledge or even direct notice of the sale three months before leaving, the custom of a *way-growing crop* not being applicable to this case. *Stultz v. Dickey*, 5 Bin. 289; *Biggs v. Brown*, 2 Ser. & R. 14; *Comfort v. Duncan*, 1 Miles, 229. See *Faviell v. Gaskoin*, 8 Eng. L. & Equ.

528. The custom is said to prevail in New Jersey and Delaware; applying, however, in all these States, to grain sown in the fall, and to be reaped at the next harvest. 1 U. S. Digest, 697; *Biggs v. Brown*, 2 S. & R. 14; *Van Doron v. Everitt*, 2 South. 460; *Templeman v. Biddle*, 1 Harring. 522. If a lessor injure the way-going crop, even after the lease has terminated, and the tenant quit possession, he is liable to an action of trespass. *Forsythe v. Price*, 8 Watts, 282. This crop includes *straw*. *Craig v. Dale*, 1 W. & S. 509; *Iddings v. Nagle*, 2, 22. A like custom prevails, and is enforced by the courts, in some parts of England, even notwithstanding a written contract, in which such custom is not referred to. *Higglesworth v. Dallison*, Doug 201; *Senior v. Armitage*, Halst. 197. But see *Roberts v. Barber*, 1 Cr. & Mees. 208. See also *Boraston v. Green*, 16 E. 71; *Beaty v. Gibbons*, Ib. 116.

In Pennsylvania, a lessee of land encumbered with a prior judgment, under which it is levied and sold, is entitled to the way-going crop sown by him prior to the levy and condemnation. *Bittenger v. Baker*, 5 Cas. 66 n. (overruling *Tallade v. James*, 6 Penn. 114; *Groff v. Levair*, 16, 179).

Under the execution act of 16th June, 1836, secs. 105, 111 and 119, he becomes a tenant at will of the sheriff's vendee.

If the tenant had sown his crop before he was notified of the purchaser's intention to determine the tenancy, he will be entitled to take it away.

Under an execution law, a lessee in

§ 23. If a lessor for years covenant and grant to the lessee, to carry away the corn which shall be growing at the end of the term; this is not a mere covenant, nor is it void as a grant *in futuro* of a thing not in *esse*; but passes the property when it comes into being.<sup>1</sup>

§ 24. The question of emblements, though usually arising between landlord and tenant, may also grow out of other relations known to the law. Thus, where one is forcibly dispossessed of land; after recovering it by a judgment, he is entitled to the crops raised by the trespasser or disseisor, though gathered, if still remaining on the premises.<sup>2</sup> So if one in possession of land, under a judgment recovered upon a writ of entry, being sued in a writ of right, pending this suit sow the land, and the demandant recover judgment, and obtain seisin and possession before the crops are gathered; the demandant is entitled to the crops.<sup>3</sup> So upon a sale on execution, the sheriff gave a deed to the purchaser, while grain was growing on the land. Afterwards, a creditor of the judgment-debtor levied on the grain and sold it, and the purchaser brings an action against the tenant of the sheriff's grantee, for cutting and removing the grain. Held, the grain passed with the land, and the action could not be maintained.<sup>4</sup> So where one leases land which is subject to a judgment against him, and the land is afterwards sold, the purchaser will be entitled to the growing crop, and not the tenant.<sup>5</sup>

§ 25. A mortgagee, not in possession, has no right to emblements. When severed by the mortgagor, they are absolutely his without any liability to account for them.<sup>6</sup> But the lessee of a mortgagor is not entitled, as against the mortgagee, to the crops on the land at the time of foreclosure and sale; but he is liable

<sup>1</sup> Grantham v. Hawley, Wms. Hobart, 286.

<sup>2</sup> Thomas v. Moody, 2 Fairf. 189. See Tyson v. Hollingsworth, 2 Bland, 384.

<sup>3</sup> King v. Fowler, 14 Pick. 238.

<sup>4</sup> Bear v. Bitzer, 16 Penn. 175. See Groff v. Levaw, Ib. 179.

<sup>5</sup> Sallade v. James, 6 Penn. 144.

<sup>6</sup> Toby v. Reed, 9 Conn. 225.

possession, at the time of a sheriff's sale of the premises, is to be treated either as tenant for years, or at will; if for years, he is entitled to the way-going crop under the general custom or common

law of Pennsylvania; if at will, he has the right to the larger emblements or way-going crop that belongs by the common law to that species of tenancy. Ib.

in trespass to the mortgagee for taking them, if the latter purchase the land.<sup>1</sup> So where the purchaser of mortgaged premises, sold pursuant to a statute foreclosure in New York, entered, harvested, and carried away the crop; in an action of trover against him, by one who had purchased the crop before the foreclosure, on execution against the mortgagor, held, the defendant was entitled to the crop.<sup>2</sup>

§ 26. The right to emblements is not a mere personal privilege, incapable of transfer; but, in this respect, a crop, even while growing, and unripe, seems to stand on the same footing with any other property. Thus a growing crop may, it seems, be sold by a tenant before the termination of his estate, and the vendee will have the right to enter and gather it, after such termination. An execution against the tenant may be levied upon the growing crop. And it was held that the officer might levy the execution in December, making a declaration to that effect, and delay to sell till the ensuing August, when the crop became ripe; although it might legally be sold at the former period. He took all the *possession*, that was practicable in the case.<sup>3</sup> (a)

<sup>1</sup> Lane v. King, 8 Wend. 584; Crews v. Pendleton, 1 Leigh, 297; 1 Penn. 76.

<sup>2</sup> Shepard v. Philbrick, 2 Denio, 174.

<sup>3</sup> Whipple v. Foot, 2 John. 418.

In Pennsylvania, where a lessee had sown land encumbered with a judgment lien, he is entitled to the way-going crop in preference to the purchaser at the sheriff's sale. *Bittinger v. Baker*, 29 Penn. 66.

He becomes, by statute, a tenant at will to the sheriff's vendee. If the crop is in the ground, before the vendee notifies the tenant of his determination to put an end to the tenancy, or before levy and condemnation, the tenant will be entitled to it as at common law; being a lessee, in possession of and sowing land, which possession is determinable on an uncertain event without his control.

He is either a tenant for years or at will, and as such entitled to the emblements as tenant for years, by the common law of the State, or the larger rights of one at will.

(a) In Ohio, where lands are valued

for judicial sale, the annual crops are not included in the estimate. *Cassily v. Rhodes*, 12 Ohio, 95.

In several of the States, in addition to the enactments already referred to, the subject of emblements is to some extent regulated by the statute law.

In Maryland, "the crop on the land of the deceased, by him or her begun," is made assets in the hands of the executor, &c. So in South Carolina and Virginia. So in Illinois, the executor is empowered to sell the growing crop. *Anth. Shep.* 428, 489, 575; *Illin. Rev. L.* 642.

The same provision is made in New York, with regard to growing crops, and all produce raised annually by labor and cultivation, except growing grass and fruit not gathered. 2 N. Y. R. S. 88.

In Virginia, South Carolina and Kentucky, as an incident to the right of em-

§ 27. The right to emblements involves the right of removing them from the land; and therefore the tenant is allowed a reasonable time for this purpose, during which the reversioner or remainder-man cannot lawfully enter and occupy.<sup>1</sup>

§ 28. Sometimes, where substances in their nature movable are thrown upon a man's land, they become his property, as part of the land.

Thus *sea-weed*, thrown upon the sea-shore, belongs to the owner of the shore, because it increases, not suddenly but gradually; is useful as manure and a protection to the bank; and is also some compensation for the encroachments of the sea upon the land.<sup>2</sup> The same is true with regard to *wreck*, as against all the world but the former owner.<sup>3</sup> So where *wood and timber* floats in the water covering a man's land, he has the exclusive right to seize it, and retain it till claimed by the owner

<sup>1</sup> *Bevans v. Briscoe*, 4 Harr. & J. 189.

<sup>2</sup> *Phillips v. Rhodes*, 7 Met. 828; *Emans v. Turnbull*, 2 John. 318; 1 U. S. Dig. 141; N.H. Rev. St. 237-8; Ken-

yon *v. Nichols*, 1 R. I. 106; See 9 Conn. 88; *Parsons v. Smith*, 5 Allen, 578.

<sup>3</sup> *Barker v. Bates*, 18 Pick. 255.

blements, the slaves of a person deceased, though held by him only for life, shall be continued on the land from March 1st to December 1st; and, in Virginia and Kentucky, as a compensation for their services, the executor or administrator shall deliver to the reversioner or remainder-man three barrels of Indian corn for every slave. In all the three States above named, a crop does not pass as emblements, if the tenant die between December 1st and the 1st of March following, or if not gathered before the former period. In Ohio there are no emblements, unless he die between March 1st and December 1st following. Anth. Shep. 489, 575, 658-4; Walk. Intro. 277; *Green v. Cartright*, Wright, 788. See Vir. Code, 573.

This must be the meaning of the language, "if the tenant die between the first of March and the last of December, they go to the personal representatives; otherwise to the real." See *Shelton v. Shelton*, 1 Wash. 58; *Thompson v. Thompson*, 6 Mumf. 514.

By a marriage settlement, the husband

was to have the use and occupation of the wife's land and the proceeds of the real and personal estate during their joint lives, and in case of her death, living the husband, leaving issue, the property to be divided, according to law, between the husband and issue, the legal title to remain, in the mean time, in her trustee. The wife died in February, leaving a daughter, her only issue, and the husband, in July of the same year, having devised and bequeathed to the daughter all the property of which his wife was possessed at the time of the marriage, and directing that she should be suitably maintained out of the proceeds. In the spring of that year, the husband planted a crop with his own slaves and those of the trust estate. Held, under the statute of South Carolina, (5 Cooper, 111, § 23,) the executor was entitled to the crop severed before the last day of December of the year of the testator's death, charged with the maintenance and education of the daughter, and the hire of her slaves. *Gage v. Rogers*, 1 Strobb. Eq. 870.

in reasonable time.<sup>1</sup> (a) But the lessor of a farm, lying upon the bank of a river, cannot bring replevin for driftwood taken from the river and piled up on the farm by the lessee, as he has no property in such wood, unless there be some provision in the lease giving him a right to it.<sup>2</sup>

§ 29. It has been held, that *dung in a heap* is personal property; but, when spread, becomes part of the land, because it cannot well be gathered without gathering part of the soil also.<sup>3</sup> A case in New Hampshire decides that manure, made in the ordinary course on the land, passes by a conveyance of the land, unless expressly reserved—whether lying in a field, yard, in heaps at the windows, or under cover.<sup>4</sup>

§ 30. *Gravel*, unlawfully removed from a close, and sold, becomes personal property by the severance; and trover lies in favor of the owner of the close against the purchaser, who used the gravel for filling up other land.<sup>5</sup>

§ 31. In this connection may properly be considered the subject of *fixtures* (b)—one of sufficient extent and importance to be

<sup>1</sup> Rogers v. Judel, 5 Verm. 223.

<sup>2</sup> Dyer v. Haley, 29 Maine, 277.

<sup>3</sup> Yearworth v. Pierce, Alleyn, 81. See Daniels v. Pond, 21 Pick. 367; *infra*, Estate at Will; Law Reporter, Jan.,

1854, 481; Roberts v. Barber, 1 Cr. & Mees. 208.

<sup>4</sup> Conner v. Coffin, 2 Fost. 588.

<sup>5</sup> Riley v. Dalrymple, Mass. S. J. C. Mar. 1853; Law Rep. May, 1853, p. 41.

(a) In Massachusetts, the owner of timber, which floats from any water upon another's adjoining land, may remove it within eighteen months, paying all damages of removal. After this period, it becomes the property of the latter. Rev. St. 389. See Gen. Sts. In Wisconsin, one year. Rev. St. 249. See N. H. Rev. St. 259.

The owner of land, upon which property is stranded, can not appropriate it to his own use, though he may cast it back into the stream, after the owner has been notified and neglected to remove it. Foster v. Juniata, &c., 16 Penn. 393. The owner of the property may enter on the land to remove it, but is not bound to do so, and incurs no liability for injury done by it; even, it seems, after notice to remove it, unless guilty of negligence in the management of it. *Ib.*

(b) There seems to be a prevailing inaccuracy or uncertainty in the application of this term, similar to that which

will hereafter be noticed in the use of the word *waste*. (See *Waste*.) As the latter word sometimes signifies merely the *destruction*, and sometimes the *unlawful destruction*, of things pertaining to the inheritance; so the word *fixture* is indiscriminately used, to denote merely something *affixed to the freehold*, whether lawfully removable or not; and something which, by the very force of the term, *is always to remain affixed*, and can never be lawfully taken away by one not the owner of the freehold. Chancellor Kent considers the proper definition of fixtures to be "things fixed in a greater or less degree to the realty." Comm. 2, 344, n. A recent definition is, "the right of severance of chattels attached to the soil, and not part of the freehold." Horsfall v. Key, 17 L. J. Exch. 266. See Teaff v. Hewitt, 1 McCook, 511.

By the word "fixtures," the court, in a case of bankruptcy, understood such



discussed, as it has been with much ability, in a distinct elementary treatise,<sup>(a)</sup> and upon which very numerous decisions and nice distinctions are to be found in the books.

The law of fixtures relates to those cases, where a thing affixed to land, and, until removed, constituting a part of the freehold, is taken away by some party not the owner of the land, as a chattel belonging to him. This class of cases, though analogous to those already considered, in which one man erects buildings upon the land of another, by *special permission or contract*, differs from the latter in two important particulars. In the first place, in the case of fixtures, there is ordinarily *no express permission* or contract for their erection;<sup>1(b)</sup>

<sup>1</sup> *White v. Arndt*, 1 Whart. 95.

things as are ordinarily affixed to the freehold for the convenience of the occupier, and which might be removed without material injury to the freehold, and the removal of which, by a tenant, would not give a ground of action to the landlord. *Barclay*, 85 Eng. Law & Eq. 169.

(a) See *Amos and Ferard on the Law of Fixtures*.

(b) In a late case it is held, that the question, whether a structure is a fixture, is to be determined by its character and manner of erection, and not by the fact that it has been erected under a parol license from the owner of the land, or that its owner, as against the licensor, has the right to remove it.

A dwelling, erected under a parol license upon the land of another, over a cellar, only partially dug and stoned, is a fixture, and passes by deed with the land to a *bona fide* purchaser without notice of the license.

The mere fact, that the licensee occupies such a building, is not notice to the world of his license or his claim of title thereunder, but merely of the fact that he is in possession. *Powers v. Dennison*, 80 Vt. 752.

Erections, which by the general rules of law are annexed to the freehold, may remain chattels, by force of an agreement to that effect; but not where the subject or mode of annexation is such, that their separation will destroy or materially injure either the freehold or the property annexed.

Thus an agreement between the owner

of salt works and the vendor of salt kettles, that these should be subject to a chattel mortgage, which was duly recorded, was sustained against a subsequent grantee of the works, although such kettles, when set, would, but for the agreement, have been held, as between the parties, as part of the realty; and want of notice in the grantee did not alter the rule, as his remedy was against his grantor. *Ford v. Cobb*, 20 N. Y. (6 Smith) 344.

"The abstract right to sever fixtures is, unquestionably, inherent in the full dominion over land which ownership confers." Per *Woodward, J. Witmer's, &c.* 45 Penn. 462.

The severance of a part of the freehold changes that part from realty to personality, but it does not divest the owner of the freehold of his right of property or ownership, nor of his right to immediate possession, which will sustain an action of trover or detinue, and, if the taking be wrongful, of replevin. Thus oil taken from a well, sunk by the owner of the freehold, is his property and may be specifically recovered. *Hail v. Reed*, 15 B. Mon. 479.

To change a chattel into a fixture, requires a positive act on the part of the person making the annexation, and his intention so to do must clearly and fully appear.

That such chattel is essential to the use of the building, for its then purposes, does not make it part of the freehold, if it be attached, not for the permanent im-

and, in the second place, until removed, they are *part of the freehold*; while, in the other case, the thing attached to the land is from its first creation a mere *chattel*, and no part of the freehold. The latter part of this distinction seems to be opposed by some dicta,<sup>1</sup> which speak of fixtures as *chattels* or personal property, and as being "deemed personalty for many other purposes." Thus, as will be seen, they are liable to be taken on execution as personal property. Mr. Amos,<sup>2</sup> however, is of opinion, that by annexation they become a part of the freehold, and reassume their character of chattels, only upon removal. This seems to be clearly laid down in the case of *Lee v. Ridon*.<sup>3</sup> It is there remarked, that the stealing of such articles would not be felony. So, as will be seen hereafter, a mortgagor may remain in possession of them, without rendering the transfer fraudulent. So they are not *distrainable* till permanently separated. So trover will not lie against the owner of real estate in possession, for fixtures annexed to the freehold.<sup>4</sup> And it has been questioned whether *replevin* will lie for them, even when separated from the land.<sup>5(a)</sup>

<sup>1</sup> 2 Browne, 285; *Van Ness v. Pacard*, 2 Pet. 144; 3 Kent (5th ed.) 340, n.

<sup>2</sup> Amos, 9, 10, 814. See *Horsfall v. Key*, 2 Wels. H. & G. 778.

<sup>3</sup> 7 Taun. 190.

<sup>4</sup> *Overton v. Williston*, 31 Penn. 155.

<sup>5</sup> *Reynolds v. Shevler*, 5 Cow. 323; *Vansce v. Russell*, 2 M'C. 829; *Powell v. Smith*, 2 Watts, 126. That *replevin* lies, see *Sands v. Pfeiffer*, 10 Cal. 258.

provement of the building, but for its more convenient use as a chattel.

Nor does it become part of the freehold, unless it has been substantially annexed thereto, so that it cannot be separated, without material injury to itself or the freehold. *Hill v. Wentworth*, 28 Vt. 428.

(a) But the tenant has an interest, not a mere power, as in case of a lease, without impeachment of waste. (See *Poole's Case*; also, *Davis v. Banks*, 16 L. J. Exch. 218.) A party cannot avail himself of his own wrong in interfering with fixtures, to deny that they are part of the realty. Thus, if the landlord distrains them, and afterwards severs and removes them for sale, and the tenant brings trover; the defendant cannot defend, on the ground that the plaintiff, by bringing this suit, has treated them as chattels, and therefore distrain-

able. *Dalton v. Whithem*, 3 Gale & Dav. 260. See *Clark v. Holdford*, 2 C. & K. 540. A fixture, when lawfully severed, becomes personal property, and may be sued for in *replevin*. *Heaton v. Findlay*, 12 Penn. 304; *Haslaw v. Haslaw*, 15 Ib. 507. The owner of land sold a fixture thereon to A, which was temporarily severed. He then sold the land to B, with notice of the previous sale. The fixture was never delivered, and was soon re-annexed, and continued to be used. At the time of sale of the fixture, there was a judgment against the owner of the land, constituting a lien upon it, under which the land was sold to the owner's grantee. Held, he thereby gained a title to the fixture, notwithstanding his knowledge of the previous sale, and his admissions that the fixture belonged to A. *Ib.*



§ 32. Conformably with this distinction, it is said, that, to constitute a fixture, that is, to give a chattel anything of the character of real estate, so as to justify a question in regard to it, there must be a *complete annexation to the soil*.<sup>1</sup> Thus a building upon blocks, rollers, stilts or pillars; or a varnish-house upon a wooden plate resting on brick work, the quarters being morticed into the plate; or a wooden barn, upon a brick and stone foundation; or a stove, in a house without fire-place or chimney, except from the chamber floor, the pipe of which passes into the lower end of the chimney; or a post wind-mill, laid on cross traces not attached to the ground, or on a sliding fender, to prevent the escape of water from a mill-stream; or loose, moveable machinery, used in prosecuting some business, and fastened to the building by belts and bands, or by cleats tacked to the floor, and movable without injury to the building; or a door, which may be lifted from its hinges;—is not a fixture, but a mere chattel. So gas fixtures and sitting stools, placed by a tenant in a shop or store, though fastened. So machinery erected for manufacturing purposes, on timbers imbedded in the ground, or fastened to the timbers of a building by bolts, screws, pins or cleats, if put up with a view to its being removed without injury to the building; is not a fixture, passing with the freehold on a sale of the latter.<sup>2</sup> So a pump and pipe, balances and scales, and beer-pumps, are *prima facie* personal property; and whether they are fixtures depends, in New York, upon the point whether they are annexed to the freehold within the meaning of the statute.<sup>3</sup> But sheds built upon posts, by a tenant, for the purpose of making brick, are fixtures.<sup>4</sup>

§ 33. Whether an article is a fixture, is partly a question of fact and partly of law. Every case must depend mainly on its

<sup>1</sup> Amos, 5, 274, *et seq.*; Wansbrough v. Maton, 4 Ad. & El. 884; Freeland v. Southworth, 24 Wend. 191; Despatch, &c. v. Bellamy, &c. 12 N. H. 205; Teaff v. Hewitt, 1 M'Cook (Ohio), 541. (This case contains a learned and elaborate examination of the law of fixtures, in some of its most important aspects.) Regina v. Haslam, 6 Eng. L. &

Eq. 321; Vanderpoel v. Van Allen, 10 Barb. 157; Lawrence v. Kemp, 1 Duer, 368; 2 Harr. Dig. (Suppl.) 1686; Wood v. Hewitt, *ib.* 688

<sup>2</sup> Farmer v. Chaufette, 5 Denio, 527.

<sup>3</sup> Hovey v. Smith, 1 Barb. 372; Rev. Sts. 83.

<sup>4</sup> Beckwith v. Boyce, 9 Miss. 560.

own circumstances. Juries should be enabled to decide the question by a clear explanation of the legal meaning of the word.<sup>1</sup>

§34. Several general conditions are of importance, in settling whether a thing annexed to the freehold can lawfully be removed. These are, *the nature of the thing*, whether in itself a personal chattel or not; usage; the comparative value of the land before and after the removal; the injury which would be caused by removal, in regard to which it is said, "the principal thing shall not be destroyed by taking away the accessory;" the situation and business of the tenant; but chiefly the purpose and object of the erection, whether for trade, agriculture, ornament, or general improvement of the estate.<sup>2</sup>(a)

§35. It is the general rule of the common law,(b) and one

<sup>1</sup> *Steward v. Lombe*, 1 Brod. & B. 510; *Grand, &c. v. Knox*, 27 Mis. 815.

<sup>2</sup> *Amos*, 7; *Van Ness v. Pacard*, 2 Pet. 148; *Lawton v. Lawton*, 8 Atk. 15; *Wetherby v. Foster*, 5 Vt. 186; *Trappes*

*v. Harter*, 3 Tyrwh. 608; *Buckland v. Butterfield*, 2 Brod. & B. 54; *Davis v. Jones*, 2 B. & A. 166; *Teaff v. Hewitt*, 1 McCook, 511.

(a) The rule, that objects must be actually and firmly affixed to the freehold, to become realty, or otherwise to be considered personalty, is far from constituting a criterion. In a late case the term fixtures is applied to locks, windows, blinds, &c., *perpetua usus causa*. 7 Allen, 79.

Doors, window blinds and shutters, removable without damage, and even though, at the time of a conveyance or attachment, actually detached. are, it seems, part of the house, and pass with it. So, it seems, mirrors, wardrobes and other heavy furniture, though firmly screwed to the walls, are chattels. Per Shaw, Ch. J., *Winslow v. Merchants'*, &c. 4 Met. 314.

Not only the manner and extent, but the object and purpose, of the annexation of a chattel to a building, is to be considered, in determining whether it has become a fixture and part of the realty. That the article is essential to the use of the building for the business for which it is used, is not the test. *Ib.*

To change the character of an article from a chattel to a fixture, there should be some positive act and intent to that effect; and if the intent is left in doubt upon an inspection of the property itself, taking into consideration its nature, the mode, extent, purpose and object of its

annexation, it should be held to remain personal property. *Hill v. Wentworth*, 28 Vt. 428.

A cistern and sinks, though fastened by nails or set into the floor by cutting away the boards, and water pipes fastened to the walls by hooks, and passing through holes cut for the purpose in the floors and partitions, if put in a hotel and boarding house by the tenant, may be removed by him during the term. So of gas pipes passing from the cellar through the floors and partitions, and kept in place in the rooms by metal bands, though some of them pass through wooden ornaments of the ceiling, which are cut away for their removal. *Wall v. Hinds*, 4 Gray, 256.

In case of a partition between tenants in common of a woolen factory, machinery, not affixed or fastened to the land or building, has been held to be personal property. *Walker v. Sherman*, 20 Wend. 686. A mortgagor commenced a building, designed for a dwelling house, and to remain on the land; also a smaller one, upon posts fixed in the ground, intended to be occupied till completion of the former. Held, these were fixtures. *Butler v. Page*, 7 Met. 40.

(b) *Quicquid plantatur solo, solo cedit.*

A plate-glass shop front, fixed with wooden wedges, without screws, nails or

which cannot be evaded by proving a contrary custom, though the presumption may be rebutted by circumstances showing the intention of the parties to the contrary;<sup>1</sup> that whatever is once annexed to the freehold becomes a part of it, and therefore cannot be removed by the party making the annexation, who is not the owner of the land.<sup>2</sup> It will be seen, that the former part of this proposition is chiefly important, as involving the consequence stated in the latter part. For, if the owner of the land himself make annexations to it, so long as he continues to be the owner, he has the absolute control, both of the land and of what is affixed to it. In regard to him, therefore, it is of little *practical* consequence, whether annexations become a part of the freehold or not.(a)

§ 36. By the ancient law, it seems, even a tenant had no right to remove things once attached to the freehold; as, for instance,

<sup>1</sup> *Christian v. Dripp*, 28 Penn. 271; *Lancaster v. Eve*, 5 C. B. (N. S.) 717.

<sup>2</sup> 2 Pet. 144; *Hubbard v. Bagshaw*, 4

*Sim.* 388; *Leland v. Gassett*, 2 Washb. 408; *Buckley v. Buckley*, 11 Barb. 48; *English v. Foote*, 8 S. & M. 444.

glue, and which could be removed without injuring the premises, is a *window*, within the meaning of a covenant in a lease to yield up, at the end of the term, the premises, with all "windows, &c., which then were, or at any time thereafter should be thereunto fixed or belonging," although it may not be a fixture in the ordinary sense of the term. *Burt v. Haslett*, 86 Eng. Law & Eq. 276.

In *Jackson v. The State*, 11 Ohio St. 104, the abstract question, what kind or degree of annexation constitutes a fixture, arose upon an indictment for larceny of *saw-mill belts*.

(a) In some of the States, however, the statute law has assumed to settle this particular question. Thus, in Connecticut, it is provided that the machinery in a cotton or woolen factory may be mortgaged, either with or without the building, *as if it were real estate*. So, while it may be attached like real estate, it is sold on execution as personal. But, in Rhode Island, the main water-wheels, upright and horizontal shafts, drums, pullies and wheels secured to the building, and necessary for operating the machinery, and all kettles set, are declared to be real estate, while other parts are personal. Conn. L. 67-8; R. I. L. 205.

In Delaware, real fixtures, such as steam engines, &c., placed on the premises by the owner, and attached to the freehold, as a fixed establishment, are a part of the freehold, subject to real estate liens, and not liable to be seized as chattels. *Rice v. Adams*, 4 Harring. 382. In Massachusetts and Michigan, for the purposes of taxation, *real estate* includes all buildings and other things erected on or affixed to lands. Mass. Rev. St. 75 (see Gen. Sts.); Mich. St. 1848, 60. By a statute in Massachusetts, all machinery used in manufacturing is taxed like real estate, in the place where it is situated. Mass. St. 1837, 20-1. See Gen. Sts. In Vermont, machinery in a woolen factory is held to be personal property, and, if mortgaged with or without the realty, the mortgagee must take possession to acquire a title against creditors. *Sturgis v. Warren*, 11 Verm. 488. To convey that, which forms part of the realty, but by severance may become a chattel, with effect against those not excepted in the statute; the same formalities are necessary as in a conveyance of the land, unless a severance is first made. *Trull v. Fuller*, 28 Maine, 545.

windows, wainscot, benches, &c.<sup>1</sup> *Poole's case*<sup>2</sup> first definitively settled a different principle, in regard to erections *for trade*, although this exception is said to be almost as old as the rule itself. In a very ancient case it is referred to by the phrase, *pur occupier son occupations*—"to occupy his occupation."<sup>3</sup>

§ 37. The general distinction is this; that, where a thing is accessory to anything of a personal nature, such as trade, it is a chattel; but where a necessary accessory to the enjoyment of the inheritance, it is a part of the inheritance.<sup>4</sup>

§ 38. In a leading case<sup>5</sup> upon this subject it is said, (though not, as will be presently seen, with perfect accuracy,) that questions as to fixtures arise in three cases.<sup>6</sup> 1. Between heir and executor. That is, when the owner of real estate dies, the question is, whether things attached to the land shall pass with or as a part of it, to the heir, or as personal property, to the executor. In the United States this branch of the subject is of less consequence, than in England, because there is less divergence in the disposal of the personal and real property of one deceased, either for the benefit of creditors or the next of kin. (a) As between heir and executor, the law is strict in favor of the former, but still allows erections *for trade* to be removed. 2. Between the executor of a tenant for life, and the remainder-man or reversioner. Here the law is liberal, in allowing the former to remove the tenant's own erections. (b) 3. Between landlord

<sup>1</sup> Co. Lit. 53 a; *White v. Arndt*, 1 Whart. 93; *Amos*. 22.

<sup>2</sup> 1 Salk. 368.

<sup>3</sup> *Van Ness v. Pacard*, 2 Pet. 144-5; 20 Hen. 7, 13 a & b.

<sup>4</sup> *Hunt v. Mallanphy*, 1 Mis. 508; *Olympic*, &c. 2 Browne, 285.

<sup>5</sup> *Elwes v. Maw*, 8 E. 38. See 2 *Smith's Lead. Cas.* 99 and note.

<sup>6</sup> 1 Whart. 93.

(a) In Maryland, articles which can be removed without injury to the premises, are made assets in the hands of the executor, &c. *Anth. Shep.* 428. In New York, things annexed to the freehold or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support. 2 N. Y. Rev. St. 83. All the erections connected with a mill or factory, carried by water-power, including the dams, water-wheels and gearing, and machinery fastened to the ground or buildings, are *prima facie*

part of the realty, and pass to the heirs. *Buckley v. Buckley*, 11 Barb. 43. So, they belong to the remainder-man, after the death of tenant for life. *Ib. Acc. Fisher v. Dixon*, 1 Cl. & Fin. 812.

(b) But a tenant *by the curtesy* cannot remove permanent buildings, such as a two story brick dwelling house and a large barn, erected by him during the life of his wife and child. *M'Cullough v. Irvine*, 1 Harr. (Penn.) 438. The grantee of a tenant by the curtesy has all the rights of a tenant for life; and, in respect to erections made by him for

and tenant. And here, in modern times, the tenant is highly favored by the law, in regard to the right of removing fixtures ;(a) particularly such as pertain to trade and manufactures, which are said to be matters of a *personal nature*, and the former of which has been called, in England, *the pillar of the State*. The general modern rule is, that the tenant may remove anything erected by him, which can be removed without injury to the premises, or putting them in a worse plight than they were in when he entered. Whether this can be done is a question for the jury. If the erection taken down is substituted for another, the latter must be restored or replaced.<sup>1</sup>

§ 39. As a general summary of the law of fixtures in reference to landlord and tenant, it is said,<sup>2</sup> that a tenant may remove ; 1. *Implements of trade* ;(a) as, for instance, furnaces, or the vats and coppers of a soap-boiler; or a kettle or boiler in a tannery, put up with brick and mortar ; or stills set up in furnaces, for making whiskey; or a hydraulic press let into the ground, and walled up with solid masonry, and wooden parts of it nailed to the building, the same being necessary to the business for which the building is occupied. (b) 2. *Machinery* ; as a steam engine or a pump, if removable without injury to the freehold; or a post windmill, or machinery for spinning and carding, though nailed to the floor. (c) 3. *Buildings for trade* ; in regard to

<sup>1</sup> 2 Kent, 280; Whiting v. Brastow, 4 Pick. 310; Penton v. Robart, 2 East, 90; 6 John. 5; 2 Browne, 285; Gaffield v. Hapgood, 17 Pick. 192; Winslow v. Merchants', &c. 4 Met. 310; Coombs v. Jordan, 3 Bland, 311; 2 Washb. 403; Avery v. Cheslyn, 5 Nev. & M. 373; Foley v. Addenbrooke. 13 Mees. & W. 197.

<sup>2</sup> Amos, 274, *et seq.*; Hunt v. Mullanphy, 1 Mis. 508; Burk v. Baxter, 3

Ib. 207; Grymes v. Boweren, 4 Moo. & P. 143; The King v. Londonthorpe, 6 T. R. 377; — v. Otley, 1 Barn. & Ad. 161; Cresson v. Stout, 17 John. 116; Tobias v. Frances, 3 Verm. 425; Taffe v. Warnick, 3 Blackf. 111; Lemar v. Miles, 4 Watts, 330; Cross v. Marston, 2 Washb. 533; Finney v. Watkyns, 13 Mis. 291.

the purposes of trade, the question is substantially between the tenant for life and remainder-man. Buckley v. Buckley, 11 Barb. 43.

(a) The privilege in favor of *trade* applies only as between the landlord and tenant, not in favor of third persons. Oves v. Oglesby, 7 Watts, 106.

(b) Otherwise with iron salt-pans, for boiling, in salt works, resting on brick work. Mansfield v. Blackburne, 6 Bing.

N. C. 426. In this case, there was a lease of salt springs, the lessee to erect works and pay rent in proportion, and to leave the works in repair. Ib.

(c) Sheds erected upon posts, by a tenant, for the purpose of making brick, are fixtures, and, if not removed within the term, vest in the landlord. Beckwith v. Boyce, 9 Mis. 560. Spinning-machines, fixed by screws, some in the floor, some in lead, which was melted

which, if permanently built, the right of removal seems questionable in England, but is well established in this country. The question is not as to the size, form, or mode of erection of a building; but whether it is *for trade*. And it matters not, though the trade be of an *agricultural* nature; nor though the building be in part constructed from the materials of an old one standing on the land, provided it is a different and distinct erection, and not merely the old one repaired or reconstructed.<sup>1</sup> Thus a tenant may remove a wooden dwelling-house, with a cellar of stone or brick, and a brick chimney, erected by him for the business of a dairy-man, and the residence of those engaged in it, and in part improved for carrying on his trade of a carpenter.<sup>2</sup>

So it is held, though not without dissent, that a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil, and removable without injury to the inheritance, is an erection made for the purpose of trade, and may be removed by a tenant at will as against his landlord.<sup>3</sup>

So where the tenant, being a tavern-keeper, erected a building which was used for a shed, stable, store-room and barn; held, they might be removed, if it could be done without injury to the land.<sup>4</sup>

<sup>1</sup> 1 Whart. 94; Beers v. St. John, 16 Conn. 322.

<sup>2</sup> Van Ness v. Pacard, 2 Pet. 137.

<sup>3</sup> Ombony v. Jones, 19 N. Y. (5 Smith) 284.

<sup>4</sup> Dubois v. Kelly, 10 Barb. 496.

and poured into holes made in stone are not part of the freehold, but subject to distress. Hellowell v. Eastwood, 3 Harr. Dig. (Supple.) 684.

Lathes, planing machines and vices, however, fastened to the earth, if a necessary part of the machinery for carrying on the business of the machine shop, are fixtures and belong to the realty, the occupants being in possession as claimants or owners, though their title to the real estate may be defective through lack of compliance with the statute of frauds. Christian v. Dripps, 28 Penn. 271.

A planing machine, lathes and vices in a machine shop or car factory, are fixtures, irrespective of the manner in which they are attached to the building,

if a necessary part of the machinery for carrying on the business. Christian v. Dripps, 28 Penn. 271.

But articles of machinery do not become a part of the freehold, when they are only attached to the building for the purpose of keeping them steadier, and in a manner best adapted to that purpose, so that their use as chattels may be more beneficial, and in such a way that they may be removed without injury to the freehold or to the articles themselves as chattels. Hill v. Wentworth, 28 Vt. 428.

As to the effect of a mortgage of machinery in case of bankruptcy, see Waterfall v. Penistone, 37 Eng. Law & Eq. 156.



But a contract between a landlord and tenant, authorizing the latter to put up additional sheds and other temporary buildings for warehouses, and to remove them when his term expired; will not authorize the removal of erections, so connected with the buildings already upon the leased premises, that they cannot be separated without material injury to the landlord's property.<sup>1</sup>

A person occupying land under an agreement to purchase it, but paying no rent, is not entitled to remove a wooden building with stone foundations, placed thereon, and used for a stable and shoemaker's shop; especially if the building was erected in consideration of the owner's postponement of the payment of one instalment of the purchase money.<sup>2</sup>

A permanent dwelling-house, built on the land of another, but in the usual way, and occupied for nearly thirty years, free of rent, although resting on blocks, is a fixture and cannot be removed by the tenant.<sup>3</sup>

So a building called a "shanty," about twenty feet square, fronting upon a street, containing two rooms and a garret, with a chimney, windows and a door, and occupied by a family, is a part of the freehold, and not a personal chattel, there being no proof that it was held upon terms giving the tenant liberty to remove it.<sup>4</sup>

An erection may be in part only for purposes of trade; as in the case of a cider-mill; or where a grazier also follows the occupation of a butcher; or a farmer uses his grain for distilling; or of machinery for working mines; in all which, the erections, though *connected with trade*, are used as means or instruments of *obtaining the profits of the land*. So in the case of a dairy-man's house, used partly for trade, and partly as a habitation. In such instances, it is suggested that the right of removal will depend upon the question, what is the *primary* business carried on. (a)

<sup>1</sup> Powell v. McAshan, 28 Mis. 70.

<sup>2</sup> King v. Johnson, 7 Gray, 289.

<sup>3</sup> Reid v. Kirk, 12 Rich, 54.

<sup>4</sup> Fisher v. Saffer, 1 E. D. Smith, 611.

(a) In Massachusetts, where a house was set off on execution, iron stoves, fixed to the brick work of the chimneys, were held to pass with them. Goddard v. Chase, 7 Mass. 482. So a furnace, so placed in a house

The tenant may remove articles erected for *ornament* or *domestic use*—unless the removal will cause great injury; such as hangings, glasses, chimney-pieces, blinds, stoves, (a) coffee-mills, shelves, bells, book-cases, cornices, fire-frames, &c., and in general such things are as necessary to domestic comfort, as may be easily severed, and will be equally useful in another dwelling. Upon this point a distinction has been made between *fixtures* and *fixed furniture*.<sup>1</sup>

§ 40. Upon the principle of the third class of cases, it seems, gardeners, nursery-men, &c., occupying as lessees, may remove trees and shrubs, which they themselves have planted for the purpose of *sale*; but not where they are planted for any other purpose. It is doubtful whether green-houses erected by such occupants are removable.<sup>2(a)</sup>

<sup>1</sup> Ames, 61-5; *Avery v. Chesslyn*, 5 Nev. & Man. 372; 2 Pet. 137; 17 Pick. 192; *Birch v. Dawson*, 2 Adol. & El. 87; *Tayl. L. & T.* 365. See also *Longstaff v. Meagoe*, 2 Ad. & El. 167.

<sup>2</sup> *Panton v. Robart*, 2 E. 91; *Lee v. Risdon*, 7 Taun. 191; *Amos*, 66; *King v. Wilcomb*, 7 Barb. 263. See *Adams v. Smith*, Bre. 221; see *Wyndham v. Way*, 4 Taun. 316.

that it cannot be removed without injury to the house, is a fixture. *Main v. Schwarzwaelder*, 4 E. D. Smith, 273. A question has been recently raised in England, whether a *door-plate* is a fixture. *Lane v. Dixon*, 11 Jur. 89.

(a) A, the lessee of land, permitted B to occupy the land as a nursery garden. The object of the garden was to cultivate trees, shrubs, plants, &c., for sale. B sold the trees, &c., to C. The fruit trees having been attached, held, C might maintain trespass *de bon. aspor.* against the officer. The plaintiff had a right to remove the trees. He had the same title as his vendor. They were articles of produce, reared to be sold, and must be considered as personal property. Whether they could have been attached in a suit against the owner of the land, *quære*. *Miller v. Baker*, 1 Met. 27. If one, having a temporary interest in land, makes improvements, in order to more fully enjoy it while such temporary interest continues, he may, at any time before his right of enjoyment expires, remove such improvements, provided such removal do not leave the inheritance in a worse condition than when the tenant took possession. Thus where land is let for nurturing trees and plants, until they are fit to be transplanted, without any

specific limitation of time; the interest of the owner of the trees in the land continues until that purpose is accomplished. *King v. Wilcomb*, 7 Barb. 263. See *Whitmarsh v. Walker*, 1 Met. 313.

In case of a green-house erected by a tenant, who has covenanted to yield up at the end of his term all erections and improvements; removal of the sashes and frame work, fixed to the walls only by being laid on them, imbedded in mortar, is a breach of covenant. *West v. Blakeway*, 8 Scott. N. R. 218. And this, notwithstanding a license during the term to erect, and an agreement that the tenant might remove them. *Ib.* 2 Man. & G. 720. See *Mansfield v. Blackburne*, 8 Scott, 720.

A rector erected in the garden belonging to a rectory two hot-houses. They consisted of a brick wall, two feet from the ground, upon which were placed the frames and glass work, the frames being bedded in the mortar on the wall. The glass work was made to slide up and down by pulleys, and was in no way fixed. After the death of the rector, his executors removed the frames and glass work, doing no damage beyond that necessarily done to the mortar in the removal; but the succeeding rector took possession of them under a claim



On the other hand, a tenant in husbandry cannot remove his own erections for merely agricultural purposes, even though he leave the premises precisely as he found them; as, for instance, a beast-house, carpenter-shop or cart-house. Nor can a mere farmer, who is not a professed nurseryman or gardener, carry away young fruit trees raised on the land, for the purpose of planting in his gardens or orchards.

Neither can a tenant plough up strawberry beds in full bearing, though he purchased them of a prior tenant, conformably to a general usage.<sup>(a)</sup> Nor can he remove a border of box—the tenant not being a gardener.<sup>1</sup>

It has been questioned, however, whether the strict rules of the common law as to agricultural erections are to be considered as adopted in this country, where so large a portion of leased property consists in wild lands, which it is the interest of landlords to have cleared and built upon.<sup>2</sup>

§ 41. Where a tenant has the right of removing fixtures, he must, in general, exercise it before quitting possession, and before a new tenant has been admitted; though not necessarily before the end of the term.<sup>(b)</sup> But the rule applies only to *fixtures* properly so called; not to chattels which are not so connected with the realty as to become a part of it. And if the estate is uncertain in duration—as, for instance, an estate at will, or *pour autre vie*—he shall have a reasonable time

<sup>1</sup> *Watherell v. Howells*, 1 Camp. 227; *Empson v. Soden*, 4 Barn. & Ad. 655; *Wyndham v. Way*, 4 Taun. 816.

<sup>2</sup> 2 Pet. 145; *Lawrence v. Kemp*, 1 Duer, 863.

of right, and the executors thereupon brought an action to recover their value. Held, the deceased rector, in his lifetime, might have removed the frame and glass work, and, *semble*, the brick wall also, or might have left the same out of repair, without rendering his personal representatives liable to dilapidations. Held, also, that the frame and glass work, being removable without injury to the freehold, passed as a personal chattel to the executors, and were removable by them within a reasonable time. *Martin v. Roe*, 40 Eng. Law & Eq. 68; 7 Ell. & B. 237.

(a) This case, however, was decided

on the ground that the circumstances showed *malice*. It was said that to take up strawberry beds would not *per se* be actionable.

(b) On the other hand, if a tenant removes and sells fixtures *during the term*, not immediately replacing them; this is not *per se* a breach of a covenant to repair and uphold and deliver up the premises, *with all things affixed thereto*. *Doe v. Burnett*, 3 Harr. Dig. (Suppl.) 684.

Erections made by the tenant, after forfeiture or re-entry for condition broken, cannot be removed. *Whipley v. Dewey*, 8 Cal. 36.

after its expiration. It has been held, that, for entering after the term expires, a tenant is liable only for a trespass upon the land; not to the articles removed.<sup>1</sup> Mr. Amos<sup>2</sup> questions this principle, and limits the right of removing fixtures, after the term expires, to the case where the tenant holds over. This he supposes to be the point settled in *Penton v. Robart*;<sup>3</sup> and that, where the tenant quits possession without removing a fixture, he is supposed to have made a dereliction of it to the landlord. And the doctrine contended for by Mr. Amos seems to be confirmed by late decisions in England.<sup>4</sup> (a)

<sup>1</sup> *Holmes v. Tremper*, 20 John 29. See *Heap v. Barton*, 10 Eng. L. & Eq. 499; *Beckwith v. Boyce*, 9 Miss. 560.

<sup>2</sup> p. 86, *et seq.*

<sup>3</sup> 2 E. 88.

<sup>4</sup> *Hubbard v. Bagshaw*, 4 Sim. 388; *Weeton v. Woodcock*, 7 Mees. & W. 14; *Leader v. Homewood*, 5 C. B. N. S. 546.

(a) Where a lease was forfeited by bankruptcy of the tenant, and the lessor entered, but the assignees retained possession, and, three weeks after such entry, removed certain fixtures erected for trade; held, such removal was unlawful. *Weeton v. Woodcock*, 7 Mees. & W. 11. And, in Pennsylvania, it has been settled that, as between a tenant for life and remainder-man, the removal must take place during the estate of the former. But in New York, a tenant, making improvements which, by parol license or agreement, he has the right to remove, may remove them after his term expires, and while he remains in possession. *Dubois v. Kelly*, 10 Barb. 496.

So, although the lessor have conveyed his estate, and the improvements were made after, but without notice of such conveyance. *Ib.*

So, where the lessor of a mill agreed that the tenant might make repairs, the expense to come out of the rent, and put in fixtures, to be removed by him at the end of his term, or paid for by the landlord; and the landlord obtained an injunction against their removal during the term: held, they might be removed within reasonable time afterwards, though the tenant was no longer in possession. *Finney v. Watkins*, 18 Miss. 291.

So where land is let for the nurturing of trees and plants, till they are fit for transplanting, the tenant may cultivate them till they are thus prepared, and then, from time to time, remove them. *King v. Wilcock*, 7 Barb. 263.

A lessor agreed with his lessee for years, to allow him, or any of his sub-lessees, the value of improvements made by them on portions of the demised premises, or the privilege of purchasing such portions at the appraised value, at the expiration of the term. The lessor, after portions had been sub-let, procured an assignment of the original lease to his son, the lessor paying the consideration therefor. In a bill by one of the sub-lessees against the lessor, after the expiration of the term, to restrain a suit at law to recover possession, and also for a specific performance, it was not stated whether or not the other sub-lessees had made improvements, and the son of the lessor was not made a party. Held, that no relief could be granted upon the complainant's bill, as framed. *Ostrander v. Livingston*, 3 Barb. Ch. 416.

In England, an out-going tenant is sometimes allowed, by custom, to retain possession of the land on which his *away going* crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering, during the old tenancy, for the purpose of ploughing and sowing. *Boraston v. Green*, 16 E. 71. See *Beaty v. Gibbons*, 16 E. 116.

A, tenant for life, leased for years to B, under an agreement, that, if the latter made certain erections, he should have the right to remove them, or they should be taken by A, at a valuation. B erected a frame stable and shops. A died before expiration of the lease, but B continued

A fire-frame, fixed in a common fire-place, with brick laid in between its sides and the jambs, is a fixture; and a tenant, who has placed it there, cannot remove it after the expiration of his term and after leaving the premises, though he may before.<sup>1</sup> So a landlord offered the house for sale at auction, reserving a fixture placed in it by the tenant, but the house was not sold. At the expiration of his lease, the tenant sold the fixture, and quit the house. Held, the purchaser could not afterwards sever and remove the fixture.<sup>2</sup>

§ 42. If a lessee, without qualification, surrender his lease, though he also take a new one from the same landlord; he loses his right to remove a building erected by himself. Otherwise, where he neglects to remove under a verbal agreement to buy the fixtures.<sup>3</sup>

<sup>1</sup> *Gaffield v. Hapgood*, 17 Pick. 192. So with a furnace. *Stockwell v. Marks*, 5 Shepl. 455.

<sup>2</sup> *Ib.*

<sup>3</sup> *Shepard v. Spaulding*, 4 Met. 416;

*Fitzherbert v. Shaw*, 1 H. Bl. 258; *Hallen v. Runder*, 3 Tyr. 959. See *Mitchell v. Speedley*, 10 Barr, 198; *Bratton v. Clawson*, 2 Strobb. 478.

to occupy under, and pay rent to the remainder-man, C. C afterwards sold the premises. In an action for rent by C against B, B defended, on the ground that he had not been allowed for his erections, and that C had received the value of them in the sale. Held, B's right of removing ceased on A's death, and C was not bound by the contract between A and B. *White v. Arndt*, 1 Whart. 91.

For an unauthorized removal of fixtures, put in by a lessee under a special agreement in writing as to his right to remove, and the lessor's right to purchase them, the lessor's remedy is by action on the agreement, and not on the covenant against waste in the lease. *Wall v. Hinds*, 4 Gray, 256.

Where a party covenants to erect a steam saw-mill on the land of another, and to manufacture lumber therewith, out of logs furnished by the latter for five years; at the end of which time the mill and buildings to belong to the owner of the land, and the machinery to the other party: such party is in no better position than a lessee, and his right to remove the machinery can not be exercised after five years. *Overton v. Williston*, 81 Penn. 155.

If A erect a building for his own use

upon the land of B, by virtue of a parol license, with the understanding that A is to remove it upon notice from B, and the building is annexed to the freehold so as to be a fixture; a subsequent mortgagee, without notice of such license, will, upon the expiration of a decree of foreclosure of his mortgage, and after he has entered into possession of the premises, be entitled to the building as well as the land, and may maintain trespass against A if he then remove it. And purchase of the title of such mortgagee, after the decree of foreclosure has expired, but before possession under the decree, will hold all the title to the building which the mortgagee had, and will not be affected by his own knowledge that the building was erected under such a license. *Powers v. Dennison*, 80 Vt. 752.

In Louisiana, a tenant has a right to remove the improvements and additions he has made, provided he leaves the property leased in the state in which he found it. When the additions are made with lime or cement, or the like, the lessor should be notified by the lessee of the intention to remove them, in order that he may exercise his right of retaining them on paying a fair price. *Pellenz v. Bullerdieck*, 13 La. An. 274.

§ 43. In addition to the three classes of cases, enumerated by Lord Ellenborough in *Elwes v. Maw*, in which the question of fixtures arises; there are others, perhaps of less importance, but often occurring in practice, and referred to in the books.

§ 44. Thus, while a tenant himself has the right of removing certain things affixed to the realty, *his creditors* may attempt to seize them, as chattels, on legal process.<sup>1</sup> And there seems no room to doubt, that whatever the tenant himself might remove, may also be thus taken by creditors. Indeed the question of a tenant's own rights is often raised in this way; and therefore the case of a *creditor's* claim upon fixtures may perhaps, with sufficient accuracy, be classed under the third of Lord Ellenborough's divisions.

§ 45. Analogous to the case of a lessee, is that of one who occupies the land of another person as his *agent*. And the latter seems to stand on a less favorable footing, in regard to fixtures, than the former.

Thus the agent of a mill-owner, occupying by permission and indulgence of the latter, who was his brother, inserted in the mill his own mill-stones and irons. Held, they became the property of the mill-owner, and were not liable to the creditors of the agent, though the mill had been carried away by a flood, and these alone remained on the premises, and were afterwards removed and offered for sale by the agent.<sup>2</sup>

§ 46. Another case of very frequent occurrence relating to the law of fixtures, is that of *vendor* and *purchaser*;(a) where the

<sup>1</sup> *Wetherby v. Foster*, 5 Vt. 136.

<sup>2</sup> *Goddard v. Bolster*, 6 Greenl. 427.

(a) The rule as to fixtures, between the owner and purchaser at a sheriff's sale, is the same as at private sale. *Farrar v. Chaffetete*, 5 Denio, 527. See *Bratton v. Clawson*, 2 Strobb. 478.

Growing wheat is a part of the freehold, and passes by a deed of the land, and parol evidence is not admissible, to contradict deed. *McIlvaine v. Harris*, 20 Mis. 457.

Where one occupies a building, not as tenant, but as a claimant or owner, machinery put into it becomes fixtures, although his title to the real estate might

be defeated for want of a compliance with the Statute of Frauds. *Christian v. Dripps*, 4 Cas. 271.

A and B being partners in a manufactory, C was taken in as a partner, and the real and personal property charged on the books as partnership property. C having put in certain machinery, with which he was credited; held, such machinery became fixtures, independent of the question of the ownership of the real estate. *Christian v. Dripps*, 4 Cas. 271.

owner of land conveys it to another, and the question arises, what shall pass with and as a part of the land. And here the law is no less liberal in favor of the purchaser, than it is in favor of the heir, as between him and the executor.<sup>1</sup> Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial employment, pass with the realty. Thus the conveyance of a *saw-mill*(*b*) passes the mill-chain, dogs and bars connected with it; that of a brewery, passes a malt-mill attached to it; that of a cotton-mill, passes the waters, flood-gates, &c., and also the machinery, whether affixed or not. So kettles for manufacturing ashes, though not set, have been held to pass with the premises in which they were used. So

<sup>1</sup> *Miller v. Plumb*, 6 Cow. 665; *Holmes v. Tremper*, 20 John. 80; 2 Washb. 403; *Despatch, &c. v. Bellamy, &c.*, 12 N. H.

205; *Buckley v. Buckley*, 11 Barb. 48; *English v. Foote*, 8 S. & M. 444; *Petrie v. Dawson*, 2 Carr. & K. 138.

(*b*) It is to be observed, however, that this construction depended in part upon the use of the word *mill*, as a *term of description*. The grant of a saw mill or grist mill, with its privileges and appurtenances, will pass the land under it, and that required for the use of the mill; also the head of water necessary to its enjoyment. *Maddox v. Goddard*, 8 Shepl. 218; *Rackley v. Sprague*, 5 Ib. 281. So also the right of flowing back upon other lands of the grantor, as before the conveyance. *Ib.* The grant of a "mill site" passes all the land covered by the mill. *Crosby v. Bradbury*, 2 Appl. 61.

But it is held, in a late case, that, if a conveyance of a mill or manufactory use words commonly applied to machinery, it will pass with the mill; otherwise, if not. *Teaff v. Hewitt*, 1 M'Cook, 540.

Conveyance of a lot of land, with one rolling mill establishment, buildings, apparatus, steam engine, boilers, bellows, &c., attached to the establishment. Held, *rolls* passed as part of the machinery, though temporarily detached. *Voorhis v. Freeman*, 2 W. & Serg. 116; *Pyle v. Pennock*, *Ib.* 890.

A clapboard machine and shingle machine, fastened into a saw mill, to be there used, are to be considered a part of the realty, and will pass to the creditor or purchaser by a levy upon the real estate, or a sale thereof. *Trull v. Fuller*, 28 Maine, 545.

Where the owner of land erects a dye-house upon it, and sets up dye kettles therein, firmly secured in brick work, they become a part of the realty, and pass, without express words, by a deed of the land. *Noble v. Bosworth*, 19 Pick. 814. The floor of a bar-iron mill, consisting of plates, kept down by their own weight, and removable without injury, passes with the mill to an execution purchaser. *Pyle v. Pennock*, 2 W. & Serg. 800.

As between vendor and vendee, the machinery of a steam flouring mill would be considered part of the realty; though not between landlord and tenant. *McGreary v. Osborne*, 9 Cal. 119.

Or a bathing tub, and the necessary pipes for conducting water through the apartments of a house into a bath room, if fastened by nailing. *Cohen v. Kyler*, 27 Mis. 122.

So stills, put up for distilling, incased in brick and mortar work. Or a large copper kettle, put up for cooking food for hogs, and incased in brick and mortar work. *Bryan v. Lawrence*, 5 Jones, 887.

So a rough plank, put into a gin-house to spread cotton seed on, though not nailed down. Otherwise with chandeliers and side brackets, attached to gas-pipes by the owner of the house, in case of a sheriff's sale of the house. *Vaughen v. Haldeman*, 88 Penn. 522.

fencing stuff, which has been used for fences, though temporarily detached from the land, but without any intention of a permanent separation. So manure in a barn-yard, even though (it seems) lying in heaps. So a steam-engine, with fixtures, used to drive a bark-mill, and pounders for breaking hides in a tannery, erected by the owner, is part of the realty, and passes by a conveyance thereof. And there are many articles, absolutely necessary to the use and enjoyment of the land, which will pass to a purchaser, whether actually upon the land or not. Such are doors, windows, locks, keys, mill-stones, &c. They are *constructively annexed*.<sup>1</sup>

Nor is it material, whether the erection is for trade or manufactures, or merely *agricultural*. If the article in question is necessary for carrying on the business meant to be followed, it passes to the purchaser. Thus a cotton-gin, attached to the gears or connected with the running works in the gin-house upon a cotton plantation, passes with the land.<sup>2</sup> But where the owner of land, having a tanning-mill upon it, sold the land, with a parol reservation of the mill, and afterwards sold the latter to another purchaser; held, (it seems) that a mill-stone, affixed to the mill with iron fastenings, did not pass with the land.<sup>3</sup> So a large and heavy wooden box, lined with zinc, put together in a room of a tavern and used for ice, and which cannot be moved whole, does not pass by a deed of the estate.<sup>4</sup> And where the land conveyed is *public property*, the grant will not pass wood, which has been previously cut and corded by a person without title; but the latter may have an action against the purchaser for taking it away.<sup>5</sup>

§ 47. It has been formerly questioned, whether fixtures would

<sup>1</sup> *Liford's Case*, 11 Co. 51; *Leroy v. Platt*, 4 Paige, 77; *Farrar v. Stackpole*, 6 Greenl. 154; \* *Phillipson v. Mullanphy*,

1 Mis. 620; *Goodrich v. Jones*, 2 Hill, 142; *Voorhis v. Freeman*, 2 W. & Serg. 119; *Oves v. Ogelsby*, 7 Watts, 106; *Harlan v. Harlan*, 15 Penn. 507.

\* This case contains an interesting exposition of the law of fixtures, as modified by the numerous inventions and improvements of modern times, both for purposes of domestic convenience, and more particularly for carrying on the various branches of manufactures.

<sup>2</sup> *Farris v. Walker*, 1 Bal. 504; *Bratton v. Clawson*, 2 Strobb. Eq. 478.

<sup>3</sup> *Heermance v. Vernoy*, 6 John. 5; See 9 Cow. 89.

<sup>4</sup> *Park v. Baker*, 7 Allen, 78.

<sup>5</sup> *Jones v. Snelson* 8 Misso. 393.



pass by a *mortgage* of the land, without being specially named.<sup>1</sup> But there seems to be now no reason to doubt that they do pass. Thus the mortgagee may have a bill for an injunction against waste in their removal.<sup>2</sup> (a) And the mortgagor's possession is not deemed fraudulent, as in case of mere chattels. (b) So, although an erection, which the jury find to be not a fixture, is separately conveyed in a mortgage of the land, the mortgagee need not take possession of it as a chattel to give him title against creditors of the mortgagor.<sup>3</sup> So, as between mortgagor and mortgagee, fixtures put up on premises leased for years, pass by a mortgage of the land.<sup>4</sup> And in general the same construction of the rule as to fixtures applies between mortgagor and mortgagee, as between grantor and grantee.<sup>5</sup> The rule, in respect to what must be deemed a part of the realty, is more liberally applied in favor of the mortgagee than in favor of a tenant. Whatever is attached to the land to be habitually used and enjoyed therewith, whether for the purposes of trade and manufacture or not, passes with the freehold.<sup>6</sup> Thus a steam engine erected in a permanent manner in a tan-yard, to facilitate the process of tanning, and used there for such purposes for two or three years, but not removable without injury to the building to

<sup>1</sup> Quincy, 1 Atk. 477. This case was evidently decided on its own phraseology, and not on any distinction between conditional and absolute sales.

<sup>2</sup> Amos, 188, *et seq.*; Union, &c. v. Emerson, 15 Mass. 159; Robinson v. Preswick, 3 Edw. 246.

<sup>3</sup> Steward v. Lombe, 1 Brod. & B.

510; See Wheeler v. Montefiore, 1 Gale & Dav. 498; Hitchman v. Walton, 4 Mees. & W. 409; Buckley v. Buckley, 11 Barb. 48.

<sup>4</sup> Day v. Perkins, 2 Sandf. Ch. 359.

<sup>5</sup> Main v. Schwarzwadde, 4 E. D. Smith, 278.

<sup>6</sup> Breese v. Bange, 2 Smith, 474.

(a) In California (Sands v. Pfeiffer, 10 Cal. 258), the remedy by injunction, under Practice Act, sec. 261, to prevent the wrongful removal of fixtures, is not the only remedy to which a mortgagee is entitled; he may also maintain replevin after they have been removed.

(b) Where a landlord distrained certain fixtures, and an action of trover was brought against him; held, an allegation in the writ, describing them as goods and chattels, did not estop the plaintiff to rely upon the fact of their being annexed to the realty, as making

the distress illegal. Dalton v. Whittem, 8 Ad. & El. N. S. 961.

Fixtures are not distrainable, because not capable of being restored or put back. Darby v. Harris, 1 Ad. & El. N. S. 895.

In case of *sale on execution*, the mortgagor has the right to possess the premises after the sale until actual delivery of the sheriff's deed; but such deed and the rights of the purchaser relate back to the date of the mortgage, so that the mortgagor has no right to remove fixtures permanently annexed during that interval. Sands v. Pfeiffer, 10 Cal. 258.

which it was braced; was held to be a fixture, and to pass by a mortgage of the land.<sup>1</sup> So A made a lease to B, which B assigned to A to secure money borrowed and to be borrowed. Held not a surrender of the term, but a mortgage; and that A was entitled to fixtures as mortgagee.<sup>2</sup> So an engine and boilers of a flouring mill were held to be part of the realty, and to be included in a mortgage of the realty, though put in after the mortgage was made.<sup>3</sup>

But machinery in a bedstead manufactory and a grist-mill, consisting of a planing machine, a machine for cutting screws, a turning lathe, a circular saw and frame, and a boring machine, which, though spiked to the floor, studs, and posts of the building, could still be removed, and were in fact removed without difficult or essential injury either to the building or the machinery itself, and were used in another building, were held to be personal property and no part of the real estate as between the mortgagee and mortgagor.<sup>4</sup> So looms, placed on the floor of a factory, fastened down by screws for the purpose of keeping the looms in a steady position, worked by a band carried by the fixed machinery, and removable without injury to the freehold, did not pass by a mortgage of the realty.<sup>5</sup>

So an iron boiler in a paper-mill, set in brick-work, which was laid on a stone foundation placed in the ground up to which the floor was laid, together with the iron pipe connected with it by screws and bolts; engines for grinding rags, fixed in tubs standing on timbers up to which the floors of the building were scribed; paper presses fastened to the building by cleats and with screws and nuts; calendar rolls in an iron frame screwed to timbers, which were spiked to the floor; a rag-cutter; a trimming press set in a frame, which was screwed to the floor; and a machine for making paper, which was fastened to the floor by cleats nailed around it, and in no other way; were held, to be no part of the real estate, as between mortgagor and mortgagee; though it is otherwise with the iron shafting put up in the build-

<sup>1</sup> *Sparks v. State*, &c. 7 Blackf. 474

<sup>2</sup> *Breese v. Barge*, 2 E. D. Smith, 474.

<sup>3</sup> *Sands v. Pfeiffer*, 10 Cal. 258.

<sup>4</sup> *Fullam v. Stearns*, 30 Vt. 443.

<sup>5</sup> *Murdock v. Gifford*, 18 N. Y. (4 Smith) 28.



ing by hangers of iron bolted to the beams and sills, and used for turning and carrying the machinery.<sup>1</sup>

§ 48. In reference to a mortgage made by the party who erected the fixtures, it has been held that gas fixtures and sitting stools, placed by a tenant in a shop or store, though fastened, are mere chattels, and may be mortgaged as such; and in an action by the landlord, against a subsequent tenant, for not delivering them, he may set up in defence the title of the mortgagee.<sup>2</sup> So where buildings and fixtures, erected by a tenant, were designed for and adapted to machinery, to be moved by water-power, the use whereof was granted in the lease; held, an assignment by the tenant to the owner by way of mortgage included these erections.<sup>3</sup> So A, a publican, being indebted to B, deposited with him his lease, also constituting B equitable mortgagee of the premises and the fixtures belonging thereto. A remained in possession and became bankrupt. Held, the fixtures, consisting of ordinary house and trade fixtures, were not in the *order and disposition* of the bankrupt, but belonged to the mortgagee.<sup>4</sup> And, in the absence of special agreement or custom, an article that can be removed without essential injury to itself or to the freehold is a chattel, as between the purchaser of the realty and a prior mortgagee of the personalty.<sup>5</sup> And where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to the defendant; held, the mortgagees had a right to enter and sever the fixtures; it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender.<sup>6</sup> So the tenant of a house in which certain fixtures had been erected mortgaged it, without mentioning them. He afterwards assigned the premises and all his estate and effects to trustees, and, while the trustees were in treaty for selling the fixtures, the mortgagee, his debt being due, entered

<sup>1</sup> Hill v. Wentworth, 28 Verm. 428.

<sup>2</sup> Lawrence v. Kemp, 1 Duer, 286.

<sup>3</sup> 2 Smith, 474.

<sup>4</sup> Barclay, 85 Eng. L. & Eq.

R. 169; See Waterfall v. Penistone, 37 Ib. 156.

<sup>5</sup> Wade v. Johnston, 25 Geo. 381.

<sup>6</sup> London, &c., Co. v. Drake, 6 C. B. (N. S.) 798.

forcibly, and refused on demand to deliver them. Held, trover did not lie against him.<sup>1</sup>

§ 49. But, on the other hand, a steam-engine set upon a granite block and fastened down by a bolt, and a boiler set in bricks in such a manner that it cannot be removed without taking down the bricks, and both used for running machinery in an adjoining shop, become a part of the realty; and evidence of a general usage and custom between manufacturers and purchasers of such property to regard it as personalty is incompetent; and a mortgage thereof to the manufacturer as personal property, executed contemporaneously with the bill of sale from him, after the engine and boiler had been put in operation, passes no title in them as against a subsequent purchaser of the real estate, though with notice of the mortgage.<sup>2</sup>

§ 49 a. Of somewhat similar nature is the case of a *mechanic*, claiming a lien upon a building which he has erected. Where such building was a *theatre*; held, the lien embraced the permanent stage, but not the movable scenery and flying stages; the former being a part of the freehold, but the latter only necessary for theatrical exhibitions—a species of *trade*. So a mechanic's lien will embrace a steam engine used for propelling a saw mill.<sup>3</sup> But an engine house, partly of stone and partly of wood, with stone foundations for a steam-engine, erected by a tenant for years for the use of a coal-mine, he having the privilege of removing all fixtures at the expiration of his term, is not the subject of a mechanic's lien.<sup>4</sup>

§ 50. As between mortgagor and mortgagee, a different question arises in regard to fixtures, viz.: whether either of them may remove erections, which he himself has made upon the land.(a) In Massachusetts, one holding land subject to redemption may,

<sup>1</sup> *Longstaff v. Meagoe*, 2 Ad. & El. 167.

<sup>2</sup> *Richardson v. Copeland*, 6 Gray, 536.

<sup>3</sup> *Olympic, &c.*, 2 Browne, 285; *Morgan v. Arthurs*, 8 Watts, 140.

<sup>4</sup> *White's Appeal*, 10 Barr, 252.

(a) A party, lawfully in possession under an execution sale, may remove temporary buildings erected by himself, before redemption. *Tyler v. Decker*, 10 Cal. 435.

In South Carolina, a statute provides

that a tenant shall not alter or remove buildings, without written permission from the landlord, under penalty of forfeiting the residue of the term. S. C. St. 1817, 87.

even after a decree to redeem, remove a barn and blacksmith's shop erected by him, and so slightly affixed, that they may be removed with but little disturbance of the soil. But a kettle, set by the owner of a freehold, who afterwards mortgages such freehold, cannot be removed by him, or taken as his personal property, but passes by the mortgage, though *appurtenances* are not expressly named. So if a mortgagor erects fixtures, he cannot remove them before payment of the debt. And if the mortgagee removes them after the mortgagor's death, they do not belong to the executor of the latter.<sup>1</sup> So a mortgagor in possession is a trespasser, if he remove a *mill* which he himself has built, or anything attached to it. In recent decisions, the reason for the distinction between such a case, and that of improvements made by a *tenant*, is very clearly and satisfactorily shown to consist in the fact, that both a mortgagor and a tenant are presumed to make the improvements *for their own benefit*; which object will be best effected by treating them in the former case as part of the freehold, and in the latter as personal property, removable by the tenant. The further considerations have been suggested, that one of the most usual purposes of mortgaging real estate, is the raising of money to be expended on its improvement;<sup>2</sup> and that the mortgagor has only to redeem, in order to have the benefit of the fixtures; and, if not worth redeeming, he ought not to do anything to lessen the value of the property.<sup>3</sup>

§ 51. In England, *shares* in some corporations have been held to be real estate; as for instance in the *New River water*, in the navigation of the river Avon, and in some navigable canals.<sup>4(b)</sup>

<sup>1</sup> Butler v. Page, 7 Met. 40.

<sup>2</sup> Taylor v. Townsend, 8 Mass. 411; 15 Mass. 159; Winslow v. Merchants', &c., 4 Met. 306.

<sup>3</sup> Pettengill v. Evans, 5 N. H. 54.

<sup>4</sup> 1 Cruise, 38; 2 Ves. 652. Chancellor Kent says, that, in England, shares in companies acting on land exclusively, as railroad, canal and turnpike companies, are held to be real estate. 8 Comm. 840, n.. 5th ed. But see, as to shares in *Water Works*, that they are *personal*,

Bradley v. Holdsworth, 3 M. & W. 422; Bligh v. Brent, 2 Y. & Coll. 268. If A and B build a bridge across a river between their respective lands, by authority of the Legislature; the bridge is real estate. Meason, 4 Watts, 341. See also Drybutter v. Bartholomew, 2 P. Wms. 127; Boyce v. Greene. Batty, 608; Duncroft v. Albrecht, 12 Sim. 189; Ang. on Corporations, 181, ch. 5, s. 4; Cape, &c. 3 Bland, 670; Binney's Case, 2 Ib. 146.

(b) A testator bequeathed the interest and proceeds of the residue of his pro-

§ 52. *In equity, money directed or agreed to be laid out in land* is regarded as land. A court of equity, regarding the substance, and not the mere forms and circumstances, of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance; provided the purposes for which the acts are to be done are legal, and can be carried into effect. The true meaning of this maxim is, that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.<sup>1</sup> Thus, where one devises and bequeaths all his real and personal estate to trustees to be sold, and then bequeaths the proceeds to an alien; the interest bequeathed to the

<sup>1</sup> 3 Wheat. 578; *Hawley v. James*, 5 Paige. 318; 1 Story on Eq. 79; See *Coster v. Clarke*, 3 Edw. 428; *Beardsley v.*

*Knight*, 10 Vt. 185; *Arnold v. Gilbert*, 5 Barb. 190; *Lindsay v. Pleasants*, 4 Ired. Eq. 320.

erty. "of every description it might be at his death," to certain persons for their lives; and, after the decease of the survivor, he bequeathed the residue in equal moieties between the British and Foreign Bible Society, and the Home Missionary Society. Part of the testator's property consisted of railway shares. On a bill filed by the treasurer of one of the charities, it was held, *without prejudice to the question whether the railway shares were or were not real estate*, within the mortmain act, that the ultimate remaindermen were entitled to have the railway shares sold, and the produce invested in consols. *Thornton v. Ellis*, 10 Eng. Law & Eq. 85.

In Connecticut, shares in a turnpike were held to be real estate. But a subsequent statute has provided otherwise. *Welles v. Cowles*, 2 Conn. 567; Dntt. 46. See *Price v. Price*, 6 Dana, 107.

In Kentucky, shares in a railroad corporation have been held real estate, descending, as such, to heirs, and subject to dower. *Price v. Price*, 6 Dana, 107. Otherwise in Ohio. *Johns v. Johns*, 1 McCook, 350.

In Maryland, where a statute provided that the property of a corporation should be held as real estate; held, this

applied only to the stockholders themselves, not as between them and third persons; and, therefore, that the levy of an execution must be as upon personal property. *Cape Sable, &c.*, 3 Bland, 670. On the other hand, canal stock, though declared to be personal property, is still real, and governed by the same law as the land over which the canal passes. *Binney*, 2 Ib. 188.

In Massachusetts, shares in a corporation are held personal property, even though the corporation be instituted merely for the purpose of holding real estate. *Sull. on L. T.* 71; 4 Dane, 670; *Russell v. Temple*, 3 Ib. 108. Shares in a railroad corporation are expressly made personal estate. Mass Rev. St. 348. See Gen. Sts.

And it has been decided in Rhode Island, that shares in a bridge corporation were personal property; and also, that, when they belonged to a wife, and the husband died without doing any act to reduce them to possession, they vested in the wife, not in his administrator. *Arnold v. Ruggles*, S. J. C. Sept., 1837.

In North Carolina and Ohio, shares in corporations are personal estate. And this is undoubtedly the general principle of American law. N. C. Rev. St. 121; Walk. Intr. 211.

latter is personal estate, and he shall hold it. So, where land is devised to a wife, but with orders that it be turned into money, the husband takes the absolute title. So land held for trading purposes is in equity treated as personal property.<sup>1</sup>

§ 53. Where money is directed or agreed to be turned into land, or the converse, if the *cestui que trust* has the whole beneficial interest, he may, at any time before the conversion takes place, either by his acts or declarations, or by application to a court, elect to take either the land or the money. If he make no election, and die, as to his representatives, the conversion shall be intended to have taken place. The mere direction of a testator will not change the proceeds of land sold into personalty. They will still remain mere equitable assets.<sup>2</sup>

§ 54. Where by will land is appropriated to the payment of debts and legacies, the heir or residuary legatee has a resulting trust in the land, subject to the fulfilment of this object; and he may either restrain the trustee from selling more than is required, or offer to pay the debts and legacies; and either a portion of the land or the whole, as the case may be, will then be held as land, and not as money. Otherwise, where the evident intent is, to give the character of personalty to the whole proceeds. If the legatee of the money to be raised by a sale of land elect to take the land instead, the law regards it as a new acquisition by him, and it will descend from him as such, and not as inherited property.<sup>3</sup>

§ 55. In England it has been held, that the land shall be treated as land, with reference to a residuary legatee, even though he

<sup>1</sup> *Craig v. Leslie*, 3 Wheat, 568; *Proctor v. Fenebee*, 1 Ired. Eq. 148; *Bligh v. Brent*, 2 Y. & Coll. 268; *Thomas v. Wood*, 1 Md. Ch, 296; See *Queen v. St. Margaret, &c.*, 2 Ad. & Ell. (N. S.) 559; *Wood v. Keyes*, 8 Paige, 365; *Bogert v. Hertell*, 4 Hill, 492; *Foster v. Hilliard*, 1 Story R. 77; *Bleight v. Manufacturers, &c.*, 10 Barr, 181; *Johnson v. Corbett*, 11 Paige, 265; *Swartwout v. Burr*, 1 Barb. 495; *Peter v. Beverly*, 10 Pet. 583; *Gott v. Cook*, 7 Paige, 534; *Kane v. Gott*, 24 Wend. 660; *Rutherford v. Green*, 2 Ired. 122; *Reading v. Black-*

*well*, 1 Baldw. 166; *Tilghman*, 5 Whart. 44; *Amphlett v. Parke*, 2 R. & My. 221; *Dawes v. Haywood*, 2 Dev. & B. Eq. 318; *Grievson v. Kissopp*, 2 Keen, 658; *Harcourt v. Seymour*, 5 Eng. Law & Eq. 208; *White v. Smith*, 8 Ib. 77; *Slocum v. Slocum*, 4 Edw. Ch. 613; *Coyte, &c.*, 8 Eng. L. & Eq. 224; *Rawley v. Adams*, 7 Beav. 548.

<sup>2</sup> 3 Wheat. 563; *State v. Nichols*, 10 Gill & J. 27; *Clay v. Hart*, 7 Dana, 6. See *Haggard v. Ront*, 6 B. Mon. 247.

<sup>3</sup> 3 Wheat, 582-3-5; *Simpson v. Kelso*, 8 Watts, 247.

have made no election. But this doctrine is expressly overruled in this country.<sup>1</sup> (a)

§ 56. The distinction between real and personal estate, though less important in the United States than in England, where, by the common law, lands are not subject even to the payment of debts, except of a certain kind, is, notwithstanding, in many

<sup>1</sup> 8 Wheat. 582; *Roper v. Radcliffe*, 9 Mod. 167.

(a) It is held that, where land of one deceased is sold, by order of court, for payment of debts, the surplus shall be distributed as real estate. So a recognizance, given to husband and wife for her share in the estate of one deceased, survives to her upon the husband's death—following the nature of the land. So an annuity secured to a widow in lieu of dower is treated as land, and as such passes to her second husband. But a bond, given to one heir for his share of the land descended, is personal property; and, if an order contained in a will for the sale of land is *conditional*, it does not become personalty till actually sold.

*Dillar v. Young*, 2 Yea. 261; *Yoke v. Barnet*, 1 Binn. 864; *Lode v. Hamilton*, 2 S. and R. 493; *Parke & J.* 287. See *Henry v. M'Closkey*, 9 Watts, 145; *Parker v. Stuckert*, 2 Miles, 278. See *Wright v. Rose*, 2 Sim. & Stu. 328; *Moses v. Murgatroyd*, 1 John. Ch. 130; *Burn v. Sim*, 1 Whart. 252; *Simpson v. Kelso*, 8 Watts, 247; *Tilghman*, 5 Whart. 44; *Reading v. Blackwell*, 1 Bald. 166; *Rinehart v. Harrison*, Ib. 177; *Wharton v. Shaw*, 3 W. & Serg. 124; *Hannah v. Swarner*, Ib. 223. These several points have been decided in Pennsylvania. They seem hardly reconcilable. The first conforms to the Statute Law of Massachusetts. Rev. Stat. 457. See *Stover v. Com.*, 16 Penn. 887.

Where, upon partition in the orphans' court, the land is adjudged to a part of the heirs, who give their recognizance, the conversion of the other heirs' share of the realty into personalty is complete, when the recognizance is given, and the land is adjudged to the acceptors. *Ebbs v. The Commonwealth*, 1 Jones, 374.

The following somewhat miscellaneous decisions may be cited to illustrate the several principles stated in the text. Where land is devised to a married woman to be sold, the husband will not be allowed

to purchase it, and thus acquire an interest as husband. *Samuel v. Samuel* 4 B. Monr. 256. Where A agreed with B to sell land to B, but died before giving a deed, the agreement being then valid, but afterwards ceasing to be so by the laches of B; held, the next of kin, not the heir of A, took the land. *Curre v. Bowyer*, 5 Beav. 6. n. Where one, having made a devise of land, sells it, and a deed is given after his death, the price belongs to the executor, &c., though there is a lien on the land therefor. *Farrar v. Winterton*, 5 Beav. 1. See *Simpson v. Ashworth*, 6, 412; *Evans v. Salt*, 6, 266.

A testator devised his estate to his widow for life, and directed his executors, after her decease, if the majority of his children should agree, to sell the real estate, and out of the proceeds to pay a debt, and a certain sum to each of his children, and to distribute the residue among his children three years thereafter. Held, the real estate was not converted into personalty until a sale by consent on the death of the wife; and that the share of a married daughter, dying in the lifetime of the wife, descended to her children, and did not pass to her administrator. *Nagle's Appeal*, 1 Harris, 260.

Husband and wife conveyed the equity of redemption in land belonging to the wife to a trustee, in trust to sell the same for their benefit. Held, a conversion of the land into personalty, so that the husband might dispose of it in the lifetime of the wife, and after her death hold it absolutely and against her heirs, although the land were not sold under the trust. *Siter v. M'Clanachan*, 2 Gratt. 280.

The land thus being converted into personalty, the husband may make a valid mortgage of it, without having his wife join in the deed. Ib.

Real estate, settled in trust for a wife for life, &c., was sold by the husband under a power of sale, and the proceeds



points of view, of the highest consequence. Real estate in many of the States cannot be held by *aliens*. Real estate only can be entailed, or is subject to curtesy and dower. Different formalities are required for the conveyance and devise of real and personal property. Lands and chattels are disposed of differently by executors and administrators, and upon legal process. And

invested in stocks, though required by the settlement to be invested in land. The husband, wife, and surviving trustee, by a deed declared the stock to be held on the trusts of the former deed. The husband died in the wife's lifetime, intestate. She made her will after his death, whereby she gave all her personal estate and effects "whatsoever and wheresoever, and of every kind soever, which she should be possessed of or entitled to at the time of her death, in possession, remainder, reversion or expectancy," to her two daughters. The produce of the sale of the land was never re-invested in land, pursuant to the trusts of the original settlement. Held, the stock was to be treated as real, and not personal estate; that it did not pass by the will of the wife, the words there used relating exclusively to personal estate; and that it descended to the heir at law. *Gillies v. Longlands*, 5 Eng. L. & Eq. 59.

Where the land of a married woman was sold by order of a court of equity for partition; held, the husband was entitled to a life-estate in the proceeds of the sale in the same manner as he would have had a life-estate in the land, if it had remained unsold. *Forbes v. Smith*, 5 Ired. Eq. 369.

Where the real estate of a married woman has been converted into personality by operation of law, during her lifetime, it will be disposed of by the court, after her death, in the same manner as if she had herself converted it into personal property previous to her death. *Graham v. Dickinson*, 3 Barb. Ch. 169.

Conveyance of the estate of a feme covert, by her and her husband, in trust, with a provision that, upon her death, the husband should have a life-estate in the land, or, in lieu thereof, \$2,500 out of the proceeds, if he should prefer to sell. After the wife's death, the husband let the land for a year, and afterwards elected to sell; but, as the trustee was dead, a new one was appointed by a

friendly suit in chancery, and the land advertised for sale, but the husband died before the day of sale. Held, the husband having elected to sell in lieu of a life-estate, such election was an equitable conversion of the land into money, on the principle that that which ought to have been done should be considered as done; that the election was not defeated by his death; and that the sum of \$2,500 should be paid his executor, deducting the rent reserved. *Washington v. Abraham*, 6 Gratt. 66.

A testator devised his lands to his executors to be sold, and gave a legacy of \$2,000 to his niece, to be paid to her out of the proceeds of the sale of his real estate. Held, the surviving husband of the niece had the same title to demand this legacy bequeathed to his wife, as if it had been payable out of the personal estate of the testator; and that it made no difference whether the wife died before or after the sale actually took place. *Thomas v. Wood*, 1 Maryland Ch. Decis. 296.

Where, for the purpose of making partition, a wife's land was sold, and after the sale the husband assigned the purchase-money, but, while it remained in the commissioners' hands, the wife died; held, the purchase-money was to be regarded as land, that the marital rights had never attached, and that the assignee of the husband took only his share in the fund, as distributee of his wife. *Mobley*, 2 Rich. Eq. 56.

A testator, in Kentucky, devised land to his widow during life or widowhood. By statute and judicial proceedings there, she was empowered to sell the land and invest the proceeds in land in Missouri. Held, that the money received by the sale was to be regarded as real estate. *Gates v. Hunter*, 13 Mis. 511.

When the land of an infant is sold by decree of a court of equity for a particular purpose, any surplus of money, that remains after that purpose is accomplished, will be regarded as real estate; and, upon the death of the infant, intes-

the distinction often decides the validity of uses, trusts, and remainders. The various tenures, incidents, liabilities, and transfers of real property are not, of course, to be properly treated of in this mere introductory view; but will constitute the subjects of the subsequent portions of the work.

tate, will go to his heirs at law, and not to his next of kin. *March v. Berrier*, 6 Ired. Eq. 524.

The statute in New York, authorizing the sale of lands of infants, must be construed according to the principles of the common law at the time of its passage, by which the proceeds of such sale retain the character of real estate, even after the infant attains his majority, in the absence of any act or intent on his part to change its character; and where he died after attaining his majority, without manifesting such intent, as in case of his retaining a bond and mortgage given for the purchase-moneys of his land sold during infancy, the moneys received thereby were held to go to his heirs at law, according to the statute of descents. *Foreman v. Foreman*, 7 Barb. 215. See *Swezy v. Thayer*, 1 Duer, 286.

Where a lunatic, whose real estate had been sold by order of court, for his maintenance and the payment of his debts, died intestate, and an unexpended balance of the fund from such sale remained in the hands of his committee; it was held, that this balance was to be regarded as land, for the purposes of distribution. *Ib.*

Money paid into court by a railway company, for land taken under the lands clauses act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, was ordered, after his death, not to be re-invested in, or considered as land, but to be paid to his executors. *Flamank*, 8 Eng. Law and Eq. 248.

Where the purchase-money of land;

taken under the compulsory powers of an act of parliament, for public purposes, is paid into court, subject to be re-invested in the purchase of land, free of expense to the parties beneficially interested, on their petition; it is impressed with real uses, and is *prima facie* to be treated as real estate. *Stewart's Estate*, 18 Eng. L. & Eq. 588.

If the person absolutely entitled to the money-land may elect to take it as a personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeathes personal estate only, and does not devise realty, are not such proof of election as to prevent the fund from descending, on his death, to his heir. *Ib.*

Equitable conversion takes place in case of an agreement to sell, although the option to purchase within a certain time rests solely with the purchaser. *Kerr v. Day*, 14 Penn. 112.

An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser, and the purchaser's administrator, if he receive rent for such land, or money for the sale of the intestate's interest therein, is accountable to the heirs for the amount so received. *Griffith v. Beecher*, 10 Barb. 482.

A devise of land to executors to sell for the payment of debts is a conversion of it, and the proceeds are applicable to pecuniary legacies. *Sharpley v. Forwood*, 4 Harring. 886. See *Holcombe v. Coryell*, 2 Stockt. 892; *Roberts v. Walker*, 1 Rus. & My. 752; *Simmons v. Rose*, 39 Eng. L. & Eq. 89; *Winders v. Winders*, 39 ib. 317.



## CHAPTER II.

## ESTATES IN LAND. ESTATE IN FEE SIMPLE.

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|--|---------------------------------------|
| 1. <i>Estate, &amp;c.</i> —meaning of the terms. | 23. Seisin in law and deed.           |
| 5. <i>Freehold.</i>                              | 24. <i>Disseisin.</i>                 |
| 7. <i>Fee Simple.</i>                            | 32. <i>Abeyance.</i>                  |
| 8. Feudal law and American tenures.              | 34. Freehold in futuro.               |
| 16. <i>Seisin.</i>                               | 35. Rectors and parsons.              |
| 20. Entry.                                       | 36. <i>Incidents</i> to a fee simple. |
| 28. Seisin of heirs— <i>continual claim.</i>     |                                       |

§ 1. An *estate* in land is the interest which the tenant has therein; or the condition or circumstance in which the owner stands with regard to his property. It implies some kind of actual interest or ownership—not a bare possibility, as in case of an heir apparent; or a mere power, as where one orders his executors to sell his land. (a) The words *estate*, *right*, *title*, and *interest*, express substantially the same idea, more especially when used in a *devise*.<sup>1</sup> The land is one thing, says Plowden, and the

<sup>1</sup> Newkirk v. Newkirk, 2 Caines, 351; 1 Steph. Comm. 216; Jones v. Roe, 8 T. R. 98; Knocker v. Bunbury, 8 Scott, 414; Doe v. Tomkinson, 2 M. & S. 170;

Queen v. St. Margaret, &c., 2 Ad. & El. (N. S.) 559; Doe v. Shotton, 8 Ad. & Ell. 905.

(a) "Estate comes from *stando*, because it is fixed and permanent." Per Lord Holt, Bridgewater v. Bolton, 6 Mod. 109.

Where a testator authorized his executors, after they should obtain knowledge of the condition of his estate, to convey at their discretion lands to his children, as each might select; the children have no estate in the land until it is conveyed to them; and one of them cannot take a tract of the land without the consent of the executors, nor maintain possession

against them. Chew's Ex'rs v. Chew, 4 Cas. 17.

Trustees under a will being empowered "to grant and sell the whole or any part" of the testator's "estate, real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto;" held, the legal estate did not vest in the trustees. Fay v. Fay, 1 Cush. 93.

As to the technical meaning of the words "propriety" and "liberties," when used in ancient colonial statutes; see Com. v. Alger, 7 Cush. 70, 71.

estate in the land is another thing; for an estate in the land is a *time in the land*, or *land for a time*.<sup>1</sup>

§ 2. Estates may be considered with respect to their *quantity* and their *quality*. *Quantity* is the extent of time or degree of interest; as in fee, for life, &c. *Quality* refers to the nature, incidents, and other collateral qualifications of interest, as a condition, joint-tenancy,<sup>2</sup> (a) &c.

§ 3. Another classification of estates is—1, as to the quantity of interest; 2, as to the time when it takes effect, whether immediate or future; 3, as to the number and relation of the owners.<sup>3</sup>

§ 4. Any person holding an interest in land for years, for life, or any greater estate of freehold, in reversion or remainder, is an owner.<sup>4</sup> (b)

§ 5. With respect to the quantity of interest, the primary division of estates is into *freehold* and *less than freehold*. A freehold is defined to be an estate in lands or other real property, held *by a free tenure*, for the life of the tenant, or that of some other person, or for some uncertain period. It was formerly characterized, as an estate which could be created only by *livery of seisin*, or as the possession of the soil by a *freeman*; a freeman being one who could go where he pleased.<sup>5</sup> (c) Neither of these definitions is applicable to the United States. All claim to be freemen, and livery of seisin is universally dis-

<sup>1</sup> Walsingham's Case, Plow. 555.

<sup>2</sup> Co. Lit. 845 a; 1 Cruise, 89; 2 Bl. Com. 103; 1 Pres. on Est. 7 see Wisc. Rev. Sts. 818.

<sup>3</sup> *Ib.*

<sup>4</sup> *Ells v. Welch*, 6 Mass. 251; *Davenport v. Farrar*, 1 Scam. 316.

<sup>5</sup> Brit. c. 82; Lit. s. 59; 2 Bl. Com. 80; Dalrymple on Feud. Prop. 11; 1 Cruise, 89; Wisc. Rev. Sts. 818.

(a) It is said, that qualified and conditional fees differ from fees simple only in *quality*. With respect to *quantity*, these estates stand on equal ground. Co. Lit. 18 a; 1 Steph. Com. 224-5.

(b) A statute provided a penalty for cutting timber, recoverable by the *owner* of the land. Held, the owner in fee was the party intended; and a devisee for life, with a naked and contingent power to dispose of the land, if necessary, for a special and limited purpose, with remainder over, could not sue for the penalty. *Jarrot v. Vaughn*, 2 Gilm. 182. A contractor for the erection of a house, who has an equitable title to it, is an

*owner* under the New York lien law of 1851. *Belmont v. Smith*, 1 Duer, 675.

(c) "A free tenement (freehold), is that which one holds to him and his heirs. So, also, for his life only or for an indeterminate period, without other certain limitation of time; as, until something is done or not done; as if it is said, I give to such an one, until I shall provide for him. But freehold cannot be predicated of anything which one holds for a certain number of years, months or days; although for the term of a hundred years, which exceeds the lives of men." Bracton, 207 a.

pensed with, either by usage, or by the express language or necessary implication of statutory provisions. A freehold is now well described, (a) as any estate of inheritance or for life in real property.<sup>1</sup> It seems quite superfluous to add *immobility* as another quality of freeholds. Immobility is a property of land itself, but not of an interest in land.

§ 6. Freeholds are divided into *estates of inheritance* and *estates not of inheritance*. These again are subdivided, as will be seen hereafter.<sup>2</sup>

§ 7. The highest estate in lands known to the American law is a *fee simple*. A fee simple is a *pure inheritance* or *absolute ownership*, clear of any qualification or condition; or "a time in the land without end;" and upon the death of the proprietor gives a right of succession to all his heirs. (b) This application of the word *fee*, to express the quantity of interest in land, and not the tenure by which it is held, is as old as Littleton and Plowden, and, although questioned by some later commentators, has been on the whole successfully vindicated.<sup>3</sup>

§ 8. The learned author of "A Digest of the laws of England respecting real property" prefixed, to the *second edition* of his valuable book, "a preliminary dissertation on Tenures;" rightly treating this portion of his labors as rather an introduction to the work than a component portion of the work itself. In entering upon a view of the *American* law of Real Property, it

<sup>1</sup> 4 Kent, 23-4. See 1 N. Y. Rev. Sts. 722.

<sup>2</sup> Burton R. P. s. 17.

<sup>3</sup> 2 Bl. Com. 81; Lit. s. 1 & n. 1; Plow. 555; Wisc. Rev. Sts. 818; Termes de La Ley, "Fee."

(a) A tenant for his own life, or for the life of another, is a freeholder, and may levy a fine. *Roseboom v. Van Vechten*, 5 Denio, 414.

A person in the adverse, though wrongful possession of land, holding as owner, has a tortious estate, and is a freeholder *de facto*. Such tortious estate authorizes the levying of a fine, which, after five years' non-claim, would bar the rights of the remainder-men and strangers. *Ib.*

Where a widow, seized of land *durante viduitate*, the remainder being in her children, conveyed in fee, with full cove-

nants, to one who entered and held the land, claiming to be owner in fee, and the defendant, having entered and held as owner under mesne conveyances from the grantee of the widow, levied a fine with proclamations while the New York statute of fines was in force; held, the fine was valid, and barred the remainders. *Ib.*

(b) This right of succession appertains immediately only to the owner himself. With reference to the heir, the ancient maxim is: "Nehil acquirit ex donatione facta antecessori, quia cum donatorio non est feoffatus." Brac. lib. 2, ch. 6, fol. 17 a.

can serve no practical purpose to go into all the intricacies of the Feudal Law. The early settlers of this country left that law behind them;(a) or, if any relic of it survived till the revolution, all was then swept away. The feudal law was a *political* system, which never made any part of American institutions. The policy and government of some States, indeed, approached nearer to it than that of others. New Hampshire, New York, Virginia, the Carolinas(b) and Georgia, administered by royal commissions; and Pennsylvania, Maryland and Delaware, by proprietary patent—were less decidedly *anti-feudal*, than Massachusetts, Rhode Island and Connecticut, with their free and well-defined corporate charters. Still the *feudal system*, with all its cumbrous machinery, such as it was when abolished in England by St. 12 Cha. 2, c. 24, was never transferred to the United States in practice, and in some instances, as in Massachusetts by a colonial act of 1641, was expressly abrogated; and it has been truly said, that every real vestige of *tenure* is annihilated.<sup>1</sup>(c)

<sup>1</sup> 4 Kent, 24; Jurist, No. 31, page 97.

(a) "Our New England ancestors left behind them the whole feudal system of the other continent." Webster, Speech in Convention, Speeches, 205. See Morgan v. King, 30 Barb. 9; Lorman v. Benson, 8 Mich. 18. 1 Spence's Equ. Juris. 93, is spoken of as "containing by far the most recondite and satisfactory account of the early history of the laws of England." Williams on R. P. 34, n 2.

(b) In North Carolina, before the Revolution, statutes were enacted "by his Excellency the Palatine, and the rest of the true and absolute Lords Proprietors of the Province of Carolina, by and with the advice and consent of the rest of the members of the general assembly."

(c) Chancellor Kent gives the following clear and precise accounts of *feuds*: "These grants, which were first called *benefices*, were, in their origin, for life, or perhaps only for a term of years. The vassal had a right to use the land and take the profits, and he was bound to render in return such feudal duties and services as belonged to a military tenure. The property of the soil remained in the lord from whom the grant was received. The right to the soil and to the profits

of the soil, were regarded as separate and distinct rights. The distinction continued when feuds became hereditary. The king, or lord, had the *dominium directum*, and the vassal, or feudatory, the *dominium utile*; and there was a strong analogy between lands held by feudal tenure, and lands held in trust; for the trustee has the technical legal title, but the *cestui que trust* reaps the profits. The leading principle of feudal tenures, in the original and genuine character of feuds, was the condition of rendering military service. Prior to the introduction of the feudal system, lands were *allodial*, and held in free and absolute ownership, in like manner as personal property was held. Allodial land was not suddenly, but very gradually supplanted by the law of tenure; and some centuries elapsed between the first rise of these feudal grants and their general establishment." Commentaries, vol. 8, pp. 494-5. He goes on to remark, that in England, from the earliest periods, lands were held by feudal tenure alone, although this species of title was first fully established by the Norman conquest. Tenures were either by *knight service*.

§ 9. In England, the king—himself not a tenant<sup>1</sup>—is held to be the only original source of title to real estate. *Theoretically*, a similar principle has been adopted in this country; to wit, that individual property in lands can be deduced only from the crown,

<sup>1</sup> “Because he hath no superior but God Almighty.” Co. Lit. 1 b.

consisting of *military* services, or by *socage*, in which the services were generally *predial* or *pacific*. The former class, though held the more honorable, were subject to divers burdens and exactions of a very oppressive character; that of *aids*, or pecuniary payments, whenever the lord married his daughter, made his son a knight, or was himself taken prisoner; *reliefs*, paid by an heir of the tenant, upon succeeding to the inheritance; *wardship* and *marriage*, the guardianship and disposition in marriage of an infant heir; *fine*, upon any alienation of the land; and *escheat*, or a reverting of the land to the lord for the crime, or upon failure of heirs, of the tenant. 3 Kent, 501-8.

*Socage* tenure denotes lands held by a fixed and determinate service. It is of feudal extraction, and retains some of the leading properties of feuds. Ib. 509. It was the tenure prescribed in all the early colonial charters or patents in this country, under the terms, “according to the free tenure of lands of East Greenwich, in the county of Kent, in England, and not *in capite* or by knight’s service.” Ib. 511, n.; 1 Story on the Constitution.

Upon this subject Chancellor Kent further remarks:—“The only feudal fictions and services which can be presumed to be retained in any part of the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due. The act of New York, in 1787, provided that the socage lands were not to be deemed discharged of “any rents certain, or other services incident or belonging to tenure in common socage due to the people of this State, or any mean lord, or other person, or the fealty or distresses incident thereunto.” The Revised Statutes also provide, that “the abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may be created or reserved.” The lord paramount of all socage land, was none other than the

people of the State, and to them, and them only, the duty of fealty was to be rendered; and the quit-rents which were due to the king on all colonial grants, and to which the people succeeded at the Revolution, have been gradually diminished by commutation, under various acts of the Legislature, and are now nearly, if not entirely, extinguished.” 8 Kent, 509-10.

“The continental jurists frequently considered *homage* and *fealty* as synonymous; but this was not so in the English law, and the incident of homage was expressly abolished in New York by the act of 1787, while the incident of fealty was expressly retained.” Ib. 510. “This statute saved the services incident to tenure in common socage, and which it presumed might be due, not only to the people of the State, but to any mean lord or private person, and it saved the fealty and distresses incident thereunto. But this doctrine of the feudal fealty was never practically applied, nor assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the State; and then it resolved itself into the oath of allegiance, which every citizen, on a proper occasion, may be required to take.” Ib. 511-12.

In New York, the people are the owners of all the lands within the State, which had not, prior to, or have not since, the Revolution, been granted to others; and in their right of sovereignty they are deemed to possess the original and ultimate property in all the lands of the State. *People v. Livingston*, 8 Barb. 253; ——— *v. Van Rensselaer*, Ib. 189.

Being the source of title, the people are presumed to be the owners of land not granted by them, until the contrary appears. And in an action to recover the possession of premises, brought in their name, it is sufficient, in the first instance, to entitle them to recover, to show that such premises are vacant, uninclosed and unoccupied. Ib.

By the American Revolution the people succeeded, as owners, to all the lands

the ante-revolutionary, United States or State Governments.<sup>1</sup> (a) By the law of nations, the discovery of a new continent gave to the discovering nation an exclusive right to acquire the soil from the native inhabitants; and individual citizens, no less than foreign governments, were precluded from purchasing it, except through the intervention of the public authority. Thus, in New York, it was held, that the court would not notice claims to lands within the State, under grants from the French Government in Canada before the treaty between Great Britain and France in 1763; such claims being at most merely equitable, and a foundation for application to the Government. It was subsequently decided, that such French grants were mere nullities, affording no legal evidence of title; that any possession under them was wholly unavailing, being not adverse to any private right, but rather a controversy between the two governments, and there-

<sup>1</sup> 8 Kent, 807-8.

within the limits of the State, which had not prior thereto been legally granted, held or possessed by persons or corporations, or in whom the title had not been legally vested. *Ib.*

The absolute property, of all kinds, and all right and title to the same, which, on the 9th of July, 1776, vested in, or belonged to, the crown of Great Britain, became from that date forever vested in the people of the State, in their sovereign capacity. But with respect to lands which, prior to October, 1775, had been legally granted to individuals by the crown, or to which the title had been legally acquired by individuals in any other way, neither the Revolution, nor the change of the form of government, nor the declaration of the sovereignty of the people, worked any change or forfeiture in the ownership of such property. *Ib.*

In Massachusetts, Shaw, C. J., says, (*Com. v. Alger*, 7 Cush. 66,) "it is not necessary to trace the powers of the colonial government further. They were then regarded, and have ever since been acknowledged to be ample and sufficient to grant and establish titles to land, and to all territorial rights and privileges. To the grants and acts of the government, all titles to real property in Massachusetts, with their incidents and

qualifications, are to be traced as their source."

(a) The common law of England, as changed and modified by our statutes, is part and parcel of the law of Alabama, so far as applicable to our institutions and government. *Barlow v. Lambert*, 28 Ala. 704.

The common law is the law of Iowa. *O'Ferrall v. Simplot*, 4 Iowa, 381.

The ordinances of 1787, for the government of the northwest territory, made the common law the law of that country, and that was extended over Wisconsin, and then the laws of Wisconsin over Iowa; and, although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected. *Ib.*

The sixth section of the act of July 30, 1840, may be considered as having prescribed the event of the union of the crown of England with that of Scotland, as the period at which the English statutes cease operating upon American law in Iowa. *Ib.*

It seems, the common law will not be presumed to exist in other States, without statute modifications. *Blystone v. Burgett*, 10 Ind. 28.

It is said, in a Republic, a title to land derived from government *springs from the law*. *M'Connell v. Wilcox*, 1 Scam. 344.



fore did not avoid the effect of a grant from the provincial government after the conquest of Canada. A question was long made in the same State, whether the constitutional prohibition of purchases from the Indians was applicable to purchases from individuals, or only those from the nations or governments. It was finally held to extend to the former—being introduced for the benefit and protection of the Indians as well as the good of the State, and therefore entitled to a benign and liberal interpretation.<sup>1</sup> (a)

<sup>1</sup> Jackson v. Ingraham, 4 John. 163; — v. Waters, 12. 865; Goodell v. Jackson, 20, 698; acc. De Armas v. Mayor, &c. 5 Mill. (Louis.) 132; Baltimore v. M'Kim, 3 Bland, 455. But see Mitchell v. U. S. 9 Pet. 748, 756, 757, that purchases made at Indian treaties, under sanction of the U. S., pass a title without any patent. See further Brush v. Ware, 15 Pet. 98; Fletcher v. Peck, 6 Cranch, 87; Johnson v. M'Intosh, 8 Wheat. 543; Cherokee, &c. v. Georgia, 5 Pet. 1; State v. Foreman, 8 Yerg. 256; Holland v. Pack, Peck, 151; Blair v. Pathkiller, 2 Yerg. 407; Clark v. Smith,

18 Pet. 195. In Tennessee, State grants of land, to which the Cherokee title has not been extinguished, are adjudged void. Gillespie v. Cunningham, 2 Humph. 19. See Kennedy v. M'Cartney, 4 Port. 141; Harris v. McKissack, 34 Miss. 464; Doe v. Wilson, 23 How. U. S. 457; Rose v. Griffin, 33 Ala. 717; Wilson v. Wall, 34 Ala. 288; Harris v. Doe, 8 Ind. 494; Haight v. Keokuk, 4 Iowa, 199. In reference to the connection of the United States government with Mexico and California; see People v. Folsom, 5 Cal. 373; 20 How. U. S. 59; Leese v. Clarke, 3 Cal. 17; Clarkson v. Hawks, Ib. 47.

(a) "In the colonies, both of Massachusetts and New Plymouth, early laws were passed, prohibiting individuals from purchasing lands of the Indians; sometimes declaring such conveyances void. and sometimes providing that they should inure to the use of the government." Per Shaw, Ch. J., Clark v. Williams, 19 Pick. 500; Brown v. Wenham, 10 Met. 495. See Martin v. Waddell, 16 Pet. 367; Conn. Sts. 1850, 37; Kellogg v. Smith, 7 Cush. 375; Stephens v. Westwood, 20 Ala. 275.

The title of the native Indians to their lands is an absolute ownership; and the right of pre-emption of lands in the western part of the State of New York, ceded to Massachusetts by the convention of 1786, was simply a right to purchase the lands from the Indians when they chose to sell them; therefore the grantee of the pre-emptive right cannot maintain trover for saw logs cut on such lands by the Indians and sold to the defendants. Fellows v. Lee, 5 Denio, 628.

The title to the lands of Indian reservations, in New York, is in the State or its grantees; the use and possession alone belongs to the Indians, until they volun-

tarily relinquish it. Strong v. Waterman, 11 Paige, 607.

Lands not under Indian government, but held by individual Indians as tenants in common are subject to the jurisdiction of the State or territory in which they lie. (Per Olney, J.) Telford v. Barney, 1 Iowa, 575.

The laws and customs of the Choctaws were not abrogated, as to members of the tribe, by the extension of the jurisdiction of the State of Alabama over their territory; nor would be, except by positive enactment. Wall v. Williamson, 8 Ala. 48.

The term *reservation*, in an Indian treaty, is equivalent to a grant. Dewey v. Campan, 4 Mich. 565.

The first article of the treaty of 1814, with the Creek Indians, confers upon the chiefs and warriors provided for a qualified inheritable estate, which is determined by the sale of the reservee, the cesser of occupation, and his removal from the State; and, immediately upon such abandonment of possession, the reservation becomes a part of the public domain, without any positive assertion of right upon the part of the U. S. Crommelin v. Minter, 9 Ala. 594.

§ 10. In Delaware, a statute declares the title to lands in that State to be founded upon the cession made by the treaty of peace to the citizens of the United States, by virtue of which the soil of the State became the property of its citizens; and proceeds to declare invalid all grants by former proprietaries, but at the same time confirms them "discharged from all rents, fines, and services."<sup>1</sup>

§ 11. It is remarked by a late writer: "Though there are some opinions that feudal tenures fell with the Revolution, yet all agree that they existed before, and the better opinion appears to be that they still exist."<sup>2</sup> But although American titles to real estate are *originally derived* from the government, yet, after they have been acquired, the tenant in fee is, to all intents and purposes, *absolute owner*. Principles undoubtedly remain in American law which are of purely feudal origin, and probably would not originally have made a part of any other than the feudal system. The claim has been set up that in Ohio, and the other States formed out of the northwestern territory, by reason of the great ordinance of 1787, which constitutes the groundwork of their law, and the absence of any express adoption or immemorial use of English principles; not one doctrine remains in force that can be deduced from *tenure*, but real estate is owned by an absolute and *allodial* (a) title.<sup>3</sup> It may well be doubted

<sup>1</sup> Del. Rev. L. 545; acc. 16 Pet. 367.

<sup>2</sup> Jurist, January, 1834, 94.

<sup>3</sup> 2 Sharsw. Bl. Com. 77, L.

Though the title to a reservation under that article be vested in the United States by the voluntary abandonment of the reserve, it is not subject to entry under the pre-emption laws of Congress. 9 Ala. 594.

Such article does not invest the chiefs, warriors or other reservees, with an estate alienable at their pleasure. James v. Scott, 9 Ala. 579.

A person having possession of a tract of land, on which an Indian, the head of a family, was located under the treaty with the Creek Indians, may have an interest that may be levied on and sold, although five years have elapsed since the date of the treaty, and no patent has issued to any one, and the president has not approved a sale of the land

by the reservee. Rains v. Ware, 10 Ala. 623.

In the absence of proof that a savage tribe of Indians have laws, or customs having the force of law, regulating the descent of property, the presumption arises that the property of a deceased person would belong to the first occupant. Brashear v. Williams, 10 Ala. 630.

After the extension of the laws of the State over a tribe, property in the possession of Indians is *prima facie* liable to the payment of their debts. Ib.

(a) The term applied in the English law to such estates of the subject as are not holden of any superior. 2 Bl. Com. 39, 47, 81; Co. Lit. 1 b; see 3 Kent, 497, n.



whether this is a distinguishing peculiarity of the Northwestern States. In New York,<sup>1</sup> the legislature have formally abolished feudal tenures, or more properly disclaimed their existence, and declared all lands to be *allodial*; and this principle has been incorporated in the Constitution.(a) So the statute law of Connecticut,<sup>2</sup> after reciting, that whereas, by the establishment of the independence of the United States, the citizens of this State became vested with an *allodial* title to their lands, provides that every proprietor of lands in fee simple has an *absolute and direct property and dominion* therein, and that patents or grants from the general assembly of the colony, according to the charter of Cha. II, are effectual in passing an estate to the purchasers and their heirs forever. So in Maryland, Pennsylvania, Michigan and Wisconsin,<sup>3</sup> lands are declared to be holden by an *allodial* title.(b) In South Carolina the statute of Cha. II, establishing the tenure of *free and common socage*, was early adopted by statute with the great body of the common law.<sup>4</sup>

§ 12. On the whole it may be safely said, that, with regard to the whole United States alike, the feudal system, *as a law of tenures*, is abolished; and the remark of Chancellor Kent<sup>5</sup> is strictly true, that an estate in free and pure *allodium*, and an estate in fee simple absolute, both mean the most ample and perfect interest which can be owned in land.(c) We need not

<sup>1</sup> 1 Rev. St, 718; Const. 1846, art. 1, secs. 12, 18.

<sup>2</sup> Rev. L. 848.

<sup>3</sup> Sarah, &c. 5 Rawle, 112-8; Matthews

v. Ward, 10 Gill & J. 443; Mich. L. 393; Wisc. Rev. Sts. 818.

<sup>4</sup> 1 Brev. Dig. 136.

<sup>5</sup> 4 Com. 8; Cornell v. Lamb, 2 Cow. 652.

(a) By the Revised Statutes every citizen of the United States may hold lands in the State, and take them by descent, devise or purchase, and every person capable of holding lands, except idiots, persons of unsound mind, and infants, seized of or entitled to any interest in lands, may alien it, according to law.

(b) The charter to Wm. Penn was in free and common socage, with power to aliene, &c., reserving services, rents, &c., to him, not to the king. Hence the statute *quia emptores* was never in force in Pennsylvania. Ingersoll v. Sergeant, 1 Whart. 348.

"Even as to the lands held by the

proprietaries themselves, they held them as other citizens held, under the commonwealth, and that by a title purely allodial." Per Woodward, J. Wallace v. Harmstad, 44 Penn. 500, 501.

In Maryland, the Lord Proprietor held in *free and common socage*, with the incident of feudal services. And his grantees, before the revolution, held in like manner; but by that event both tenure and services were abolished, and the title became *allodial*. 10 Gill & J. 443. Quit rents, due any subject of a foreign prince, are abolished. Md. L. 158.

(c) "When the early settlers of Massachusetts, holding their lands under

spend time to show that there is nothing *feudal* in the principle, by which lands derived by patent from the government may be forfeited for non-payment of taxes;<sup>1</sup> nor is there much more of the feudal character, or of limitation to absolute ownership, in the doctrine of *escheat*, by which, upon failure of heirs, the land of a tenant in fee simple passes to the State or *the people*. With us escheats take effect, not upon principles of tenure, but by force of our statutes, to avoid the uncertainty and confusion inseparable from the recognition of a title, founded in priority of occupancy.<sup>2(a)</sup> Moreover, inasmuch as lands and goods, upon failure of heirs, follow the same destination, if escheat is an infallible symptom of *feudality*, we must admit that every merchant holds his stock in trade by a feudal tenure.

§ 13. The absolute ownership of a tenant in fee simple is indeed subject to one other qualification, which may, in this connection, be briefly noticed. This, however, is not an existing paramount *title* in the government, but a mere *power*, to be exercised on

<sup>1</sup> *Clay v. White*, 1 Mun. 170.

<sup>2</sup> *Sarah Desilver*, 5 Rawle, 112-3; 10 Gill & J. 448.

the freest and most liberal English tenure, that of tenants in fee simple in free and common socage, were making provision for granting and taking titles to real estate for themselves and their posterity, and when a certain valuable right and interest was annexed to and made part of such grants of estate by the government, competent to impress such character upon it; they understood, both those who made and those who proceeded to take titles and settle the country under such grants, that the grantees acquired a legal right and vested interest in the soil, and not a mere permissive indulgence or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it." Per Shaw, C. J. *Com. v. Alger*, 7 Cush. 71.

(a) In the foregoing remarks, I would by no means be understood to undervalue the importance of studying the feudal law (so earnestly contended for by the learned author of "*A Course of Legal Study*"), as *matter of history*, or as furnishing an *explanation* of some principles now in force. Let it be deeply inquired into, like the *History of England*,

or the *Civil Law*, by the ingenuous and philosophical student. I have merely wished to explain why it is omitted as a constituent portion of *American Law*. The observations already made upon the subject may properly be closed by the following forcible remarks of Chancellor Kent, showing conclusively that the American student is not to neglect the study of the feudal law. "It is a singular fact—a sort of anomaly in the history of jurisprudence—that the curious inventions, and subtle, profound, but solid distinctions, which guarded and cherished the rights and remedies attached to real property, in the feudal ages, should have been transported, and should for so long a time remain rooted in soils that never felt the fabric of the feudal system; whilst, on the other hand, the English parliamentary commissioners, in their report, proposed, and Parliament executed, a sweeping abolition of the whole formidable catalogue of writs of right, writs of entry, writs of assize, and all the other writs in real actions, with the single exception of writs of dower, and *quare impedit*." 4 Kent, 70-1, n.

the happening of a future contingency. We refer to the power on the part of the government, common to the United States and all other civilized nations, of taking private property for public purposes, subject to the obligation expressly imposed by the constitution of every State, of paying a fair compensation therefor. This right is termed the right of *eminent domain*. It is exercised in a variety of instances, but for the most part in the taking of private lands for highways, turnpikes, canals and railroads. The subject will be noticed in a future portion of this work. "The state is lord paramount as to no man's land. When any of it is wanted for public purposes, the state, in virtue of her political sovereignty, takes it, but she compels herself, or those who claim under her, to make full compensation to the owner."<sup>1</sup>

§ 14. In view of the foregoing considerations, it may safely be laid down, that one who holds lands in fee simple is the absolute owner. The methods of acquiring this title will be treated of hereafter.

§ 15. An owner in fee simple, as well as of every other freehold estate, is said to be *seised*; while the owner of an estate less than freehold has *possession* merely, and not *seisin*. Anciently, the possession of a feud was called *seisin*, denoting the completion of the investiture by which the tenant was admitted to the feud. Upon the introduction of the feudal law into England, this word was only applied to the possession of an estate of *freehold*; in contra-distinction to that precarious kind of possession by which tenants in *villinage* held their lands; which was considered to be the possession of their lords, in whom the freehold continued.(a)

<sup>1</sup> Per Woodward, J. *Wallace v. Harmstad*, 44 Penn. 501.

(a) An executory contract of purchase, even with possession delivered, does not constitute the *complete investiture*. *Pritts v. Ritchey*, 5 Cas. 71.

In Pennsylvania, a complete equitable title is treated as equivalent to a legal *seisin*, but does not apply where there has been a failure in the stipulations necessary to complete the title. *Pritts v. Ritchey*, 5 Cas. 71.

A tenant *in fee* cannot maintain an action for the *freehold*, as distinct therefrom. So with a tenant in tail. *Webster v. Gilman*, 1 Story, R. 499. See *Howe v. Wildes*, 84 Maine, 566. If a tenant for life die, pending a suit for the land, the court may render judgment; and, if heirs succeed to the title, may issue execution in their favor. *Wilson v. Hall*, 13 Ired. 489.

§ 16. Seisin is of two kinds—seisin *in deed*, or, as Lord Coke terms it, “a natural seisin,” and seisin *in law*, or “a civil seisin.” The former is *actual possession* of a freehold; the latter a *legal right* to such possession. Formerly seisin in deed could be acquired only by an actual occupation. In case of a purchase or conveyance, the ceremony of *livery of seisin* was required to vest a title; and, in case of descent, the heir was not seised in deed, until he had by himself or another actually entered on the land.

§ 17. How far these principles are in force in the United States, will be more particularly considered hereafter. (a) It is sufficient to say here, that for most purposes an heir is considered as actually seised, without entry, and that a conveyance by deed, executed, acknowledged and recorded, or, in general, by a patent under the seal of the Commonwealth, if there be no adverse possession, also gives a seisin in deed, without entry.<sup>1</sup> (b) The recording of a deed is the legal equivalent for livery of seisin.<sup>2</sup> And a deed duly acknowledged and recorded is *prima facie* evidence of seisin in the grantor and in the grantee. In Ohio, Massachusetts, and Connecticut (and the law is the same, it seems, in Pennsylvania), it is said, seisin means nothing more

<sup>1</sup> 5 Cas. 71; Pidge v. Tyler, 4 Mass. 546; Knox v. Jenks, 7, 494; Goodwin v. Hubbard, 15. 214; Clay v. White, 1 Mun. 170.

(a) See *Deed, Descent, Livery of Seisin*.

(b) So, in Massachusetts, a devisee of vacant land may maintain a writ of entry therefor, without an actual entry. Green v. Chelsea, 24 Pick. 71.

So the levy of an execution upon land of the debtor gives the creditor actual seisin. Munroe v. Luke, 1 Met. 462; Blood v. Wood, Ib. 534. But if an execution against A is levied on land of B, B is not so far disseised that he cannot bring trespass, without re-entry, against the judgment creditor or those acting under him. Blood v. Wood, 1 Met. 528.

And a mixed possession of land, under a deed from one without title, does not convey a seisin, as against one claiming by virtue of a like possession. Magoun v. Lapham, 21 Pick. 185.

If the land of a debtor was attached upon the original writ, by the levy of his

<sup>2</sup> Barr v. Galloway, 1 McLean, 476; Proprietors, &c. v. Permit, 8 N. H. 512; 4 Mass. 546; Ward v. Fuller, 15 Pick. 185.

execution, the creditor gains the same seisin as if the debtor had given him a deed at the time of attachment. Bryant v. Tucker, 1 Appl. 888. Nason v. Grant, 8 Shepl 160. By such levy, the debtor becomes a tenant at will; and, if he resists the creditor's entry, may be treated as a disseisor at his election. Ib. To vest the title to real estate in the creditor who levies an execution upon it, there must be a delivery of seisin to him, and, if he refuse to receive seisin, the previous proceedings in making the levy will not operate to satisfy the execution. Jackson v. Woodman, 29 Maine, 266.

The delivery of seisin must be shown by the return of the officer, and the declarations of the creditor are not evidence upon the question of title. Ib.

than *ownership*. It is further remarked, that there is no distinction between seisin in law and seisin in deed, and, in Ohio, that entry probably is not necessary to complete the title of *an heir*.<sup>1(a)</sup> But where one gave a deed of wild land, having no title, although the deed was acknowledged and recorded, and the grantee entered, but exercised no open and exclusive ownership by fencing or otherwise; it was held, that these facts did not give an adverse seisin against the will of the owner, the registration not being constructive notice to him.<sup>2</sup> In Kentucky, a patent of lands by the Commonwealth gives only a right of entry, not actual seisin.<sup>3</sup>

§ 17 a. Entry, to give seisin, may be made by the owner, or by his agent. So an occupation for twenty years by an agent gives a good title. The entry must be made, not by consent, invitation or hospitality of the occupant, as, for instance, to remove the goods of the party entering; but with the intent to gain seisin—*animo clamandi*—and accompanied by some act or declaration showing such intent, and challenging the right of the occupant. The intent is a question for the jury. If the entry is such as would be a trespass in a mere stranger, it is effectual; otherwise, not. If there be no one residing on the land, it is not necessary to seek the adverse occupant and give notice of the claim under which entry is made. If made by an agent, it is the usual and perhaps most prudent course, to give him a power of attorney under seal. But a general agency is sufficient authority; and if the principal bring a suit founded on the entry, this ratification is sufficient, without previous authority.<sup>4</sup> And where an agent was empowered by the owners

<sup>1</sup> Walk. Intro. 824, 830; *Bush v. Bradley*, 4 Day, 305-6; *Cook v. Hammond*, 4 Mass. 489.

<sup>2</sup> *Bates v. Norcross*, 14 Pick. 224.

<sup>3</sup> *Speed v. Buford*, 8 Bibb, 57. See *Rogers v. Moore*, 9 B. Mon. 401; *Hinman v. Cevanway*, 9 Barr, 40; *Steadman v. Hilliard*, 3 Rich. 101.

<sup>4</sup> *Richards v. Folsom*, 2 Fairf. 70;

*Stearns*, 45; Co. Lit. 245, b; Plow. 92-3. In England, an authority to deliver seisin must be by deed. Co. Lit. 52 a; See *Altemas v. Campbell*, 9 Watts, 28; *Holly v. Brown*, 14 Conn. 255; *Campbell v. Wallace*, 12 N. H. 162; *Cowan v. Wheeler*, 31 Maine 439; *Goodwin v. Sawyer*, 33 Maine, 541.

(a) Seisin is *possession*, under an express or implied claim of freehold. *Towle v. Ayer*, 8 N. H. 57; *Straw v. Jones* 9, 400. When used in statutes, it may have

an enlarged signification, if necessary to effect the intent. *Matthews v. Ward*, 10 Gill & J. 443.

of certain unoccupied land to "look up the land for them," and entered to survey and take possession, without making any declaration of his intent; held, such declaration was unnecessary.<sup>1</sup>

§ 18. If one disseised, having a right of entry, enter and give a deed on the land, the deed is effectual to pass a title.<sup>2</sup> So if one disseised, having the right of entry, enters peaceably, the land being vacant, and takes possession under his title; and the disseisor or others afterwards break and enter the premises: the disseisee may bring an action of trespass against them.<sup>3</sup>

§ 19 a. Where one enters on land claiming no title; he gains no seisin but by ousting the occupant, and not beyond his actual possession. But if there is a claim and color of title, especially if clearly defined in extent, entry on a part may give seisin of all to which the title extends, although the land be not enclosed, provided there is no adverse possession.<sup>4(a)</sup>

§ 19. b. The general principle applies, only where the quantity of the land and the attendant circumstances reasonably induce the belief, that the land was bought and entered upon for the ordinary purposes of cultivation and use; but not where a person takes and maintains possession of a few acres in an uncultivated township, for the mere purpose of gaining a title to the township by possession, against the lawful owners.<sup>5</sup>

<sup>1</sup> Tolman v. Emerson, 4 Pick. 160.

<sup>2</sup> Oakes v. Marcy, 10 Pick. 195.

<sup>3</sup> Tyler v. Smith, 8 Met. 599.

<sup>4</sup> Ellicott v. Pearl, 10 Pet. 414; 1 McL. 214; Proprietors, &c. v. Springer, 4 Mass. 418; Green v. Litch, 8 Cranch, 229; Bank, &c. v. Smyers, 2 Strobb. 24; Barr v. Gratz, 4 Wheat. 213; Shrieve v. Summers, 1 Dana, 239; Farrar v. Eastman, 1 Fairf. 191; Thompson v. Milford 7 Watts, 442; Johnson v. Farlow, 13 Ired. 84; Heiser v. Riehle, 7 Watts, 85; Crowell v. Bebee, 10 Verm. 33; Hubbard v. Austin, 11. 129; Griffith v. Dicken, 2 B. Mon. 24; Shackleford v. Smith, 5

Dana, 239; Watkins v. Holman, 16 Pet. 25; Webb v. Sturtevant, 1 Scam. 188; Blackburn v. Baker, 7 Por. 284; Stearns v. Palmer, 10 Met. 82; Osborne v. Ballew, 12 Ired. 373; Moor v. Campbell, 15 N. H. 208; Waggoner v. Hastings, 5 Barr, 800; Kite v. Brown, Ib. 291; Bailey v. Carleton, 12 N. H. 9; Doe v. McCleary, 2 Cart. 405; Noyes v. Dyer, 25 Maine, 468; Northrop v. Wright, 7 Hill 476; Putnam v. Fisher, 34 Maine, 172; Altemus v. Long, 4 Barr, 254; Saxton v. Hunt, 1 Spencer, 487; Virg. Code, 560; Misso. Sts. 1847, 55.

<sup>5</sup> Chandler v. Spear, 22 Verm. 388.

(a) Lord Coke seems to limit the latter principle to the case, where an entry is made merely to complete a seisin in law, like that of an heir; and to regard it as inapplicable where the entry is adverse, as by a disseisee, or a feoffor for

condition broken. But he elsewhere explains the distinction between a *bare title*, such as a condition, involving no interest in, or right of action for the land, and the claim of a disseisee. Co. Lit. 15 a, 252 b.



§ 19 c. Adverse possession, under a claim of right, extends to so much of the land within another's survey, as is within known bounds, up to which a claim has been made, with such use as farmers make of their farms, by one residing on a part of the land claimed; although his house was not within the lines of the survey, and the land was not enclosed.<sup>1</sup>(a)

<sup>1</sup> *Fitch v. Mann*, 8 Barr, 508.

Where a rightful owner enters upon part of the land, this will be sufficient for the whole, although another person, having no color of title, enters upon the vacant portion. *Hubbard v. Austin*, 11 Verm. 129; See *Ralph v. Bayley*, Ib. 521. A statute of limitation gives title not only to such part of the land as is enclosed and cultivated, but to all which is advantageously used as a portion of the farm—as, for instance, woodland. *Lawrence v. Hunter*, 9 Watts, 64. So, to all the lands included in marked lines. *Bell v. Hartley*, 4 W. & S. 32. See *M'Call v. Coover*, Ib. 151; *M'Caffrey v. Fisher*, Ib. 181. Where two distinct grants or deeds lap, and neither party is in possession of the lapped portion, the law gives it to the owner of the better title. But, if one is in possession, he is the exclusive owner. *Williams v. Buchanan*, 1 Ired. 535. See *Smith v. Ingram*, 7, 175. In case of a demise of mines and minerals upon a long tract of waste, working under a part gives legal possession of the whole. *Taylor v. Parry*, 1 Man. & G. 604.

An entry upon a tract of land, under a survey bill or record, giving a definite and certain extent to the land, and the occupation of part of the land, without evidence to limit or restrict the possession, will give constructive possession of the whole tract surveyed. But this may be restricted and controlled by evidence of the acts and declarations of the occupant. *Brown v. Edson*, 22 Verm. 357. Where one enters upon wild lands, and marks out boundaries with the intention of taking possession, the possession embraces all within those boundaries. *Campbell v. Thomas*, 9 B. Mon. 82.

A tenant put in possession by the grantee, without definite boundaries, will be held as in possession of the whole tract. *Ellicott v. Pearl*, 1 McL. 214.

The deed, contract or plat, under which possession is acquired, constitutes color of title, and defines or shows the

extent of the occupant's claim. *Gray v. Bates*, 8 Strobb. 498.

The rule, that one in actual possession of part of a tract will be deemed in possession of the whole, does not apply as against the real owner, who is also in possession of a part. To create an adverse possession as against such owner, there must be actual occupation. *Cottle v. Sydnor*, 10 Mis. 763.

(a) A party entered upon two tracts of wild land, cultivated a very small portion of them in the midst of the woods, and held them for seven years. Held, by his adverse possession, he gained a title to the whole of the tracts included in his fictitious grants. *Lenoir v. South*, 10 Ired. 237.

The owner of a large tract of land made a parol gift of it to his two sons, who, with him, during his life, for more than fifteen years, occupied the land. The father had made a will conformably to this gift, but afterwards made another one, not altering the devise to his sons. After his death, the sons bring a joint action for the whole land. Held, their adverse possession during the father's life included only the parts enclosed by them, there being no deed or plat giving a colorable title to the whole; and that their joining in suit did not strengthen their claim, they being mere co-trespassers. *Golson v. Hook*, 4 Strobb. 23.

Where a patentee settles a tenant upon the land included in his patent, without limiting his possession, he has a constructive possession of the whole. But where a stranger settles upon patented land without license from the patentee, an intention to occupy the whole may be inferred, but is not a presumption of law. *Wickliffe v. Eusor*, 9 B. Mon. 253.

A small improvement, made by a person on one of two quarter sections of land, which were distant from each other a half of a mile, is no authority for his setting up an adverse possession of the

§ 20. Entry upon land must *ensue* or correspond with the party's action for its recovery. Hence, one entry can never be sufficient, upon lands lying in different counties, or wrongfully taken by different disseisors, or let by one disseisor to different *tenants for life*; because in each of these cases there must be several actions.

§ 21. On the other hand, if the lands are in one county, let by one disseisor to several *tenants for years*, or taken by one disseisor at several times; one entry *in the name of the whole* may be sufficient, because one action would lie.

§ 22. So where one enters, without title, on a tract of land lying in two counties, in one of those counties, and keeps possession of the same, claiming to hold the whole tract; his possession extends only to the lines of the county in which the entry was made.<sup>1</sup> An analogous distinction is established in England as to livery of seisin. But it is said not to apply, where one manor extends into two counties. This however is doubted.<sup>2(a)</sup>

<sup>1</sup> Co. Lit. 252 b; *Roberts v. Long*, 12 B. Mon. 194.

<sup>2</sup> Lit. 61; Co. Lit. 50 a. n. 2.

other quarter section. though both were conveyed to him by the same deed. *Stephenson v. Doe*, 8 Blackf. 508.

An entry on a lot of land by the owner, to survey it and put up monuments of boundaries, gives him seisin, as against wrong-doers, of all within the boundaries, though including more than his lot. *Parker v. Brown*, 15 N. H. 176.

Where one person is seised, entry by another, claiming under a registered deed, upon a part thereof, does not constitute a disseisin of the whole by election, unless the latter continues in possession of the part entered upon. *Robinson v. Brown*, 32 Maine, 578.

Where one, having the elder title to land, enters under his deed, with intent to take possession to the boundaries of his deed, he is in possession to that extent, though another person be in possession under a junior title to the same land, but outside of the interference. *Grugher v. Wheeler*, 12 B. Mon. 183.

Where one goes into possession of land under a survey, and by mistake occupies beyond the limits of the survey, the possession beyond the limits of the sur-

vey is not adverse, and, being continued twenty years, will give him no right against the owner. *Hunter v. Chrisman*, 6 B. Mon. 463.

When land is enclosed by a river, fence or road, and a disseisor occupies it as near the boundary as is convenient, considering the nature and situation of the land, and intends to occupy the whole lot; this may be an occupation of the whole, though there is a narrow strip by such boundary not actually cultivated. *Allen v. Holton*, 20 Pick. 458. See *Barker v. Salmon*, 2 Met. 32.

The tenant fenced in part of the demandant's land, in order to protect a crop on his own, and cut a tree and some brushwood on this part, but without intending to claim or occupy, or exclude the demandant from it. Held, the demandant might elect to consider himself disseised. *Allen v. Holton*, 20 Pick. 458. See *Barker v. Salmon*, 2 Met. 32.

(a) Littleton places this rule upon the ground that the younger son claims by *the same title* with the elder; as heir to his father. It is abolished by St. 3 & 4 Wm. 4, c. 27, s. 13.



§ 23. Where an heir is deterred by bodily fear from entering upon the lands descended to him, it will be sufficient to go as near as he can and claim them; which act shall be repeated once in a year (called in the old law a year and a day), and is then called *continual claim*, and has the effect of actual entry.<sup>1</sup> If the land is in possession of a tenant for years, at the death of the ancestor, the heir becomes seised in deed, without entry or even receipt of rent. So also where the heir is an infant, and the land is in possession of his guardian.<sup>2</sup> If the land is in possession of a tenant for life, the heir becomes seised of the rent by receipt of an instalment; but whether of the land also, has been doubted.<sup>3</sup> Where, after the ancestor's death, a stranger enters upon the land, such entry is termed an *abatement*, and defeats the seisin in law of the heir. But the latter may regain seisin by entry, unless the abator have died seised, in which case the heir must in general resort to an action to recover possession.<sup>4</sup> In some cases, however, the entry of a party without title does not defeat the seisin of the heir, but on the contrary gives him a seisin in deed. This is where the entry may be supposed to be not adverse, but amicable, and made to prevent the entry of strangers. As where a mother, or, in England, a younger brother enters. And even the death of a party so entering will not prevent an entry by the heir.<sup>5</sup>(a) So, when

<sup>1</sup> 1 Cruise, 42; Stearns, 18. By St. 3 & 4 Will. 4, c. 27, such claim is ineffectual to preserve a title, without actual change of possession.

<sup>2</sup> Co. Lit. 15 a.

<sup>3</sup> Ib.

<sup>4</sup> 1 Cruise, 42.

<sup>5</sup> Lit. s. 396; Gilb. Ten. 28; Doe v. Keen, 7 T. R. 386. (See 3 Nev. & M. 331.) Burrows v. Holt, 20 Conn. 459.

(a) The owner of a farm died in 1778, leaving his widow and ten children in possession. The tenant, one of his sons, then seventeen years of age, carried on the farm, living there, with the co-heirs, until 1793, when the rest of the heirs went away. His sisters having married, he was left in possession of the farm, which he continued to manage until his death, in 1822. It did not appear that he ever made any claim of title to the whole farm. \* Held, he acquired no title by adverse possession. *Campbell v. Campbell*. 18 N. H. 483.

Where land is *set off* to two persons jointly, the possession of one, claiming

the whole, is not adverse to the other, within the statute of limitations. *Brooks v. Towle*, 14 N. H. 248. So an entry by one cotenant gives seisin to all in the whole lands, according to their respective titles. *Thomas v. Hatch*, 3 Sumn. 170. So if a disseisor, after five years' possession, give up to one tenant in common all the title of the latter to the land; the title of all the tenants revests in them. *Vaughan v. Bacon*, 8 Shepl. 455.

A judgment was recovered in the name and with the knowledge and consent of A, for the benefit of B; execution issued, and land was thereupon set off to A, possession received by B as his attorney,

land descends to several heirs, a part of whom enter thereupon, their entry is presumed to be according to their legal title, and enures to the benefit of all, so that all are seised, unless those who enter claim adversely and oust the others.<sup>1</sup>

§ 23 a. It may not be unimportant to notice the distinction between seisin *in law* and *by operation of law*; and between seisin *in deed*, and *by deed* or *by purchase*.(a) It has been seen that an heir, who claims by operation of law, is seised only *in law*, until actual entry. But there are other cases, hereafter to be more particularly noticed, where a party, coming to an estate by operation of law, is seised *in deed* without entry or any other formality. Thus a tenant by the curtesy, upon the death of the wife, becomes fully seised by mere operation of law. So in the case of dower, although the widow does not perfect her title until an actual assignment is made, yet, when made, her title relates back to the death of the husband; she holds, not by the assignment, but by law, and merely in continuation of the husband's estate.

§ 23 b. The reason of these rules is obvious. Although neither husband nor wife acquires a complete title till the death of the party from whom such title is derived; yet both acquire an *initiate* title before that event—the one upon marriage and birth of issue, the other by marriage alone. And the husband by his own possession, and the wife by her husband's possession, may be regarded as actually seised during the marriage.

§ 24. Intimately connected with the subject of seisin is that of *disseisin*; of which it has been remarked,<sup>2</sup> “there is scarcely a subject in the English law so obscure.” This observation of an English writer derives additional force from the various and

<sup>1</sup> Means v. Welles, 12 Met. 356.

<sup>2</sup> 1 Cruise, 43; Watson v. Gregg, 10

Watts, 289; Graffius v. Tottenham, 1 Watts & S. 488.

and the land was held and occupied by B. with the knowledge of A, for over 20 years. Held. B did not gain a title by disseisin, sufficiently to sustain a writ of entry. Peabody v. Tarbell, 2 Cush. 226.

Upon a somewhat similar principle, a party in possession of land, holding under another person, cannot render his

possession adverse, except by an open and notorious act. If he take a secret conveyance in fee of the land from one claiming to be owner, and keep it secret, the character of his possession is not changed. Sharpe v. Kelley, 5 Denio, 481.

(a) See 1 Steph. Comm. 367, n.

conflicting decisions upon the subject, to be found in the American cases. Disseisin is defined as a wrongful putting out of him that is seised of the freehold;<sup>1</sup> or it is, "where a man entereth into lands or tenements, where his entry is not *congeable* (i. e., by leave or permission) and ousteth him which hath the freehold."<sup>2</sup>

§ 25. To constitute disseisin, it is held that an entry must be *at the time under claim or color of title*; (a) otherwise it is a mere trespass. It must be such as to raise the presumption of a deed. If made under a deed, the character of the possession may be shown by the terms of the deed. If these are indefinite, they will not control the extent of actual occupancy. So entry by a party as purchaser under a judgment is a disseisin. *The intention guides the entry*, and fixes its character. Adverse possession must be *continued, uninterrupted, notorious, and exclusive*; and the burden of proof is on the party alleging it to be so. To make a continuity in successive persons, there must be privity of blood, contract or estate. As has been stated, disseisin may be proved by a conveyance, and this, though defective, and disproved by an offer of purchase, or any act or declaration implying recognition of another's title. Whether possession under an executory contract to purchase can be deemed adverse, is a point left

<sup>1</sup> Taylor v. Horde, 1 Burr, 110; a very leading case upon this subject, the prominent doctrine of which is, that, except in cases of actual forcible dispossession, it shall depend upon the *election* of the owner, whether an interference with his title shall constitute disseisin. Acc. Jewitt v. Ware, 8 Price, 535; Blowder v. Baugh, Cro. Car. 302; Goodright v. Forester, 1 Tann. 578; Doe v. Lynes, 8 B & C. 388; Bouham v. Badgley, 2 Gilm.

622; But see 2 Prest. on Abstr. 279; Prescott v. Nevers, 4 Mass. 326; Towle v. Ayer, 8 N. H. 57. It is doubted, whether every possession of the land of another is not *prima facie* adverse, until the contrary is proved. Conyers v. Kenan, 4 Geo. 308. There cannot be two seisins of the same land. Putnam, &c. v. Fisher, 84 Maine, 172.

<sup>2</sup> Lit. sec. 279.

(a) As under a grant, though void for irregularity, if the deed and entry are *bona fide*. Moody v. Fleming, 4 Geo. 115; Macklot v. Dubrenil, 9 Miss. 477; Noyes v. Dyer, 25 Maine, 468. But a deed void on its face has been held insufficient. Simpson v. Downing, 23 Wend, 316.

If a person enters into possession of land under one title, and afterwards purchases in an adverse claim, his subsequent possession will not be regarded as

adverse to his former title, but under both. So of those claiming under him. Pleak v. Chambers, 7 B. Mon. 565.

Where a party is in actual possession, and has a right to possession under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not be deemed adverse. Nichols v. Reynolds, 1 Angell, 30.

A sheriff's deed, without producing

somewhat doubtful.(a) If a lessee *pour autre vie* hold over, under the false representation that the *cestui que vie* is living; his possession is not adverse. But where the husband of a woman, tenant for life, held the land for twenty years from her decease; held, he thereby acquired a good adverse title. The general rule is, that, when seisin is once proved, it is presumed to continue till some adverse possession is shown, and *prima*

the judgment and execution under which the land was sold, is sufficient to show the character of the grantee who claims under it, and renders his possession adverse. *Riggs v. Dooley*, 7 B. Mon. 236.

And where the grantee in such deed went into possession, before he obtained the deed, under a purchase from two of five heirs; held, the statute of limitations began to run against the others from the time of notice of the adverse holding. *Ib.*

(a) Thus in Massachusetts it has been held, that, in case of an agreement to buy and sell, no payment made or deed given, and an entry by the purchaser, he is presumed to enter by consent, and holds as tenant at will. But if payment is made, and consent given for the purchaser to enter and hold the land as his own, but the deed is delayed, accidentally or for convenience, and with the agreement to give it without further consideration or condition, and possession taken; this is a disseisin. *Brown v. King*, 5 Met. 173. *Acc. Fosgate v. Herkimer, &c.*, 12 Barb. 352. And see *Sellers v. Hayes*, 17 Ala. 749; *Fain v. Garthright*, 5 Geo. 6. So, in South Carolina, he who goes into possession of land, under a contract to purchase, holds the land adversely to the claims of all other persons, except him from whom he bought; and his possessions, both before and after he receives title, may be coupled together, to make up a statutory title. *Bank, &c. v. Smyers*, 2 Strobb. 24. Continued possession under a license from the owner gives a title. *Pope v. Henry*, 24 Verm. 560.

On the other hand, if a vendor continue in possession after giving a deed, he is a tenant at will, unless there be an explicit disclaimer of the relation. If he deny the title and resist the claim of the vendee, the latter may at his election sue him as a disseisor. *Burhans v. Van Zandt*, 7 Barb. 91; *Carver v. Earl*, 1 Shepl. 216; See *Millay v. Millay*, 6 Ib.

387. Possession for over seven years, in North Carolina, will not enable such vendor to maintain a suit for the land, unless he show a subsequent colorable title, and occupation under it, which he is not estopped from doing. *Johnson v. Farlow*, 18 Ired. 84. Where one enters, claiming title under a parol gift, twenty years' possession gives him the absolute ownership. *Summer v. Stevens*, 6 Met. 387. So where an execution defendant remains in possession of the land sold, such possession is not necessarily permissive, nor is he estopped from setting it up as adverse; and if continued twenty years, it gives him a good title. *Chalfin v. Malone*, 9 B. Mon. 496.

If one enter upon land of tenants in common by license of one of them, and erect and occupy a building thereon, he is presumed to hold under them, till the contrary is proved. *Buckman v. Buckman*, 30 Maine, 494.

A corporation being in possession of land as tenants of the crown, a grant was made to the corporation by the colonial governor, after which none of the rents in the lease were paid, which before had been paid, but only the quit rents reserved in the grant; and these were finally discontinued, and long leases made by the corporation. Held, the corporation were in possession, not as tenants, but grantees, of the crown; and acquired a perfect and absolute title after a possession of one hundred and forty years. *Bogardus v. Trinity, &c.*, 4 Sandf. Ch. 638.

In 1829, land was leased for twenty-one years to the defendant. He applied to the lessor for leave to take in a piece of ground adjoining, but the lessor declined to permit it, stating that other persons, purchasers of adjoining houses, had a right of way over the ground. The defendant, notwithstanding, enclosed and for twenty years occupied it, without payment of rent or acknowledgment of title. Held, the piece of ground was

*facie* evidence of disseisin is not sufficient to change the burden of proof. So a possession originally adverse is presumed to continue so. A *tenant* cannot disseise his landlord, but at the election of the latter, unless he give notice, or make some change in his mode of occupation, which may put the landlord on his guard. His declaration to a stranger is no evidence of disseisin.<sup>1</sup>(a)

<sup>1</sup> Ripley v. Yale, 18 Verm. 220; Rung v. Shoneberger, 2 Watts, 23; Stillman v. White &c., W. & M. 538; Corwin v. Corwin, 9 Barb. 219; Fosgate v. Herkimer, &c., Ib. 287; Lane v. Gould, 10 Barb. 254; Mitchell v. Lite, 8 Yerg. 179; Ewing v. Burnett, 11 Pet. 41; Avery v. Baum, Wright, 576; Kinsell v. Daggett, 2 Fairf. 309; Jackson v. Johnson, 5 Cow. 74; Tubb v. Williams, 7 Humph. 867; Jones v. Chiles, 2 Dana, 31; Miller v. Lindsey, 1 McL. 83; Thomas v. Hatch, 8 Sumn. 170; Brower v. King, 5 Met.

173; Alden v. Gilmore, 1 Shepl. 178; Crane v. Marshall, 4 Ib. 27; Stearns v. Godfrey, Ib. 158; Dow v. Plummer, 5 Ib. 14; King v. Axbridge, 4 Nev. & M. 477; Doe v. Gregory, Ib. 308; South, &c. v. Blakeslee, 13 Conn. 227; Wickliffe v. Euson, 9 B. Mon. 253; Long v. Mast, 11 Penns. 189; School, &c. v. Benson, 31 Maine, 38; Story v. Saunders, 8 Humph. 668; Stansbury v. Taggart, 3 McL. 457; Peirson v. Doe, 2 Carter, 123; Clason v. Rankin, 1 Duer, 337; Fosgate v. Herkimer, &c. 12 Barb. 352.

no part of the demised premises for which rent was paid, and therefore an action by the lessor was barred by St. 3 & 4 Will. 4 c. 27. Palmer v. Eyre, 6 Eng. L. & Eq. 355.

Where adverse possession for thirty years is admitted, it makes no difference that the entry was first made through a mistake of boundaries. Melvin v. Proprietors, &c. 5 Met. 15; acc. Otis v. Moulton, 2 Appl. 205. But see Proprietors, &c. v. Day, 7 N. H. 457; Hale v. Glidden, 10, 397. So one may claim title by disseisin, though he has previously relied upon a deed which does not include the premises. Ib. And see Greenlaw v. Greenlaw, 1 Shepl. 182.

*Color of title* may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. Beverly v. Burke, 9 Geo. 440.

(a) Where one party protested against the acts of the other, during the possession of the latter, and consulted counsel in regard to them; held, the possession was not adverse. Stillman v. White, &c. 3 W. & M. 538. Where one enclosed with his own land, by mistake, land of an adjoining owner, claimed no title beyond the true line, and did not prevent the other from occupying to that line;

held, not a disseisin. Lincoln v. Edgcomb, 31 Maine, 345.

In Maine and Massachusetts (Mass. Rev. Sts. 610-11; Me. Ib. 610), every person in possession of land and claiming a freehold, or claiming less than a freehold, if he has turned or kept the owner out of possession, may be treated as a disseisor. Neither force nor fraud is necessary to constitute a disseisin. Small v. Proctor, 15 Mass. 495; 8 N. H. 57. But it has been held in New York, that a disseisin which will *cast a descent*, so as to *toll entry* (that is, preclude an entry, and require *an action* by the true owner against *an heir* of the disseisor), must be *a disseisin in fact*, expelling the true owner by force or some equivalent act; and in Pennsylvania, that adverse possession is not to be inferred, but possession is presumed to be in subordination to the legal title. The same doctrine is held in Kentucky. Smith v. Burtis, 6 John. 197; Rung v. Shoneberger, 2 Watts, 23; Robertson v. Robertson, 2 B. Mon. 238.

It has been held in Massachusetts, (Poignard v. Smith, 6 Pick. 172; Hapgood v. Burt, 4 Verm. 155; Alden v. Gilmore, 1 Shepl. 187; Ewing v. Burnett, 11 Pet. 41), that actual knowledge, on the part of the owner of land, of an adverse occupation, is not necessary to constitute disseisin. It is enough that there are acts in their nature public and notorious, such as fencing or building on the

§ 26. It is said, that the fencing(*a*) or enclosing of land has no peculiar efficacy in regard to seisin. It merely raises a presumption; and other acts, such as raising a crop, making improvements, or felling trees,*(b)* do the same. So the erection of a fence on wild land, by felling trees and lapping them together, or the *blazing* of trees, will not warrant a jury in presuming a grant, or that the owner of the land had notice thereof, nor does it constitute a disseisin. So cutting wood on woodland for use and sale, clearing land for cultivation, running lines,

land. So it has been held in the Supreme Court of the United States, that no acts of improvement are necessary to have this effect. where there has been an entry under claim and color of title, followed by a possession for twenty-one years, and where the land is so situated as not to admit of improvement.

In New York it is held, that an adverse possession of land, so as to vest the title, where there is no deed or written instrument, can only be made out by showing a real, substantial enclosure, an actual occupancy, which is definite, positive and notorious, or that the premises have been usually cultivated or improved; and such possession must be regularly continued and accompanied throughout by a claim of title for twenty years. *Lane v. Gould*, 10 Barb. 254. By the new *Code of Procedure* (pp. 88-4), in case of adverse possession, founded upon a writing or a judgment; *possession and occupation* mean, 1, that the land is usually cultivated or improved; 2, protected by a substantial enclosure; 3, if not enclosed, used for the supply of fuel or fencing timber, for purposes of husbandry, or the ordinary use of the occupant. Where a known farm or single lot has been partly improved, the part not cleared, or not enclosed, according to usage, is held to be *occupied*. Otherwise where land is divided into separate lots.

In case of continued, actual occupation under claim of title, exclusive of any other right, and not founded upon a writing or judgment, a title is gained only to the part actually occupied; where it is, 1, protected by a substantial enclosure; 2, usually cultivated or improved.

The possession of a tenant is that of his landlord, till twenty years from termination of the tenancy; if there were no lease, twenty years from the last pay-

ment of rent; though the tenant has acquired another title or claimed to hold adversely.

In Maine, to constitute a disseisin which would, at common law, defeat the deed of the proprietor, there must be an occupancy of a part under a recorded deed, or such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the claim and occupation. *Foxcroft v. Barnes*, 29 Maine, 128.

An occupation, according to statutes 1821, c. 62, and Rev. Sts. c. 147, does not constitute such a disseisin, as will prevent the owner from conveying his land, although it might defeat a writ of entry brought by the owner for the possession, if it were continued for twenty years. *Ib.*

The question of adverse possession is not for the court, but exclusively for the jury. *Hobart v. Hanrick*, 16 Ala. 581; *Hatch v. Smith*, 4 Barr, 109; *Grafton v. Grafton*, 8 S. & M. 77. Hence, the presiding judge cannot properly charge the jury, that the plaintiff's possession is "uninterrupted, continuous, notorious, sufficient and adverse." But, the facts being found by the jury, it is a question for the court. *Macklet v. Gubreuil*, 9 Mis. 477.

(*a*) Especially if extending beyond the true line by accident. *Gilchrist v. McLaughlin*, 7 Ired. 310.

(*b*) Sometimes termed *fugitive trespasses*. A distinction is made between acts of this description, and a possession which is continued so far as is practicable; as, in case of a stream not navigable, by keeping up fish-traps, making and repairing dams, and catching fish every year through the fishing season. *Treadwell v. Reddick*, 1 Ired. 56. See *Flanniken v. Lee*, *Ib.* 293.



marking them by lopping trees, and a sale of part of the land, do not constitute disseisin, though done with notice to the owner. So with the payment of taxes, suing trespassers, &c. On the other hand, a new parol agreement between adjacent owners, upon a divisional line, followed by a corresponding possession of one party, is a disseisin of the others.<sup>1</sup>

§ 27. An entry upon land, in order to take possession of it under a claim of title, and marking the lines by spotting the trees around it, is a sufficient possession against one without title; although, without actual enclosure, not such an adverse possession against the owner as to bar his right by the statute of limitations.<sup>2</sup> Upon such possession, trespass will lie for an entry upon the land against a wrong-doer, or trover for carrying away timber, after it has been cut upon the land.<sup>3(a)</sup>

§ 27 a. Clearing and cultivating new fields, turning out old ones, when worn out, and cutting wood promiscuously, are held in North Carolina to constitute sufficient proof of adverse possession. So, entering, ditching, and making woods in a cypress swamp, in order to procure shingles, cutting trees and making shingles.<sup>4(b)</sup>

<sup>1</sup> *Ellicott v. Pearl*, 10 Pet. 414; *Bishop v. Lee*, 3 Barr. 214; *Slater v. Jepherson*, 6 Cush. 129; *Coburn v. Hollis*, 8 Met. 125; *Ewing v. Burnet*, 1 McL. 266; *Boston, &c. v. Sparhawk*, 5 Met. 469; *Hale v. Glidden*, 10 N. H. 897; *Urket v. Coryell*, 5 W. & S. 60. See *Stearns v. Palmer*, 10 Met. 82; *Pasley v. English*,

5 Gratt. 141; *Moor v. Campbell*, 15 N. H. 208; *Chandler v. Walker*, 1 Fost. (N. H.) 282.

<sup>2</sup> *Woods v. Banks*, 14 N. H. 100.

<sup>3</sup> *Ib.*

<sup>4</sup> *Wallace v. Maxwell*, 10 Ired. 110; *Treadwell v. Reddick*, 1 Ired. 56.

(a) The defendant may show a liability to a third person, for the value of the property, in mitigation of damages, though he has made no actual payment. *Woods v. Banks*, 14 N. H. 101.

A testator devised land, of which he obtained the right of possession by a judgment recovered in a petition for partition, after legal notice to parties interested. Held, he died seised of the land, although others, who claimed title, occasionally entered and cut wood upon the land, after the judgment of partition. *Dascomb v. Davis*, 5 Met. 385.

(b) In an action of trespass for cutting timber upon a lot containing 250 acres, the plaintiff claimed title under a deed from the comptroller, given upon a sale for taxes. At the date of the deed,

there was a brush fence between the lot and another lot adjoining, which was occupied under a contract from the plaintiff. In consequence of a crook in the fence, about two and a half rods of the lot in question were enclosed with the lot adjoining, so occupied, and the occupant, and those who had preceded him in the possession of that lot, had mowed grass upon the two and a half rods, but without intention to occupy over the line of the lot, or knowledge that they had done so. Held, the lot in question was not actually occupied within the meaning of the statute (1 Rev. Sts. 412, sec. 88) of New York, so as to require notice to the occupant, before the title could become absolute under the comptroller's deed. *Smith v. Sanger*, 4 Comst. 576.

§ 28. Though there is no written claim of title, where the manner of occupying a part of the land clearly shows the extent of the claim, every occasional entry will be an act of possession, and not a bare trespass, which it would be in one making no claim of title; and this is constructive possession.<sup>1</sup>

§ 28 a. If, in an action of ejectment, the defendant claim title by possession, and it appear that the fence of his adjoining land was so constructed and so far extended towards the disputed land, as to give notice to the public and to all concerned, that the defendant and his grantors claimed to exercise exclusive dominion over the disputed land, by extending their fence so as to include this land, whenever it should be convenient to complete the enclosure; and that it was left open for the time, for convenience of use, or because it was not then of sufficient importance to be enclosed; and this have been continued for fifteen years; it will be a sufficient possession to give title.<sup>2</sup>

§ 28 b. Acts of improvement and ownership done by a *mortgagor* will not operate as a disseisin of the mortgagee.<sup>3</sup>

§ 29. Mere enjoyment of an *easement*, being the exercise of a right, cannot make a disseisin of the land.<sup>4</sup> Thus, to cover land with water, gives no *pedis possessio*, showing adverse right. It is merely an easement, not inconsistent with title in another.<sup>5(a)</sup>

<sup>1</sup> Buck v. Squiers, 23 Vt. 498.

<sup>2</sup> Ib.

<sup>3</sup> Hunt v. Hunt, 14 Pick. 874; Fenwick v. Macey, 1 Dana, 279.

<sup>4</sup> Stetson v. Veazie, 2 Fairf. 408

<sup>5</sup> Mims v. Weathersbee, 2 Strobb 184.

(a) Where an island, subject to overflow, and susceptible of use without being enclosed, was used by the defendant for pasturage, whenever it was safe so to use it, for twenty years; held a sufficient possession to bar any other claimant, but not within the seven years' limitation law of Kentucky, for want of actual settlement. Wells v. Haynes, 9 B. Mon. 388.

Where the legislature provided that improvements, whether wharfs, houses, or buildings, made out of the water, should be the right, title and inheritance of the improvers forever, and A held land bordering on the water, under a patent, and B erected and maintained a fence, for thirty years and upwards, on

a part of the low grounds adjacent to A's land, which was covered by the flow of the tide, and claimed below it: held, A had no possession, property or right in the land covered by the tide, until reclaimed from the water; that B gained no possession by his said acts; and that those acts gave A no right of action against B, either in ejectment or trespass. Casey v. Inloes, 1 Gill, 480.

Where one had driven piles into the ground, which was covered by a mill-pond belonging to another, and had erected and maintained buildings on the piles for sixty years, the water of the pond flowing between the piles; held, a disseisin of the owner of the mill-pond. Boston, &c. v. Bulfinch, 6 Mass. 229.



§ 30. A disseisin of *flats* may be made by an appropriate occupation thereof for that purpose, as by entering upon, and filling them up, or by building a wharf, and using the flats adjoining for laying vessels at the same. But passing with vessels over flats, and anchoring on them, or using them for the purpose of access to and egress from a wharf with vessels, being a usage of common right, provided for in the Massachusetts ordinance of 1641, is not inconsistent with the right of the proprietor to a fee in such flats, and constitutes neither a disseisin nor a trespass.<sup>1(a)</sup>

§ 31. If a person can acquire title to flats covered by water at high tide only, by cutting "thatched grass" thereon for forty years, his title will extend only to the time of his actual occupation by cutting such grass.<sup>2</sup> And if the title of a person to such "thatch islands" was extended to low water mark by force of the ordinance of 1641, c. 63, it would not extend over flats adjoining the islands, except those lying between them and low water mark.<sup>3</sup>

§ 31 a. Where a dock, of which the owner of an adjoining wharf claimed to be seised, was filled up by the town, and in this condition used with the wharf as a highway, and afterwards the whole was paved by the town, though it did not appear that the way had been legally laid out; held, the acts of the town amounted to a disseisin of the dock, but in respect to the wharf were so equivocal, as to present a question for the jury as to the intention to disseise.<sup>4</sup>

§ 31 b. Where a person entered upon land under a claim of title, and removed iron ore therefrom, from time to time, to

<sup>1</sup> *Wheeler v. Stone*, 1 Cush. 313; *Drake v. Curtis*, *Ib.* 395.

<sup>2</sup> *Thornton v. Foss*, 26 Maine, 402.

<sup>3</sup> *Ib.*

<sup>4</sup> *Tyler v. Hammond*, 11 Pick. 193.

(a) The tenant in a real action, who had acquired title to a wharf by disseisin, had also exclusively occupied the flats at the end of the same, to the distance of eighty feet, for the purpose of laying vessels, and had used the flats in front of the wharf beyond the distance of eighty feet, for the purpose of access to

and egress from the wharf with vessels. Held, the exclusive occupation to the distance of eighty feet was a disseisin of so much, but the occupation beyond that distance was not a disseisin of the residue, and the former did not extend to and create a disseisin of the latter. *Wheeler v. Stone*, 1 Cush. 313.

supply an adjoining factory, but without any actual enclosure or residence thereupon; held, an actual possession by disseisin, for which the owner might sue in trespass; but that he could not recover for injuries to the freehold, subsequent to such entry and disseisin, till he had recovered possession.<sup>1</sup>

§ 31 c. A stranger without title took possession of land mortgaged, and built on parts of it a blacksmith's shop and carpenter's shop; and the occupants of the former occasionally used parts of the lot adjacent to their shop to spread their boards on, and the occupants of the latter used other parts of the lot to run carriages on, and put tires on wheels. Held, the mortgagee was hereby disseised only of the part of the land covered by the shops.<sup>2</sup>

§ 31 d. It is intimated, that the law will require peculiarly strict proof to constitute a possession adverse, in a newly settled country. The property acquired by settlers on public lands, more especially that class termed *squatters*, is novel in its character, peculiar to the Western States, not like that of a bailee or trustee, or that of mere wanton trespassers. With the revolution, it became an object to raise a revenue from the sale of vacant lands, without requiring any actual settlement or cultivation. Hence it is a settled rule, that the possession of such lands follows the title, and so continues until an adverse possession is clearly made out.<sup>3(a)</sup>

<sup>1</sup> West v. Lanier, 9 Humph. 762.

<sup>2</sup> Poignard v. Smith, 8 Pick. 272. See Wickliffe v. Ensor, 9 B. Mon. 253.

<sup>3</sup> 4 Verm. 155; Fite v. Doe, 1 Ind. R.

129; Jones v. Snelson, 8 Misso. 398; Jackson v. Sellick, 8 John. 270; Bell v. Fry, 5 Dana, 344.

(a) With regard to lands belonging to the government, it is held, that, though one who enters upon such lands is a mere intruder, yet he may maintain a writ of right against any third person. Thomas v. Hatch, 3 Sumn. 170. Upon a similar principle, if the State convey land occupied by a third person, he will have a claim for *betterments*, as in other cases, against the grantee. Kinsman v. Greene, 4 Shepl. 60. In New Hampshire, unauthorized possession of public lands is subjected to a penalty, and confers no title. N. H. Rev. St. 417. So, in Alabama, possession will not give a title against the government. Wright v.

Swan, 6 Por. 84. In Wisconsin, a settler on the public land may maintain an action therefor. His possession extends to the bounds of his claim, without enclosure, not exceeding 160 acres. The land may be in two parcels. The claim must be marked out, so as to show its extent, and the land occupied or improved to the value of \$50. A neglect to occupy or cultivate for six months is an abandonment. Wis. Rev. St. 610. A purchaser of lands, knowing the claims and possession of the state, and taking subject to its rights, has no adverse possession. Kingman v. Sparrow, 12 Barb. 201.

§ 32. There are some cases, where, for the time, an estate is so situated that no person is seised of it in fee. Thus, if land be conveyed to A for life, remainder to the right heirs of B, who is living; during B's life no one is seised in fee. The fee is said to be in *abeyance*; a word derived from the French *bayer*, to expect, and meaning in remembrance, intendment and consideration of the law.<sup>1</sup> An abeyance of the fee, however, is against the policy of the law, on account of several inconveniences which attend it. Thus the occupant of the land may commit waste, and there is no one who can maintain an action of waste against him. So the title, if attacked, cannot be completely defended, unless the tenant can *pray in aid* a present owner in fee. Nor will a writ of right lie against a mere tenant for life.<sup>2</sup> Abeyance is unpropitious to proper care and vigilance in the preservation of property, and to productive labor and improvement.<sup>3(a)</sup>

§ 33. Sometimes, also, even the freehold is in abeyance, not even an estate for life being vested in any person. But the law rarely allows this; partly for the feudal reason, not in force in the United States, that the lord could call only upon the tenant of the freehold for services, and partly that a true owner dis-seised can maintain an action only against such tenant.<sup>4</sup>

§ 34. For these reasons, by the common law, a freehold estate cannot be conveyed to commence *in futuro*. But in Connecticut, Virginia, Wisconsin, Indiana, New York, Ohio, (and probably some other States,) this rule has been abolished or greatly qualified.<sup>5</sup> So, in New Hampshire, a freehold *in futuro* may be conveyed either by deed of bargain and sale, or covenant to stand seised.<sup>6</sup> Under the statutes of Vermont,

<sup>1</sup> Co. Lit. 342; Bray Peerage, &c. 5 Bing. N. 754; 8 Scott, 108.

<sup>2</sup> 1 Cruise, 45.

<sup>3</sup> Bucksport v. Spofford, 3 Fairf. 492.

<sup>4</sup> Withers v. Isam, Dyer, 71 a; Sheffield v. Ratcliffe, Hob. 338; 1 Cruise, 43; Terrett v. Taylor, 9 Cranch, 47; Jewett

v. Burroughs, 15 Mass. 464. See N. H. Rev. St. 282-3.

<sup>5</sup> 4 Dane, 646; 1 N. Y. Rev. St. 724; Walk. Intro. 278, 286; Vir. Code, 500; Wisc. Rev. St. ch. 56, sec. 24; Ind. Rev. Sts. 282.

<sup>6</sup> Bell v. Scannon, 15 N. H. 381.

(a) The feudal reasons for this rule were, that the superior lord might know on whom to call for military services, and

any adverse claimant of the lands, against whom to bring his præcipe for their recovery. See Dyer, 71 a; Hob. 338.

in reference to conveyancing, a freehold estate may be created, in terms, to take effect in future.<sup>1</sup>

§ 35. By *act of law*, however, the freehold may be in abeyance. One of the few instances of this is, where a *parson* or *minister*, seised of parsonage lands *in jure parochiæ*, dies; in which case the freehold is in abeyance till his successor is appointed.<sup>2(a)</sup>

§ 35 a. *Rectors* and *parsons* are deemed so far to have a fee-simple, that they transmit the estate to their successors; while, for the benefit of those successors, they are restricted in their use of the land within the powers of tenants for life. In England, however, a parson, with the assent of the patron and ordinary, may grant a perpetual rent-charge from the land.<sup>3(b)</sup>

§ 36. To every estate in lands the law has annexed certain peculiar incidents, rights and privileges, which appertain to it as of course, without being expressly enumerated. In some

<sup>1</sup> Gorham v. Daniels, 23 Vt. 600.

<sup>2</sup> Lit. sec. 647.

<sup>3</sup> Co. Lit. 341 a & b; Lit. 648.

(a) So where land is granted to pious uses before there is a grantee in being competent to take it; the fee in the meantime is in abeyance. Pawlet v. Clark, 9 Cranch, 298. So where a charter is granted, and the corporation is to be brought into being by future acts of the corporators; in the meantime, the franchises or property granted by the charter remain in abeyance. Dartmouth, &c. v. Woodward, 4 Wheat. 691.

(b) In South Carolina, a statute provides, that a parson may bequeath the crop standing on his glebe land. Anth. Shep. 564.

One holding the office of minister for life, or for years, is seised of a conditional freehold, and liable for waste. Cargill v. Sewall, 1 Appl. 288. So, he may maintain trespass, and the suit may proceed after he ceases to hold his office. Ib.

In Massachusetts, as early as 1654, provision was made by a colonial statute for parsonages. By a provincial statute of 28 Geo. 2, c. 9, a Congregational minister might convey with the assent of the parish, and an Episcopal minister with the assent of the vestry. The same statute made Protestant ministers sole corporations. Jurist, July, 1836, p. 268.

While the fee is in abeyance, the parish is entitled to the profits. Weston v. Hunt, 2 Mass. 500; Brown v. Porter, 10 97.

A conveyance in fee by the parish to the minister is void.

A parish, for certain considerations, released and sold to the minister parsonage property. The minister, by his will, authorized his executors to sell the lands, who accordingly sold them. Held, the above-named release did not in any way enlarge the minister's estate, and that it could not be coupled with the will and executors' sale, so as to constitute a joint conveyance by minister and parish. Austin v. Thomas, 14 Mass. 383.

So, in Maine, where a town with the assent of the minister voted that he should have the use of one-half of the parsonage lands; it was held that the fee of the whole lands still remained in him. Bucksport v. Spofford, 8 Fairf. 487.

A lease for 999 years, of parsonage land, by a parish having no minister, vests in the lessees all rights of entry and possession belonging to the lessor, whether valid against a successor in the ministry or not. Cheever v. Pearson, 16 Pick. 266. See Second, &c. v. Carpenter, 23 Pick. 131.

instances, these incidents are absolutely inseparable from the estate, while in others they may be restricted or destroyed by express provisions and conditions. A fee-simple being the absolute ownership, the law regards its incidents as inseparable from the estate, and any restriction upon them as repugnant, and therefore void.<sup>(a)</sup> Such are the rights of descent, of curtesy and dower, belonging not to the owner himself, but to those claiming under him. These will be considered hereafter. Such also is the right, in the owner himself, of *unlimited alienation*, or of committing *waste*.<sup>1</sup> A condition, in a conveyance or devise in fee-simple, against alienation generally, is void. Hence the usual clause in conveyances of the fee, "assigns forever," has no legal effect.<sup>2</sup> If used with the word *heirs*, it is superfluous; if without, it confers no new right.<sup>(b)</sup> So, any condition

<sup>1</sup> Shep. Touch. 181; 1 Cruise, 46; Lit. 360. See *Germond v. Jones*, 2 Hill, 569; *Craig v. Watt*, 1 Watts, 498.

<sup>2</sup> Prest. Est. 3.

(a) With regard to the incidents of estates, there seems to be little uniformity or consistency in the law. While in some instances they are made subject to express limitations and agreements (according to the principle stated by Bracton, lib. ii, c. 6, "*modus et conventio vincunt legem*;" ) in others, they are held to *over-ride* all stipulations against them. Good reasons may be given, why the incidents of an estate in fee-simple should be held inseparable from it. But the same principle is adopted in regard to *estates tail*. Thus a condition, against the right to curtesy or dower in such estates, is void. So an *estate at will* must be at the will of both parties, though expressed otherwise. So, if land be given to A *and his heirs* for twenty-one years, it goes to his executors. But, on the other hand, though the right of assigning or underletting is incident to an estate for years, it may be controlled by an express condition or covenant. So, although a conveyance to husband and wife ordinarily makes them *joint tenants*, yet a grant to them *to hold as tenants in common* makes them such. Co. Lit. 187 b. So a mortgage, though personal estate, will pass as real estate, where such appears to be the intent of a testator. See ch. 32.

(b) A provision in a devise, that the land shall not be "subject or liable to

conveyance or attachment," is void. *Blackstone. &c. v. Davis*, 21 Pick. 42.

Devise of real estate to the testator's wife for life, "the remainder of his estate, whether real or personal, in possession or reversion, to his five children to be equally divided to and among them or their heirs respectively, always intending, &c, that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned to them." Held, the children took a vested remainder in the real estate devised to the wife for life, and the restriction upon their right of alienation was void. *Hall v. Tufts*, 18 Pick. 455. In Kentucky it is held, that, although a condition against alienation, in a deed, is void, yet a bond against it, accompanying the deed, is good, because the latter does not impair the title in the hands of third persons, but merely gives a claim for damages against the obligor. *Turner v. Johnson*, 7 Dana, 438. Bequest of money and leaseholds to a *feme sole*, "for her own absolute use, without liberty to sell or assign for her life." Held, she took an absolute title, but without the power of disposal. *Baker v. Newton*, 2 Beav. 112.

Devise to a *feme covert* in fee for her separate use, with a prohibition of any transfer or charge during her life or mar-

or local custom against *leasing* the land is void. But a condition against alienation to any particular person, or an unlawful alienation, as in *mortmain*, (a) is valid. So, if A convey to B one lot of land, on condition that B shall not alien another lot, of which B was previously seised; this condition is valid. And it has been said that a condition against alienation, generally, may be annexed to the creation of a new rent-charge. But Lord Coke says "this is against the height and purity of a fee-simple."<sup>1</sup>

<sup>1</sup> Co. Lit. 223 a, b; Dyer, 357 b; Lit. 361; M'Williams v. Nisly, 2 S. & R. 378. See Hawley v. Northampton, 8 Mass. 37; Turner v. Johnson, 7 Dana, 438.

riage. "She shall not sell, charge, &c," "shall hold for her own sole and separate use, benefit and disposal, have the sole management, independent of her husband and his debts." Held, this restraint was effectual, and an equitable mortgage, made with notice thereof, was

void against her. Baggett v. Meaux, Coll. Cha. 138; Churchill v. Marks, ib. 441.

(a) A clause was anciently in use, allowing alienation to all but religious men and Jews.

## CHAPTER III.

## QUALIFIED AND CONDITIONAL FEES AND ESTATES TAIL.

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| 1. Fees, <i>qualified</i> , <i>conditional</i> , &c. | 18. Conveyance by tenant in tail.      |
| 3. <i>Estates Tail</i> —origin.                      | 25. Contracts of tenant in tail.       |
| 5. Description.                                      | 27. Entailment—how barred.             |
| 6. What may be entailed.                             | 28. Estates tail in the United States. |
| 12. Rights and duties of tenant in tail.             |  |

§ 1. HAVING treated of estates in fee-simple, we proceed to consider other *estates of inheritance* of an inferior kind. These have been by some writers included in one class, by others divided into fees *qualified* and *conditional*, and by others into fees *qualified*, fees *conditional*, and fees *tail*; but such minute distinctions of classification are of little consequence.<sup>1</sup>

§ 2. Where an estate limited to a person and his heirs has a qualification annexed to it, by which it must determine whenever that qualification is at an end; it is a *qualified* or *base* fee. In other words, a qualified, base or determinable fee, is an interest which may continue forever, but is liable to be ended by some act or event, circumscribing its continuance or extent. Thus, if land is granted to Alexander, king of Scotland, and his heirs, kings of Scotland; or to A and his heirs, *tenants of the manor of Dale*; if the heirs of Alexander, in the one case, are not kings of Scotland, or, in the other, whenever the heirs of A cease to be tenants of this manor, their estate terminates.<sup>2</sup> So a devise to trustees and their heirs, upon trust to pay the

<sup>1</sup> 2 Bl. Com. 104–9; Co. Lit. 1 b; Plow. 241; 1 Prest. on Est. 420; 4 Kent. 5; Ed. Seymour's case, 10 Rep. 97 b.; Plowd. 557.      <sup>2</sup> 1 Cruise. 51 4 Kent, 9. See Keslin v. Campbell, 15 Penns. 500; Woodroffe v. Daniel, 15 L. J. N. S. 356.



testator's debts and legacies, and after payment thereof to his sister for life, &c.; gives a base fee to the trustees, determinable on payment of the debts and legacies.<sup>1</sup>

§ 3. To this class of fees or inheritances, belong *conditional fees* and *estates tail*. A conditional fee is a limitation of an estate to *some particular heirs* of a man, exclusive of others—as, for instance, to the *heirs of his body*, or the *male heirs of his body*. This kind of limitation, originally unknown to the common law, gradually at an early period came into extensive use. (a) It was construed by the judges to differ from a fee-simple only in the following points; that its duration beyond the life of the donee depended upon his having issue, and, when this condition was fulfilled, it became liable to alienation, forfeiture and incumbrance, like an absolute estate. The owner might also alienate the estate before the birth of issue, and, if issue were afterwards born, neither the donor, nor the issue, when born, could reclaim it. When the donee died without having had issue, or when his issue died without issue, and not having alienated, the donor might re-enter as for breach of condition.

§ 4. From this form of limitation originated *estates tail*, so called after an ancient German feud—“*feudum talliatum*.” (b) These were established by the statute Westminster 2, 13 Edw. I., entitled the statute “*de donis conditionalibus*.” This act, in

<sup>1</sup> Willington v. Willington, 1 Bl. R. 645. See Doe v. Woodroffe, 10 Mees. & W. 608.

(a) Bracton (lib. 2, ch. 6) thus describes it:—“Heirs may be restrained by the mode of the gift, whereby all the heirs generally are not called to the succession; for the mode gives law to the gift, and the mode is to be upheld against common right and against the law, because mode and agreement control law. As if it be said, ‘I give to such an one so much land, with the appurtenances, in N., to have and to hold to him and his heirs, whom he shall have begotten of his body and the wife married to him.’ Or thus, ‘I give to such an one, and such a person his wife, or with such a person, my daughter, &c., to have and to hold to him and his heirs, proceeding from the body of such wife or daughter, either born or to be born; in which case, since

certain heirs are expressed in the gift, it will be seen that the descent is only to these very common heirs, through the mode specified in the gift; all his other heirs being wholly excluded from the succession, because the donor has willed it.”

(b) An ancient author (Du Cange) thus describes it. “A fee tail (*feudum talliatum*) is defined, in forensic language, as an inheritance limited to a particular certainty, or a feud granted on certain conditions; as, for example, to a person and his children to be born in lawful marriage. Hence, if he to whom the feud was given die without children, the feud returns to the donor; for to entail is to reduce to a kind of certainty, or to limit an inheritance to something certain.”



general, provides that the will of a donor, manifestly expressed in the charter of his gift, shall be observed, and forbids persons to whom the above-named estates are conveyed, from barring their issue and the donor by alienation. Its passage was procured by the nobility, with the object of perpetuating estates in their families; and, by virtue of it, if the donee die, leaving issue, they shall take the estate; but, if he die leaving no issue, or upon any future failure of lineal heirs of the class to which the estate is limited, it shall return back to the donor or his heirs. The effect of this statute is, that, whereas the estate was before a conditional fee, and the donor's right of re-entry founded on breach or failure of condition; an *estate tail* is viewed as *carved out of the inheritance*, like any other particular estate, and, upon its expiring by limitation, the donor or his heirs re-enter like any other reversioners.<sup>1</sup>

§ 5. An estate tail is defined,<sup>2</sup> as an estate of inheritance, created by the statute "*de donis conditionalibus*," and descendible to some particular heirs only of the person to whom it is granted. (a) It is of two kinds—*general* and *special*; the former descendible to the heirs of the body generally; the latter to some particular heirs of the body. In the former case, the issue of the donor, male or female, by any marriage may inherit. A special entailment may be made either to the issue begotten upon a certain wife; or to issue male or issue female; (b) and no children can inherit who do not fall within these respective descriptions. (c) Thus, in case of an estate in tail male, if the donee has a daughter, she cannot inherit;<sup>3</sup> nor can the son of such daughter inherit, being obliged to claim through her. So,

<sup>1</sup> See 1 Burr. 115; 2 Inst. 385; Plow. 248.

<sup>2</sup> 1 Cruise, 58; 2 Bl. Com.; 4 Kent.

<sup>3</sup> 1 Roll. Abrid. 841, *contra*. See Co. Lit. 19 a. n. 4.

(a) Inasmuch as these heirs must be *heirs of the body* or *lineal descendants*, perhaps the definition in the text might be rendered more strictly accurate, by specifying this necessary element in the estate.

(b) It has been questioned whether the law would sustain the latter form of limitation; but, it seems, without reason. Co. Lit. 25 a. n. 1.

(c) Before the statute *de donis* (upon what principle it is difficult to understand), although the limitation was made to issue had by a certain wife, yet, after the birth of such issue, the land became descendible to *any* issue of the donee, whatever. Co. Lit. 19 a. n. 2. See Doe v. Woodroffe, 10 Mees. & W. 608.

if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body, and the donee has issue a son, who has issue a daughter, who has issue a son; this son cannot inherit either of the estates; because he cannot deduce his descent wholly either through the male or female line. So, under a devise to "the eldest male lineal descendant," a person cannot take, who claims in part through a female.<sup>1</sup>

§ 6. Not only lands may be entailed, but every species of incorporeal property of a real nature—such as dignities, in England, *estovers*, commons, or other profits concerning, or annexed to, or granted out of land. So, charters or muniments of title.<sup>2(a)</sup>

§ 7. So, in equity, money directed or agreed to be laid out in the purchase of land may be entailed.<sup>3</sup>

§ 8. But inheritances merely personal, not real rights or interests, or partaking of the realty—as, for instance, an annuity charging only the person and not the lands of the grantor,—are not entailable, but the subjects of a conditional fee at common law, and absolutely alienable on the birth of issue.<sup>4(b)</sup>

§ 9. Thus, an annuity in fee-simple, granted by the crown out of four and a half per cent. duties, payable for imports and exports at Barbadoes.<sup>5</sup>

§ 10. So, an annuity granted by Parliament out of the revenues of the post-office, redeemable upon payment of a sum of money, to be laid out in land, is not entailable, notwithstanding the latter provision; for Chancery will not treat the annuity as land, merely upon a possibility of such future redemption.<sup>6</sup>

§ 11. The instance of an *annuity* seems to be the only one in which even a conditional fee in a personal chattel can be created.

<sup>1</sup> Co. Lit. 25 b; *Oddie v. Woodford*, 3 My. & C. 584. By "male descendants," in a will, are meant those who claim through males alone. *Bernal v. Bernal*, 3 Ib. 559.

<sup>2</sup> 1 Cruise, 58-9; *Nevil's Case*, 7 Rep. 33; Co. Lit. 20 a.

<sup>3</sup> Ibid.

<sup>4</sup> Ib.; *Stafford v. Buckley*, 2 Ves. 178; Co. Lit. 20 a.

<sup>5</sup> *Stafford v. Buckley*, 2 Ves. 170.

<sup>6</sup> *Holderness v. Carmarthen*, 1 Bro. R. 876.

(a) By the law of Scotland, a jewel or picture. 2 Bell, 2.

(b) King Chas. II. granted a perpetual annuity to A and his heirs, payable

from coal duties. Held, it passed to heirs, though personal poverty. *Radburn v. Jervis*, 8 Beav. 450.

In equity, estates *pour autre vie*, terms and chattels, though they may be limited in strict settlement, cannot be entailed. Terms and chattels pass absolutely, by a limitation which would operate as an entailment of real estate.<sup>1</sup> In New York the same restriction is imposed upon perpetuities in chattels real, as in freehold estates.<sup>2</sup>

§ 12. Tenant in tail, being owner of the inheritance, may commit *waste*. But the power must be exercised during his life. Hence, if he sell trees growing on the land, the vendee must cut them during the life of the tenant in tail; otherwise they descend with the land to his heir.<sup>3</sup>

§ 13. The grantee of a tenant in tail, and the grantee of such grantee, may commit waste.<sup>4</sup>

§ 14. Chancery will not interfere to restrain a tenant in tail from committing waste, although he is an infant in feeble health and not likely to live to full age.<sup>5</sup>

§ 15. The power of waste is so far an inseparable incident to an estate tail, that a bond against it is repugnant and void, like a recognizance not to suffer a common recovery; and Chancery will order it to be given up and cancelled.<sup>6</sup>

§ 16. Tenant in tail is entitled to all deeds and muniments belonging to the lands; and Chancery will compel a delivery of them to him.<sup>7</sup>

§ 17. He is not bound to pay off incumbrances. But, if he does, he will be presumed to have done it in exoneration of the estate in fee simple, because he has the power of making it his own. But such tenant, restrained as to alienation, though having powers of leasing and jointuring, stands in this respect like a tenant for life.<sup>8</sup>

§ 18. The statute *de donis* restrains the tenant in tail from

<sup>1</sup> 2 Chit. Black. 89, n.; 2 Story on Equity, 252-3; Dorr v. Wainwright, 18 Pick. 330; Betty v. Moore, 1 Dana, 286; Harkins v. Coalter, 2 Porter, 463; Co. Lit. 20 a, n. 5; Adams v. Cruft, 14 Pick. 25; Kirch v. Ward, 2 Sim. & Stu. 409; Ladd v. Harney, 1 Fost. 515.

<sup>2</sup> 1 N. Y. Rev. St. 724.

<sup>3</sup> Perk. s. 58; Hales v. Petit, Plow. 259; Liford's Case, 11 Rep. 50 a.

<sup>4</sup> 1 Cruise, 60; 3 Leon. 121.

<sup>5</sup> Glenorchy v. Bosville, Cas. Temp. Talbot, 16.

<sup>6</sup> Jervis v. Bruton, 2 Vern. 251.

<sup>7</sup> 1 Cruise, 61.

<sup>8</sup> Jones v. Morgan, 1 Bro. R. 206; Ware v. Polhill, 11 Ves. 277; Shrewsbury v. Shrewsbury, 1 Ves. 227; St. Paul v. Dudley, 15 Ves. 178.

alienating his estate for a longer term than his own life. Where he grants away his whole interest, according to some authorities, the grantee's estate is for the life of the tenant in tail, the reversion being in abeyance; while, according to others, it is a *base fee*, descendable to the grantee's heirs so long as the tenant in tail has heirs of his body, and subject to dower.<sup>1</sup>

§ 19. The prohibition against alienation, though not expressly extended to the issue, applies to them also by implication. The *equal mischief* implies *the like law*.<sup>2</sup>

§ 20. Where tenant in tail conveys away his estate, the interest of the grantee does not terminate *ipso facto* with the death of the former, but is merely defeasible or subject to be avoided by the issue; because he has the inheritance in him, and the statute *de donis* makes no alteration as to him, but merely provides that the issue shall not be disinherited.<sup>3</sup>

§ 21. But where something is *granted out of* an estate tail; as, for instance, *a rent*; it becomes absolutely void at his death.<sup>4</sup>

§ 22. Where tenant in tail mortgages the land, Chancery will decree him to make as perfect a title as he is capable of making, and to pay the amount due in a certain time, or be foreclosed.<sup>5</sup>

§ 23. Where tenant in tail covenants to stand seised to the use of himself for life, remainder to another in fee; the whole limitation is void, and his former estate continues.<sup>6</sup>

§ 24. But an estate created by him, which must or may commence in his lifetime, is good. Thus a remainder after a life estate will be valid till avoided by the issue.<sup>7</sup>

§ 25. Although a different rule prevailed formerly, it is now settled, that the issue in tail is not bound by any contracts of his ancestor in relation to the estate, either in law or equity, nor by a decree to bar the entailment. Nor will equity aid in carrying into effect an incomplete alienation against him, as, for instance,

<sup>1</sup> Lit. s. 650; Walsingham's Case, Plow. 554-7; Seymour's Case, 10 Rep. 96 a.

<sup>2</sup> Regina v. Fogossa, Plow. 13; Darby's Case, T. Jones, 239.

<sup>3</sup> Machell v. Clarke, 2 Ld. Ray. 779; Whiting v. Whiting, 4 Conn. 179.

<sup>4</sup> Walter v. Bould, Bulst. 82.

<sup>5</sup> Sutton v. Stone, 2 Atk. 160.

<sup>6</sup> Beddingfield's Case, Cro. Eliz. 895.

<sup>7</sup> Machell v. Clerk, 2 Ld. Ray. 782;

7 Mod. 27.

*a fine.* But, if he does any act towards performance, equity will enforce the contract against him.<sup>1</sup>

§ 26. An estate tail does not, like estates for life and for years, merge in the fee-simple, when the two become vested in the same person. If it did, a tenant in tail might at any time destroy the entailment by purchasing the reversion in fee. It was otherwise with conditional fees before the statute *de donis*.<sup>2(a)</sup>

§ 27. In England, the mischiefs of entailment in rendering real property unalienable became so severe, that constant attempts were made in Parliament to procure a repeal of the statute "*de donis*," but for a long time without success. Judicial construction, however, at length supplied the place of express legislation. The courts held in the first place, that the issue in tail, having assets, were bound by a warranty of the ancestor; and afterwards, that both the issue and the reversioner or remainder-man might be barred by a *feigned recovery*. And at length two statutes of Hen. 7 and Hen. 8 declared a *fine* to be a bar of estates tail. But by St. 3 and 4 Wm. 4, c 74, fine and recovery are abolished, all warranties by tenants in tail are made void against the issue, and the only mode of barring entailments is by an enrolled deed.<sup>3</sup>

§ 28. In the United States, estates tail have in a great measure fallen into disuse, and the law pertaining to them is therefore comparatively unimportant.

§ 29. The people of Massachusetts, at a very early period of the country, adopted the idea of entailment, even to the extent of giving an estate, limited to one and the heirs of his body, to the oldest son, in the first instance, and to the other sons only on failure of his issue. But the use of the common recovery in barring entailments became so universal, that, at the time of the revolution, there was rarely an estate tail in the province. In

<sup>1</sup> *Jenkins v. Keymes*, 1 Lev. 237; *Wharton v. Wharton*, 2 Vern. 8; *Frank v. Mainwaring*, 2 Beav. 115; *Ross v. Ross*, 2 Cha. C. 171; *Cavandish v. Worsley*, Hob. 208.

<sup>2</sup> 2 Rep. 61 a. See *Woodroffe v. Daniel*, 15 L. J. (N. S.) 856.

<sup>3</sup> *Mildmay's Case*, 6 Rep. 40 b.; *Rolls of Parl.* 142.

(a) But a life estate so far merges in an estate tail, that the tenant in tail cannot maintain an action for *the freehold*, as such. *Webster v. Gilman*, 1 Story, R. 499.

Pennsylvania, estates tail were distinctly recognized in the charter of 1681; and in Virginia a law was passed in 1705, to take away from the courts the power of defeating them.<sup>1</sup>

§ 30. In South Carolina, the statute *de donis* never was in force, but the old doctrine prevails, of fees conditional at common law; and it has been held, that the lien of a judgment or decree against one thus holding lands, after the birth of issue, bars the right of the issue to take "*per formam doni*."<sup>2</sup>

§ 31. In Virginia,(a) Kentucky,(b) Tennessee, North Carolina, Indiana,(c) Georgia, Mississippi, Alabama, Wisconsin and Michigan, entailments are expressly abolished, or estates tail declared to be estates in fee-simple. But, in Alabama and Mississippi, an estate may be granted to a succession of donees *in esse*, and to the heirs of the body of the remainder-man, and, in default of such heirs, to the right heirs of the donor in fee-simple.<sup>3</sup>

<sup>1</sup> Hawley v. Northampton, 8 Mass. 3; Sull. on land. T. 73; 4 Kent, 13, 14, n.; Corbin v. Healy. 20 Pick. 514.

<sup>2</sup> 4 Griff. 852; Izard v. Izard, 1 Bai. Equ. 228. See Pearse v. Killian, 1 McMull. 231. The whole estate is held to be in the tenant. The possibility of reverter is neither inheritable nor devisable; nor would one interest merge in the other. 1 Hill's Cha. 276. A conveyance to one, "his heirs and assigns forever, but should he die without lawful issue of his body," then over, gives the grantee a fee-simple absolute at common law. Edwards v. Edwards, 2 Strobb. Equ. 101. The words, "have loaned to A during her natural life and after her death, hath given unto the heirs of her body which shall survive her, to be equally divided amongst them," were held to create an estate tail, under the laws of South Carolina, in the personal property granted, so as to vest it absolutely in the grantee, and by her marriage in her husband, to whose administrator it belonged after

their deaths, and not to her heirs. Watts v. Clardy, 2 Florida, 869. A testator, after the decease of his mother, gave "the use" of the estate to A "for life," and, after his decease, declared the same to be vested in the male issue of the said A, and, in default of such, in the issue female surviving him, and if a general failure at the death of A, then over. Held, the estate devised was a fee conditional at common law; that the will gave A an estate for life, and at his death to his issue male, in their default to his issue female, the issue taking by way of limitation; and that the limitations over, in the event of his leaving no issue, were void either as contingent remainders or executory devises. Birst v. Davies, 4 Strobb. Equ. 87.

<sup>3</sup> N. C. Rev. Sts. 258; Ind. Rev. L. 209; 8 Griff. 441-4, 578, 666, 781; Mich. L. 293; Zollicoffer v. Zollicoffer, 4 Dev. & B. 441; Wisc. Rev. Sts. 313; Virg. Code, 500.

(a) The statute on the subject does not change into a fee a remainder in tail expectant upon another estate tail. 2 Wash. 35-6.

(b) Where the ancestor takes either an estate in fee, defeasible upon his death without issue, or a fee-tail, (converted by law into a fee-simple,) his alienation

bars his issue and heirs, who, in either case, cannot claim otherwise than by descent. Grimes v. Ballard, 8 B. Mon. 625; Deboe v. Lower, 8 B. Mon. 616.

(c) By the Revised Statutes of 1838, (p. 238,) one may be seized of an estate tail, but after the second generation it becomes a fee-simple.

§ 32. In Illinois, Missouri and Arkansas, the donee in tail takes a life estate, and his issue a fee-simple.<sup>1</sup>

§ 33. In New Jersey,(a) Ohio, Missouri, Illinois, Arkansas, and Connecticut, estates tail become estates in fee-simple, in the heirs of the original owner. In Connecticut (and probably in the other States mentioned) he cannot alienate, and, if he leave no issue, the lands revert. In Connecticut, the statute, which establishes the rule above stated, seems to be merely an affirmation of previous decisions. It is there held, that, if the tenant convey in fee, the grantee takes a base fee, determinable upon the tenant's death, by entry of the issue.<sup>2</sup>

§ 34. In Vermont, the constitution provides, that the legislature shall regulate entails in such manner as to prevent *perpetuities*. There is a similar provision in the constitution of Texas. In Vermont, the same rule is established by the Revised Statutes as in Connecticut.<sup>3</sup>

§ 35. In New York, an estate tail may still exist, for the benefit of a remainder limited upon its determination.<sup>4</sup>(b)

<sup>1</sup> Illin. Rev. L. 131; Ark. Rev. St. 189; Misso. Sts. 119.

<sup>2</sup> Walk. 300; 1 Swift, 79; Hamilton v. Hempsted, 3 Day, 332; Chappel v. Brewster, Kirb. 175; 4 Conn. 179; Allyn v. Mather, 9, 114; Misso. Rev. Sts. ch. 32,

s. 5; Illin. Rev. Sts. 131; Ark. Rev. Sts. 265.

<sup>3</sup> 4 Kent, 16; Verm. Rev. Sts. 810; Tex. Const. art. 17

<sup>4</sup> 1 N. Y. Rev. Sts. 722.

(a) The wife has dower, and the husband curtesy. Rev. C. 774-5. By statute, in New Jersey, all estates tail at common law are changed into an estate for life in the first taker, with remainder in the child or children of the first taker. *Morehouse v. Cotheal*, 1 New Jersey, 480.

(b) The statute of New York, of February 23, 1786, abolishing estates tail, and providing that all persons, who then were, or who, but for that statute, would thereafter, by virtue of any devise or conveyance, become seized in fee-tail of any real estate, should be deemed to be seized of the same in fee-simple, has been construed by the courts of New York to include estates tail *in remainder*, and their construction is followed by the courts of the United States. *Van Rensselaer v. Kearney*, 11 How. U. S. 297.

A testator, by his will, made in 1805, devised the use and improvement of his farm to A during his life, and after his

death to B, the eldest son of A, and to the heirs of his body, and their heirs and assigns forever; but, in case B should have no such heirs, then to C, the brother of B, and his heirs. Held, B took a vested remainder in tail expectant on the termination of the life estate of A, which, by the statute abolishing entails, was converted into a fee-simple, and that the limitation over to C was cut off. *Barlow v. Barlow*, 2 Comst. 386.

A, by a will which took effect in 1783, devised lands to trustees during the life of the testator's grandson B, to preserve contingent remainders in trust, to permit the grandson to receive the rents and profits during his life, and after his death to his first, and every other son successively, in tail male. The first son of the grandson, who was born after the will took effect, died in the lifetime of his father without issue. Held, the remainder which vested in such son at his birth.



§ 36. In Pennsylvania, (a) Maryland, (b) Massachusetts, (c) Maine and Delaware, estates tail may be conveyed, and, in Rhode Island and Virginia, conveyed or devised, so as to pass a fee-simple. In Massachusetts, Maine and Virginia, they are liable for debts, and a sale for creditors passes a fee-simple. In Massachusetts, a remainder in tail is not thus liable, but a tenant for life and a remainder-man in tail may join in conveying the fee-simple. So in Maine.<sup>1</sup>

<sup>1</sup> Mass. Rev. St. 405-12-16-63; Purd. Dig. 279; 1 Smith, St. 143-4; 1 Vir. Rev. C. 158; 4 Grif. 1057; Riggs v. Sally, 8

Shepl. 408; Maine Rev. Sts. 372; Dela. Rev. Sts. 271.

was immediately converted into a remainder in fee-simple. *Van Rensselaer v. Poucher*, 5 Denio, 85.

Where an estate tail in remainder was limited to the eldest son of the first taker, to whom an intermediate life estate was given, and became vested by the birth of a son prior to the act of 1786, abolishing entails; held, by the operation of that act, the estate tail in remainder was converted into a fee-simple in remainder, which, on the death of the remainder-man without issue in 1800, and before the termination of the intermediate life estate, descended to his father as his heir at law. *Wendell v. Crandall*, 1 Comst. 491.

(a) An estate tail may be barred by a common recovery. So, in Delaware, by *fine* and recovery. 4 Kent, 71 n.; Purd. 278; 4 Grif. 1075.

Whether an entail can be barred by deed of partition between tenants in common, see *Tiernan v. Roland*, 15 Penn. 429.

A deed from a tenant in tail, purporting to bar the entail, but never recorded, as required by law, and thus incompetent to bar the entail, was held, nevertheless, to be good to convey the grantor's right of possession, and therefore admissible in evidence. *George v. Morgan*, 4 Harris, 95; *Worrall v. The Same*, ib.

(b) In Maryland, it is said, *docking* estates tail by common recovery was abolished in 1782. By a statute of 1786, estates tail general, subsequently created, are abolished. But this act does not apply to *special* entailments, which may be barred by deed or recovery, are chargeable with debts only by mortgage, are not devisable, and descend only to issue. 4 Kent, 15-16 n. See *Newton v. Griffith*,

1 Harr. and G. 111; 3 H. and McH. 244; 1 Harr. and J. 465.

Where there was a devise of an estate in fee, with a limitation over, after a dying without issue, it was formerly, in Maryland, converted into an estate tail, and the limitations over operated by way of remainder; but the act of descents now converts that estate tail into an estate in fee. *Watkins v. Sears*, 3 Gill, 492.

(c) Devise of one undivided half of certain land to A in fee-simple, and the other half to B in fee-tail general. Before the act of 1791, c. 60, the parties made partition by deed, each releasing to the other, his heirs and assigns forever, that part which was set off to the other. B conveyed his portion, with warranty, to C, who conveyed it to D, and D to E. After B's death his heir in tail brings an action against E to recover the land. Held, he was entitled to recover one moiety of it. *Buxton v. Uxbridge*, 10 Met. 87.

A deed of an estate tail was made, purporting to be in consideration of a sum of money, and of a lease of the land to the grantor for one year, at an apparently nominal rent. Before the lease expired, the grantee made a declaration of trust, *inter alia*, to permit the grantor to have possession for life; and the grantor remained in possession from the time of giving his deed. Held, *prima facie*, the deed was given upon valuable consideration and *bona fide*, and therefore was *prima facie* sufficient to bar the entailment. *Nightingale v. Burrell*, 15 Pick, 104. By St. 1851, 568, *equitable* estates tail may be barred in the same manner as legal estates, by a conveyance in fee-simple; and the grantee may demand and enforce a conveyance to him of the outstanding legal title. See Gen. Sts.



§ 37. In Pennsylvania, the purchaser of an estate tail on execution may bar the entailment, by suffering a recovery and vouching the tenant.<sup>1</sup>

§ 38. In New Hampshire, Chancellor Kent says, entailments may still be created, though in practice almost unknown. In this State, as in Pennsylvania and Delaware, they may be barred by a common recovery.<sup>2</sup> By a recent act, they may also be barred by deed.<sup>3</sup>

§ 39. In Pennsylvania, where the tenant in tail dies, the land descends to his heir at common law.<sup>4</sup> In Virginia, if escheatable for defect of blood, the estate descends according to the limitation.<sup>5(a)</sup>

<sup>1</sup> Purd. 280. See *Robb v. Ankeny*, 4 Watts & S. 128.

<sup>2</sup> 4 Kent, 71, n. See *Frost v. Cloutman*, 7 N. H. 1.

<sup>3</sup> St. 1887. c. 340.

<sup>4</sup> Purd. Dig. 279; *Jenks v. Backhouse*, 1 Bin. 96.

<sup>5</sup> 1 Vir. Rev. C. 159.

(a) By a late English Statute, 3 & 4, Wm. 4, ch. 74, tenant in tail may by deed, duly enrolled, alienate in fee-simple or for any less estate; subject, however, to the rights of any prior tenant, whose estate was created by the same settlement as the estate tail, unless such tenant consent to the alienation. 1 Steph. Comm. 287. See further *Riggs v. Sally*, 15 Maine, 408; *Egerton v. Earl, &c.*, 7 Eng.

L. & Equ. 170; *Monypenny v. Dering*, 8 Eng. L. & Equ. 42. The statutes above cited, on the subject of entailment, have been doubtless modified by subsequent enactments, and the statutory law of many of the States is not referred to. The subject, however, is comparatively so unimportant in American jurisprudence, as not to justify a more extended notice.

## CHAPTER IV.

## ESTATE FOR LIFE.

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|--|---|
| 1. Definition.                                     | 8. Payment of incumbrances.                               |
| 2. How created; different forms of life estates.   | 14. Transfer of estate.                                   |
| 2 c. <i>Merger</i> —estate <i>pour autre vie</i> . | 15. Forfeiture.   |
| 3 a. <i>Incidents</i> — <i>Estovers</i> .          | 18. Estate <i>pour autre vie</i> .                        |
| 4. <i>Praying in aid</i> .                         | 19. Termination of estate for life; presumption of death. |
| 5. Title deeds.                                    |   |

§ 1. An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.<sup>1</sup>

§ 2. An estate for life may arise either from the act of parties or from operation of law.<sup>2</sup> A life estate may be created by *act of parties*, either by an express disposition for the life of the grantee or devisee, or of a third person, or both, (a) or by a general disposition, specifying no limit, (b) which in a deed cannot, in general, pass an inheritance for want of the word *heirs*.<sup>3</sup> (c)

<sup>1</sup> 1 Cruise, 76.

<sup>2</sup> *Ib.*

<sup>3</sup> *Ib.* 77; Co. Lit. 42 a.

(a) Agreement by a lessor not under seal, that he would not turn out the tenant so long as he paid rent. Held invalid, because constituting a life estate, which can be created only by deed. *Doe v. Brower*, 8 E. 165.

(b) An estate may be so situated, that it may last either for the tenant's own life or for that of another person, according to the happening or not happening of some uncertain event. Thus a husband, before the birth of issue, has an interest in the wife's lands for her life; liable, however, to be changed into an interest for his life, upon the birth of issue. Lease to A "for the natural life

of A and wife, the same being secured for the separate use, for the maintenance of A and wife, and for no other use." After the death of A, the wife may defend against an action of ejectment by the lessor. *Towers v. Craig*, 9 Humph. 467.

(c) A mere life estate may be created, though words of perpetuity be used in the limitation. Thus, where there was a bequest of a leasehold, after limitations for life, to A, his *executors, administrators and assigns*, during the term of his natural life; held, a life estate in A. *Morrall v. Sutton*, 4 Beav. 478; 5, 100.

So an estate limited upon a contingency, as to a woman during her widowhood, (a) or to a person *quamdiu bene se gesserit*, is a life estate, in the hands of the original tenant, or, in the case of widowhood, of her grantee, or a purchaser from the administrator of such grantee; though it may terminate sooner than the owner's life. If given to a woman for her life or widowhood, she holds only during widowhood. The provision is a *limitation*, not a *condition*. But where one devises to his wife, for life, if she remain so long his widow, and, if she marry, her husband to have no other privilege than that of living on the place for her life and no longer; this gives the wife an estate for her life, not subject to be encumbered by the husband.<sup>1</sup> So a conveyance, for so long a time as certain salt-works proposed to be erected shall continue to be used, passes a life estate determinable by the disuse of such works.<sup>2</sup>

§ 2 a. A lease made by tenant in fee-simple *for term of life*, not mentioning whose life, shall be for the life of the lessee,—a deed being always construed most strongly against the maker. But a lease in this form by tenant in tail will be for the life of the lessor. So, a lease without special limitation by a tenant for life; because this estate he may lawfully make, while a conveyance for the lessee's life would be a wrongful act.<sup>3</sup>(b)

<sup>1</sup> Pease v. Owens, 2 Hayw. 234; The People v. Gillis, 24 Wend. 201; Brown v. Brown, 8 N. H. 98; Craig v. Watts, 8 Watts, 498; Coppage v. Alexander, 2 B. Monr. 316; Rosaboom v. VanVechten, 5 Denio, 414; Lloyd v. Lloyd, 10 Eng. L. & Equ. 139.

<sup>2</sup> Hurd v. Cushing, 7 Pick. 169. See Cook v. Bisbee, 18 Pick. 527.

<sup>3</sup> Co. Lit. 42, a, b; Jackson v. Van Hoesen, 4 Cow. 325; Whittome v. Lamb, 12 Mees. & W. 813.

(a) Such limitation is valid, without limiting over the estate upon her marriage. Coppage v. Alexander, 2 B. Monr. 314. See Sims v. Aughtery, 4 Strobl. 103; Slocum v. Slocum, 21 Edw. Cha. 613. A testator provided in his will, "that the proceeds from the sale of my real estate shall be loaned out and amply secured, so that my wife may get the interest annually, as long as she shall remain my widow, for the support of herself and my daughter; and, if at any time she should marry, then my whole property, principal and interest, to go to

my child." Held, the wife was entitled to the income on the whole estate of the testator during widowhood. Dale v. Dale, 1 Harris, 446. A devise by a husband to his wife, "during her natural life or widowhood," is valid; and the estate is terminated by the marriage of the widow. Walsh v. Matthews, 11 Mis. 131.

(b) A, tenant for life, leases to B, on condition that, if B dies leaving A, the land shall revert to A. All the estate passes under the condition. Co. Lit. 42 a, n. 11.

§ 2 b. A grant for the life of one not in existence is void; but if for the life of three persons, one of whom has no existence, it is good for the lives of the others.<sup>1</sup>

§ 2 c. One holding an estate for the life of another is called tenant *pour autre vie*. An estate *pour autre vie* will merge in a remainder for a man's own life—being an inferior interest to the latter, and the lowest species of freehold. But, if lands are conveyed to a person for his own life and the lives of A and B, he has one freehold, determinable on his own death and the deaths of A and B, and not two distinct estates; and there is no merger. Lord Coke remarks, that the books are very plentiful with cases on this subject, “whereof you may disport yourselves for a time.”<sup>2</sup>

§ 3. There are several *incidents* to an estate for life.

§ 3 a. Tenant for life is entitled to *estovers*, *estoveria rationalia*, or allowance of necessary wood from the land.<sup>3</sup> *Estover* is derived from the French word *estoffe*—material.<sup>(a)</sup> The corresponding Saxon word is *botes*.<sup>4</sup> There are three kinds of *estovers* or *botes*: *house-bote*, which is two-fold, *estoverium ardendi et ædificandi*—of burning and building; *plough-bote*, “*arandi*”—of ploughing; and *hay-bote*, “*claudendi*”—of enclosing or fencing.<sup>5</sup>

§ 3 b. Where a lessor covenants that the tenant for life shall have thorns for hedges, by the assignment of the lessor's bailiff, the tenant may still cut thorns without such assignment, having an implied right to do so. Otherwise, if the tenant had covenanted that he would not cut without assignment.<sup>6</sup>

§ 3 c. A tenant for life, of a farm of 165 acres, is not entitled to fire-bote for the dwelling of a farmer or laborer, in addition to fire-bote for the principal dwelling. A custom to that effect would be unreasonable and invalid.<sup>7</sup>

§ 4. In all real actions, tenant for life may *pray in aid*, or call

<sup>1</sup> Doe v Edwards, 1 Mees. & W. 588.

<sup>2</sup> Abbot, &c. v. Bokenham Dyer, 10 b; Bowles' case, 11 Rep. 88; 4 Kent, 26; Co. Lit. 41 b.

<sup>3</sup> Co. Lit. 41 b.

<sup>4</sup> Spel. Glos.

<sup>5</sup> Co. Lit. 41 b; Heyden's case, 18 Rep.

<sup>6</sup> Dyer, 19 b. pl. 11, 5. Shelby, J., dissented. Stukely v Butler, Hob. 178.

<sup>7</sup> Sarles v. Sarles, 3 Sandf. Ch. 101.

(a) Hence the English word *stuff*.

for the assistance of the owner in fee, to defend his title, because the former is not generally supposed to have the evidences of title.<sup>1</sup>

§ 5. When and how far a tenant for life is entitled to possession of *the title-deeds*, seems to be a point somewhat unsettled. In one case, it was said to be a common practice for the Court of Chancery to take them from him and deposit them in court. And the court will take care of the deeds, where the tenant manifests an indifference on the subject, and parted with the possession of them. But on the other hand it has been doubted, whether Chancery will interfere, either to take the deeds from the tenant or restore them to him. It will refuse to give them to a remainder-man, where there are intermediate remainders.<sup>2(a)</sup>

§ 6. In an action at law to recover title deeds, the defence was, that the defendant held under a *cestui que trust*, claiming by a written declaration of trust. The plaintiff contended, that the court would not notice a merely equitable title. Held, the court either could or could not notice such title. If the latter, this was because such title was doubtful, and therefore the plaintiff must go into equity to settle it. If the former, the defendant was entitled to the deeds. In either case the plaintiff must fail.<sup>3</sup>

§ 7. It will be seen hereafter, (ch. 10,) that, if a widow detains the charters of the estate, she thereby forfeits her dower, and that a jointress will be compelled to deliver up title deeds, upon having her jointure confirmed.<sup>4</sup>

§ 8. Tenant for life is not bound to pay the principal of any sum charged upon the inheritance. Hence, if he does pay it, he

<sup>1</sup> Booth on R. A. 60. See *Sohier v. Williams*, Curtis' R. 479.

<sup>2</sup> *Ivie v. Ivie*, 1 Atk. 481; *Papillon v. Voice*, 2 P. Wms. 477; *Hicks v. Hicks*, Dick. 650; *Ford v. Peering*, 1 Ves. jun.

72. See, as to title deeds, *Dryden v. Frost*, 8 My. & C. 670.

<sup>3</sup> *Atkinson v. Baker*, 4 T. R. 229.

<sup>4</sup> See *Detinue of Charters, Jointure*

(a) *Prima facie* the tenant for life is entitled to them; and the remainder-man can call for them only to answer some specific purpose. *Shaw v. Shaw*, 12 Price, 168. In a late case it was held, that the owner of the inheritance is entitled to them, though there be an attendant term for 1,000 years. *Austin v.*

*Croome*, 1 C. & Mar. 653. Where a lessee has, for twenty years after the expiration of his term, had possession of the lease, such possession is deemed adverse, and Chancery will not interfere to have it delivered up. *Dean, &c. v. Dorrington*, Holt Eq. 59.

becomes a creditor of the estate, (a) standing in place of the original creditor, and being entitled to the charge for his own benefit, unless he have in some way indicated a contrary intent. But the smallest demonstration is sufficient; and he can claim no interest during his life. The old rule required a tenant for life to bear one-third of the debt; but this principle has been pronounced absurd, making no allowance for the different ages in different cases, and overruled.<sup>1</sup>

§ 9. In case of a jointure, where the jointress and the issue claim under one settlement, they shall contribute proportionally to the discharge of a prior incumbrance.<sup>2</sup>

§ 10. Tenant for life is bound to keep down the interest, or, if a dowress, one-third of the interest, upon incumbrances, whether it accrued before or since the commencement of his estate, and though it exhaust the rents and profits. (b) If the incumbrancer neglect to collect the interest from the tenant for life, the reversioner, &c., may file a bill to charge the rents or have the estate sold. But, where the latter for a series of years pays the interest, far exceeding the profits, it is *prima*

<sup>1</sup> Jones v. Morgan, 1 Bro. R. 205; Earl, &c. v. Hobart, 8 Swanst. 199; White v. White, 4 Ves. 38; Hunt v. Watkins, 1 Humph. 498; Wainwright v.

Hardisty, 2 Beav. 368; Bulwer v. Astley, 1 Phil. 422.

<sup>2</sup> Carpenter v. Carpenter, 1 Vern. 440.

(a) Held, in Kentucky, that he does not thereby become a creditor of those in remainder. King v. Morris, 2 B. Monr. 104. Charges upon the estate, paid by such tenant, are *prima facie* kept alive; not merged in the fee. Faulkner v. Daniel, 8 Hare, 217.

(b) So an annuity is charged, first upon the life-estate, then upon the inheritance. Cason v. Lawrence, 3 Edw. 48. So an *assessment* will be apportioned upon the two estates. Cairns v. Chabert, 3 Ib. 312. And if a tenant for life neglect to pay the taxes upon the estate, Chancery will appoint a receiver. Astreen v. Flanagan, 3 Edw. 279. The expense of draining land was charged upon a fund absolutely belonging to an infant tenant for life, and not upon the land. Stanhope v. Stanhope, 3 Beav. 547.

Tenant for life cannot charge the remainder-man for improvements made

by the former. Caldecott v. Brown, 2 Hare, 844; Thurston v. Dickenson, 2 Rich. Equ. 817.

Where a tenant for life has power to sell in fee, reserving a ground rent, he cannot bind the remainder-man with special covenants, except in pursuance of his power. Naglee v. Ingersoll, 7 Barr, 185. But his agreements are evidence of the boundaries and of the conditions of the estate at the time of the grant. *Ibid.*

Where a building is insured, in which there is a life estate, in case of a partial destruction of it, the insurance money is to be applied to repairs. Brough v. Higgins, 2 Gratt. 408. The tenant for life is not entitled to receive the principal of the money paid for a loss, but only the interest, deducting the premiums. Graham v. Roberts, 3 Ired. Equ. 99.

*facie* evidence that he meant to discharge the estate, especially if settled ultimately on his family.<sup>1(a)</sup>

§ 11. It is said that the rule above stated applies only to mortgages and other charges upon the inheritance. With regard to *renewal leases*, in England, and, so far as they are known, in the United States, the charges of renewal are shared by the tenant for life, in proportion to the benefit which he derives from it under the particular circumstances; and this is referred to a master to settle.<sup>2</sup>

§ 12. If a mortgagee, after a neglect by the tenant for life to pay the interest, purchase the estate for life, and then, after the tenant's death, bring a bill to foreclose; he shall be charged in his account with all the arrears which accrued before such purchase. He would have been bound in this way had he taken possession as mortgagee.<sup>3</sup>

§ 13. Tenant for life, unless expressly restrained, may transfer the whole or any part of his estate to a third person, in any

<sup>1</sup> Tracy v. Hereford, 2 Bro. R. 128; Penrhyn v. Hughes, 5 Ves. 99; 4 Kent, 74; 1 Bro. R. 220; Burges v. Mawbey, 1 Turn. & R. 167; Hunt v. Watkins, 1 Humph. 498; Williams, 8 Bland, 245; Lindsey v. Stevens, 5 Dana, 108; Tucker v. Boswell, 5 Beav. 607; Glengall v. Bar-

nard, Ib. 245; Bull v. Birkbeck, 2 Y. & Coll. Cha. 447; Caulfield v. Maguire, 2 Jones & Lat. 141.

<sup>2</sup> 4 Kent, 75. See Reeves v. Creswick, 8 Y. & Coll. 715.

<sup>3</sup> 5 Ves. 99.

(a) In case of tenant for life, remainder in fee, of lands mortgaged, the parties contribute to a discharge of the incumbrance, according to the relative value of their respective interests, calculated according to the value of the life estate by the common tables. Foster v. Hilliard, 1 Story, 77. Real estate was devised to A for life, remainder to certain minors in fee. A, with consent of the guardians, sold the land, but died before receiving the whole consideration, and the residue was received by his executors. Held, the rights of the parties were fixed at the time of sale, and the executors and the remainder-men should divide the proceeds according to the interests of A and the remainder-men at that time.

Also, that the interest of the tenant for life was to be determined, not by the time of his death, but by the value of his life, as ascertained by the common tables at the time of sale. Thus, although he died within four years from

the sale, his interest was to be calculated for about twenty years, that being the estimated duration of his life. Ib.

It is held, that there is no general rule for estimating the relative value of a life estate and reversion; but the most convenient course is to sell the whole estate, and divide the proceeds. Atkins v. Kron, 8 Ired. Equ. 1. See Williams, 8 Bland, 221; Bristed v. Wilkins, 8 Hare, 240. The dividends of a sum of stock were ordered, upon petition, to be paid to A for her life, and, after her decease, to B for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. Lowndes' Trust, 6 English Law and Equity, 60; Staples, 9 ib. 186. A terre-tenant is not bound to go beyond the profits of the land, in keeping down incumbrances. Jones v. Sherrard, 2 Dev. & B. Eq. 184. A tenant by the curtesy must pay all the interest accruing during his estate, but not before. Ibid.



way which shall not injure or endanger the remainder; or he may join with the owner in fee in alienating the entire inheritance.(a)

§ 14. It is one of the incidents of a tenancy for life, that for certain acts done by the tenant the estate may be forfeited. We shall have occasion, hereafter, to consider this subject in one point of view, under the head of *Waste* (Ch. 18.) There is another ground of forfeiture, which may properly be considered here.

§ 15. At common law, where a tenant for life undertook to convey by feoffment a larger estate than he himself owned, such interference with another's title, operating to divest the remainder or reversion, was punished by forfeiture of the estate for life to the remainder-man or reversioner.(b) This, however, was not the only ground of forfeiture; for where tenant for life of a *rent* levied a fine of such rent, although nothing more passed thereby than his lawful estate, still a forfeiture was incurred.<sup>1</sup> This principle, being founded in the feudal system, according to which such a conveyance was a renunciation of the

<sup>1</sup> Gilb. Ten. 38-9. See *Dehon v. Redfern*, Dudl. Equ. (S. C.) 115; *Ackland v. Lutley*, 9 Ad. & Ell. 879.

(a) It has been held that a proviso against alienation is void. *Rochford v. Hackman*, 10 Eng. L. & Equ. 64. In New Jersey, a statute provides that the assent of the next owner to a conveyance by tenant for life shall appear of record. 1 Cruise. 81; 1 N. J. Rev. C. 348; *King v. Sharp*, 6 Humph. 55.

(b) To bind remainder-men, their acquiescence in a sale of the property by tenant for life must amount to a fraud on the purchaser. *Parker v. Chambers*, 24 Geo. 518.

A bequest having been made to a wife, of real and personal property, for her enjoyment and maintenance during her life or widowhood; a sale of any part of the property by her neither destroys her estate nor cuts off the remainder. *Thrasher v. Ingram*, 32 Ala. 645.

Property holden by A for life, in trust for himself and others, cannot be levied upon under executions against A. *Wylie*

*v. White*, 10 Rich. Eq. 294. In England, numerous statutes have recently been passed, extending the power of a tenant for life over the estate, where the interest of all parties concerned so requires. See *Wms. on R. P., Estate for Life*. See, as to forfeiture by tenant for life, Sts. 7 & 8 Vict. c. 76, s. 7; 8 & 9 Vict. c. 106, s. 4.

In Maine, he may join with the remainder-man in tail, in passing a fee-simple. Me. Rev. St. 372. The provision in Massachusetts Rev. Sts. c. 59, sec. 28, that no conveyance of an estate in fee or for life, nor any lease for more than seven years, "shall be valid and effectual against any other person than the grantor, his heirs, &c., unless it be made by deed recorded," does not dispense with the necessity of a deed, in order to pass an estate for life, even as against the grantor and his heirs, *Stewart v. Clark*, 13 Met. 79.



connection between the lord and his vassal,(a) is for the most part obsolete in American law.<sup>1</sup> It is said by one distinguished commentator, that scarcely a direct decision upon the subject is to be found in our American books; and another is of opinion, that, as the form and nature of American conveyances is that of a *grant*, which passes nothing more than the grantor is entitled to, the doctrine of forfeiture is not in force, even independently of statute provisions, in the United States.<sup>2</sup>(b)

<sup>1</sup> Walk. Intro. 277; 4 Kent, 88-4; M'Corry v. King, 8 Humph. 267.

<sup>2</sup> 5 Dane, 5, 11; 4 Kent, 106.

(a) Tenant for life is sometimes called an *implied trustee*. Joye v. Gunnels, 2 Rich. Equ. 259. Vaden v. Vaden, 1 Head, 444.

If land and slaves, together with personal property, are bequeathed to the wife for life, with a remainder in the land to the son,—the residue of the property to be sold at her death or marriage, and the money to be equally divided between his children named in the will; the widow takes an estate for life, with the right to enjoy and use the same in specie, and it cannot be sold by the executors. Forsey v. Luton, 2 Head, 188. The rents and use of the land, the hire and labor of the slaves, crops, young animals—the offspring of those originally given,—new furniture, &c., and the entire fruits of the life-estate, belong absolutely, to her. If she wastes any part of the estate for life, her estate will be liable. But if the property were consumed in the use intended to be made of it, or perished by time or death of animals, or wear and tear of furniture and farming tools; the rights of the remainder-men are defeated, and they are entitled to nothing, except what remains of the original stock. If an executor participate with the tenant for life in a breach of trust, in the sale of any part of the estate for life, he is jointly liable with her for the value of the property sold. If she received the proceeds of the sale, her estate is primarily liable to the remainder-men. *Ib.*

One who owns the fee, with a devise over upon his death under twenty-one, is entitled to the possession and income of the property. Bowman v. Long, 26 Geo. 142.

(b) It is remarked by the court in Massachusetts, that, at common law, a bargain and sale could not work a for-

feiture or discontinuance; to the latter of which livery of seisin or something equivalent is essential. But a bargain and sale, covenant to stand seised, or release, with a *general warranty* annexed, may produce a discontinuance, where the warranty descends upon him who hath a right to the lands. Stevens v. Winship, 1 Pick. 827.

In a previous case, in the same State, the English doctrine of forfeiture was incidentally recognized as in force. Grant v. Chase, 17 Mass. 446.

Whether the doctrine of forfeiture is still in force or not, it is inapplicable where there is no change of possession attending the conveyance. Thus, if the tenant convey to A, even with general warranty, immediately take back a conveyance from him by quit claim deed, and then mortgage to A, remaining all the time in possession; this works no forfeiture. Stevens v. Winship, 1 Pick. 818.

It was held in Pennsylvania, as early as 1798, that a statute, making the registry of a deed equivalent in effect to *livery*, did not give to the recorded deed of a tenant by the curtesy, the operation of *livery* in forfeiting the estate. The deed was a quit claim in regard to the covenants; but the words used were "grant, bargain, sell, aliene, release, enfeoff and confirm." So, in Maine, a deed of release and quit claim of the fee is no forfeiture. M'Kee v. Pfont, 3 Dall. 486; Bell v. Twilight, 34 Maine, 500.

"The obvious purpose of the provision (substituting a deed for a feoffment) was to dispense with actual investiture, without imparting to its substitute the feudal and almost inconceivable effect of dis-

§ 16. The English law of forfeiture being modified or abrogated in this country, as above mentioned, only a few of the most general principles on the subject will be here stated. If there be tenant for life, remainder for life, and the tenant and remainder-man join in a feoffment, it is a forfeiture of both their estates. If husband and wife, tenants for life, make a feoffment, it is a forfeiture during coverture. So, where he is seised in her right, or where he alone conveys. But the forfeiture ceases with his death.

placing lawful estates, and turning them to a mere right." "The object was, to give without the aid of feudal ceremonies the legal seisin for *lawful purposes*." *Sarah, &c.*, 5 Rawle, 118. See *Salmon v. Clagett*, 8 Bland, 172; *Dawson v. Dawson*, Rice, 248.

In New York, it has been decided, that a conveyance in fee made by a tenant by the curtesy, though with covenant, passes only his own interest, the extent of it being proved, and the form of the deed such as passes only a rightful estate. *Jackson v. Mancius*, 2 Wend. 359. But, in Maine, such conveyance has been held to make a forfeiture. *French v. Rollins*, 8 Shepl. 872. Otherwise by statute. Rev. St. 872; Sts. 1857, c. 78, s. 6.

Forfeiture seems to be unknown in Pennsylvania, Virginia, New York, Connecticut and Massachusetts. In Pennsylvania, if a tenant for life incurs a forfeiture, the remainder-man is not bound to treat the estate as merged, and to enter immediately. *Moore v. Luce*, 29 Penn. 260. In the same State, a tenant for life cannot destroy the rights of a remainder-man by a surrender or a release, or by any other voluntary act for the purpose of merging the particular estate in the greater. *Id.*

In Massachusetts, Michigan, Indiana, New Hampshire, Vermont and New York, it is expressly abolished by statute. *M'Kee v. Pfont*, 8 Dal. 486; 1 Swift, 84; 1 N. Y. R. S. 789; Verm. Rev. St. 310; N. H. Rev. St. 242-3; Mich. Rev. St. 258; 5 Dana, 511; *Grout v. Townsend*, 2 Hill, 554; 11 Conn. 557; 3 Dana, 291; Mass. Gen. Stat. c. 89, s. 9; Ind. Rev. Stats. 232. So in Wisconsin. Rev. Stat. ch. 59, s. 4; 1858, c. 86, s. 4.

In North Carolina, the Revised Statutes provide that a conveyance by a widow shall pass no more than her own lawful estate.

In Tennessee, a deed of conveyance operates as a *grant*, not a *feoffment*, and passes only the grantor's actual interest. So in Virginia. In Kentucky, a deed, though with warranty, passes only the grantor's estate. But, if he warrant for his heirs, they are barred to the value of the land which descends to them. But, in New Jersey, warranty of tenant by the curtesy shall not bind his heirs, claiming under the mother. In Delaware and Alabama, the warranty of a tenant for life is void against the reversioner, &c. 1 N. J. Rev. St. 615; *Miller v. Miller*, Meigs, 484; Aik. 9, Ala. C. s. 1317; *Smith v. Shackelford*, 9 Dana, 475; *Robinson v. Miller*, 1 B. Mon. 94; 1 Ky. St. 110; 1 N. J. Rev. C. 348; Dela. Rev. Sts. 271; Vir. Code, 500.

There is no forfeiture by tenant for life in Minnesota. Comp. Sts. 1859, c. 85, s. 4.

In New Jersey, if a dowress or tenant for life, being sole, discontinue or aliene, or suffer any recovery by covin, the alienation shall be void, but the next owner may enter immediately, as if she were dead. If she aliene with her husband, the forfeiture ceases with his life. 1 N. J. Rev. C. 347-8.

In Ohio, a neglect or refusal to pay the taxes upon land causes a forfeiture to the reversioner or remainder-man, though the tenant was a mere trustee for minors. The reversioner, &c., may redeem from the purchaser of the land, but the tenant for life cannot. Chase's Stat. 2, 1868-9; *M'Millan v. Robbins*, 5 Ohio, 80.

In Kentucky, where the widow had an allowance in slaves in the nature of dower, if she actually or permissively removed a slave from the State, she forfeited her whole dower. Anth. Shep. 649; *King v. Mims*, 7 Dana, 272.

§ 17. By the English law, there are some other acts besides a conveyance, which, on the same principle, cause the forfeiture of an estate for life. Thus, if tenant for life levies a fine, or suffers a common recovery, the reversioner, &c., not being a party, he forfeits his estate; or if, being disseised, he brings a writ, and therein claims the fee. So if, being sued in a writ of right, he joins the *mise* on the mere right, which is the privilege of the owner in fee. So, if a stranger brings an action of waste against him, and he pleads in bar "*nul waste faite*," this being an admission that the plaintiff is the party entitled to sue. Or if he is defaulted or pleads covinously in a real action against him<sup>1(a)</sup>

§ 18. An estate *pour autre vie*, though falling under the general title of *life estates*, and regarded as real for many purposes, is a freehold interest *sub modo*, partakes of the nature of personal property, and is subject by law to peculiar modes of disposition. This estate has sometimes been called, though improperly, a *descendible freehold*. The heir does not take *by descent*, but, if at all, as *special occupant*. Lord Eldon said he found it very difficult to determine under what phrase to describe this interest.<sup>2</sup>

§ 19. The description of the estate is as follows: At common law, where one was tenant for the life of another, called the *cestui que vie*, and died, living the latter, any person who first entered might hold the land by right of occupancy, during the *cestui's* life; subject, of course to the rent reserved, and other liabilities of the former tenant, but not subject to his debts; for the heir might plead "*riens per descent*," though, if it came to the executor or administrator, it would be assets. So slight

<sup>1</sup> Co. Lit. 251 b.; 1 Cruise, 82-8.

<sup>2</sup> Doe v. Luxton, 6 T. R. 289; Brown

v. Elton, 3 P. Wms. 208; Ripley v. Waterworth, 7 Ves. 487, 441.

(a) In Kentucky, it is said, a tenant for life incurs no forfeiture, unless he claims the fee by some proceeding of record. Robinson v. Miller, 1 B. Monr. 91. See Robinson v. Miller, 2 Ib. 292. In

a late English case it is held, that no forfeiture is incurred by a verbal refusal to pay rent, and claim of the fee. Doe v. Wells, 10 Ad. & El. 427.

acts of occupancy would create this title, that it has been thought necessary to decide, that riding over the ground to hunt or hawk doth not make an occupant. This doctrine led to some singular results, where the tenant for life had leased the land. Thus A, tenant for the life of B, leases to C for 5l., and C to D for 3l. A dies, leaving D in possession. C shall receive from D the 3l., and D from C the 5l., because D's term is prevented from merging by the intermediate reversion of C, but D has the freehold in reversion expectant on C's term, and the rent incident to it.<sup>1</sup>

§ 20. St. 29, Chas. 2, c. 3, s. 12, provided, that such estate might be devised, and, if not, that it should be assets by descent in the hands of the heir, if he entered as special occupant;(a) or, if he did not enter, assets in the hands of the executor or administrator. A subsequent statute (14 Geo. 2, c. 20, s. 9,) provided for the distribution of such estate as personal property, in default of any devise or special occupancy.(b)

<sup>1</sup> Co. Lit. 41 b. & n.; Duke, &c. v. Kinton, 2 Vern. 719; Doe v. Luxton, 6 T. R. 291.

(a) By a special occupant, is to be understood one who enters by virtue of a limitation in the instrument which created the estate. (But see *infra* (s. 21) that this is not the sole use of the phrase.)

(b) A, the owner of land in fee-simple, conveyed to B, his heirs and assigns, to hold to him and his assigns during the life of C. B died, leaving C his heir. Held, C should hold for life, as special occupant, the words used in the *habendum* clause not operating to vest the estate in B's executors. Doe v. Steele, 4 Ad. & El. 663. Demise to A, his heirs, &c., for lives. A devises for the remainder of the term to B and his assigns, who dies intestate. B's administrator takes the property. Doe v. Lewis, 9 Mees & W. 662.

The English statutes have been adopted or substantially re-enacted in Maryland, Virginia, Kentucky, North Carolina, Indiana, Alabama, Minnesota and Michigan. (Assets in the hands of the executor, &c., unless granted to the deceased and his heirs only. Md. L. 1798, ch. 101; Dorsey, Test. L. 88. In Arkansas, this estate is excepted from the Statute of Descents. Rev. St. 331.) Ala. Code, 1852, s. 1594; Minne. Sts. 1859, c.

18, s. 6; Mich. Comp. L. 1857, c. 85. See St. 1 Vict. c. 26, s. 3; 4 Kent, 27-8; Anth. Shep. 428, 490, 655; 1 N. C. Rev. St. 278; Ind. Rev. St. 274; 1 Ky. Rev. L. 669; 1 Vir. R. C. 167.

In Massachusetts and Vermont, such estate descends to the heirs, unless devised. Mass. Rev. St. 418-6; Verm. Rev. St. 292. So in Arkansas. Dig. St. 1858, c. 56, s. 19. See Rev. St. 881. And N. C. Rev. C. 1856, c. 38, s. 1, rule 12. In Rhode Island it is devisable. Rev. St. 1857, c. 154, s. 1. So in Indiana. 2 Rev. Sts. 1852, 208, s. 2. And New Jersey. (otherwise, it is personal estate.) Nix. Dig. 878, s. 1. So in Texas. Oldh. & W. Dig. 454.

In New York, New Jersey, and Wisconsin, it is a chattel real after the tenant's death, though freehold before; and in New York, though limited to heirs. 1 N. Y. Rev. St. 722; 4 Kent; Wis. Rev. Sts. 814.

In Ohio there is no statutory provision on the subject; but it is said the courts would never recognize so absurd a doctrine as to allow a stranger to take possession; but this estate would pass either to heirs or executors, probably the latter. Walk. Intro. 275.

§ 21. The English and American statutes seem to contemplate chiefly the case, where, in general terms, an estate is limited to one man for the life of another. This estate, however, is often created with special limitations; in the construction of which there has been no little contradiction and confusion. If an estate be limited to one and *his heirs*, or the *heirs of his body*, for the life of another, no question can arise, because the heirs will hold as special occupants, according to the terms of the grant.<sup>1</sup> But a life estate is not *entailable*, not being an inheritance nor subject to dower. Therefore, in case of an attempted entailment, the heirs of the body or a remainder-man will take, only in case the tenant has not disposed of the land. He has power to grant it away absolutely, after fulfilment of condition by the birth of issue. It was formerly held that he could bar only the issue, not a remainder-man; but the rule seems to be now fully settled as above stated. It has been intimated, that the tenant may even *devise* such estate, so as to bar the heir. But this is doubted.<sup>2</sup> It has been held, that, where the estate is limited to executors, administrators and assigns, it passes, after payment of debts, with the personal estate, to residuary legatees.<sup>3</sup> But if limited to "*heirs, executors,*" &c., and not devised, the heir takes as special occupant in preference to the executor.<sup>4</sup> If a wife is tenant *pour autre vie*, the husband shall hold, after her death, as special occupant.<sup>5(a)</sup>

<sup>1</sup> 1 Cruise, 84; Anth. Shep. 428, (Maryland.)

<sup>2</sup> Low v. Burron, 3 P. Wms. 262; Doe v. Luxton, 6 T. R. 292; Blake v. Blake, 3 P. Wms. 10, n. 1; 1 Rep. in Ireland, 294.

<sup>3</sup> Ripley v. Waterworth, 7 Ves. 425.

<sup>4</sup> Atkinson v. Baker, 4 T. R. 229.

<sup>5</sup> 2 Kent, 112.

\* This case contains the fullest exposition, to be found in the books, of an

estate *pour autre vie* at common law, and as affected by the statutes above named. It was here contended, under the particular form of limitation, on the one hand, that the estate went to the heir, not being validly disposed of by an unattested will; and, on the other, that the executors took it in trust for the legatees. The court remarked, that they should sooner give it to the executor for his own benefit, than to the heir.

(a) A husband entered on land as tenant *pour autre vie* of his wife, leased it, and died. Held, the lessee and his tenant must attorn to the title under which the husband entered, and not to his heirs. Syme v. Sanders, 4 Strobb. 841.

An estate for life terminates of course

upon the death of the tenant; hence, one entering upon land, under an agreement with the husband of a tenant for life, and holding over after her death, is, with respect to the remainder-man, a mere trespasser. Williams v. Caston, 1 Strobbart, 180.

So in New York, a tenant for life or lives, who continues in possession, without the consent of the owner, after the determination of the life estate, is not entitled to notice to quit. The statute (1 R. S. 749, s. 7) declares him a trespasser, and ejectment without previous notice to quit will lie. A tenancy at sufferance, within the meaning of the statute requiring a month's notice to quit, is not created by such holding over. *Livingston v. Tanner*, 4 Kern. 64; *Torrey v. Torrey*, 4 Kern. 430.

The death of a tenant for life may sometimes be presumed from circumstances. The common law fixes no period after which this presumption arises. But, by virtue of St. 19, Chs. 2, c. 6, the principle of which, though not the act itself, is generally adopted in this country, a continued absence for seven years raises a presumption of death, which authorizes the next succeeding owner to enter upon the estate. But if the tenant for life prove to be still living, he shall recover the land with the intermediate rents and profits. Absence for a less period than seven years does not raise a presumption of death. The absence is an absence from the State or Commonwealth. Thus the rule was applied, in a case where a husband emigrated from South Carolina to the Western country. *Woods v. Woods*, 2 Bay, 476; *Spurr v. Trimble*, 1 Mar. 278; *Salle v. Primm*, 3 Miss. 529; *Newman v. Jenkins*, 10 Pick. 515; *Miller v. Beates*, 8 S. & R. 490; *Forsaith v. Clark*, 1 Fost. (N. H.) 409; *Taylor*, 3 Harr. Dig. (suppl.) 715; *Com. v. Thompson*, 6 Allen, 591; *Clark v. Owens*, 18 N. Y. 484.

This act provides, that, if the persons, for whose lives estates are granted, shall go abroad, and no sufficient proof be made that they are alive; in any actions for the lands by the lessors or reversioners, the judge shall direct the jury to give their verdict, as if the absent persons were dead. *Holman v. Exton*, Carth. 246; Stat. 6 Anne, ch. 18: 2 Cox, 373. In Arkansas, absence from the State five years raises a presumption of death. If the party return, he may recover the intermediate profits of the land. Ark. Rev. St. 321-2, 536. In England, by a late act (3 & 4 Wm. 4, ch. 74, s. 91), after a certain absence of the husband, the wife may be empowered, by order of court, to convey lands. But this can be done only upon her affidavit that she has had no communication with him. Anne, &c. 8 Man. & G. 182. In

New Jersey, an heir or devisee may receive the same authority. St. 1848, 48.

Where a husband, twelve years before, sailed for South America, and neither he, nor any of the crew, nor the vessel, were ever heard of afterwards; it was held, in analogy to the statutes relating to bigamy, and to leases determinable on lives, that the death of the husband must be presumed, and the wife treated as a *feme sole*. *King v. Paddock*, 18 John. 141.

So the brother of A, a person deceased, left Oldenburg more than thirty-five years ago. He went to Hamburg and shipped as a sailor for Lisbon, and had never been heard of since. Held, the administrator of A should distribute his property as if the brother were proved to be dead. *Loring v. Steineman*, 1 Met. 204.

A father, seventy years old, and his daughter, thirty-three years old, were on board a steamboat, lost at sea, and both perished, there being nothing to show which survived the other. Held, they must be presumed to have died at the same instant. *Coy v. Leach*, 8 Met. 371.

Presumption of death does not arise from the fact, that a person who, twenty-two years ago, was in "bad health," would, if now living, be eighty years old; even although, on recent inquiry, his name was not known at the post-office of a large city, (his former residence) nor inserted in its directory, there being no evidence of the sort or degree of bad health, nor of inquiries having been made about him among his friends, or of his having ever left the place of his former residence. *Matter of Hall, Wallace, Jr.* 85.

What is a reasonable search and inquiry for the person upon whose life the continuance of a leasehold estate depends, is a mixed question of law and fact, to be determined upon the particular circumstances of each case. Inquiry of the tenant may in some cases, it seems, be sufficient. *Clarke v. Cummings*, 5 Barb. 339.

In the case of a lease for the longest of three lives; if the lessor, after reasonable search, could not find that any of such lives were in being, he might, after a year's notice, re-enter, unless, within that time, the tenant should produce before a judge of common pleas evidence of a continuance of the lives. Held, that reputation among the relatives of the person was admissible in evidence to



prove his death. *Clark v. Owens*, 18 N. Y. (4 Smith) 484.

That the question whether reasonable search had been made by the lessor was one of fact for the jury. *Ib.*

And that the fact that the court of common pleas was abolished did not relieve the tenant from the obligation to produce evidence to repel the presumption of death. *Ib.*

In a suit in equity by certain heirs of a person, having an equitable interest in an estate, against the executor of the person who held the legal title, and who had, in his lifetime, conveyed the estate to *bona fide* purchasers without notice, one of the heirs not having been heard of for seventeen years, and being an infant when last heard of: the share of such absent heir was divided among the

other heirs, upon their executing bonds, payable to the judge and his successors in office, with condition to indemnify the executor against the claim of the absent heir. *Norman v. Cunningham*, 5 Gratt. 68.

Under special circumstances, the death of a party may be presumed to have occurred, at some particular part of the time of seven years, during which he was absent; as where one sailed from Demerara during *the hurricane months*. But in general no such presumption arises, but the time must be affirmatively proved. *Sillick v. Booth*, 1 Y. & Coll. Cha. 117; *Spencer v. Roper*, 18 Ired. 888.

In regard to the levy of an execution upon the rents and profits of a life estate; see *Batchelder v. Thompson*, 1 Adams, 589.

## CHAPTER V.

## ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

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|---------------------------------------|-----------------------------|
| 1. Life estates created by law.       | 8. When it arises.          |
| 2. Estate tail after possibility, &c. | 7. Qualities of the estate. |

§ 1. HAVING treated of estates for life created by *act of party*, we are now to consider those created by *act of law*.

§ 2. Of these, the first, in the English law, is called *estate tail after possibility of issue extinct*. This is of little consequence in the United States, and will be very briefly noticed.

§ 3. Where tenements are given to a man and his wife in special tail, and one of them dies without issue, or where they have issue, who die without issue, the surviving man or woman is tenant in tail after possibility of issue extinct, because he can no longer have issue capable of inheriting the estate. So, where tenements are given to a man, and to his heirs which he shall beget on the body of his wife; if she die without issue by him, he is tenant in tail after, &c.

§ 4. No one can have the above-described estate, except a donee in special tail, because both a tenant in tail general, and the issue of tenant in tail special, may always, by legal possibility, during their life, have issue capable of inheriting.<sup>1</sup> And this estate cannot arise without a moral impossibility, caused by act of God, of having issue. Thus a man and woman will remain tenants in special tail, though they live to be more than a hundred years old. So, if a man and woman, tenants in tail special, are divorced, *causa præcontractus* or *consanguinitatis*, the

<sup>1</sup> Lit. ss. 82, 88, 84



separation not being by act of God, they become mere joint tenants for life.<sup>1</sup>

§ 5. This tenancy may exist in a remainder.<sup>2</sup>

§ 6. In some particulars, the estate above described resembles an estate tail; in others, an ordinary estate for life. The tenant is a tenant for life, but with many of the privileges of a tenant in tail; or a tenant in tail, but with many of the restrictions of a tenant for life. Thus such tenant is dispunishable for waste, the law not divesting him of a power which he once possessed. But whether he acquires a property in the timber cut by him, seems to be a point somewhat unsettled. But, on the other hand, by a feoffment, he forfeits his estate; and, if he acquire a fee, simple or qualified, by descent, in the same land, his former interest is merged.

§ 7. If tenant in tail after possibility, &c., grant over his estate, the grantee is a mere tenant for life, with none of the peculiar privileges of the former.<sup>3</sup>

<sup>1</sup> 1 Inst. 28 a.

<sup>2</sup> Bowles' case, 11 Rep. 81 a.

<sup>3</sup> 1 Cruise, 108-5; 2 Chit. Black. 98 and n. 6.

## CHAPTER VI.

### CURTESY.

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| 1. Estates arising from marriage.                          | 13. Conditional fees, &c.  |
| 2. Curtesy—origin of the name.                             | 14. Money to be converted into land, or land converted into money. |
| 3. Definition of the estate; curtesy in the United States. | 15. Wife must have the <i>inheritance</i> .                        |
| 4. Requisites.   | 16. Wild lands.  |
| 5. Marriage.   | 17. Entry not necessary.   |
| 6. Seisin.   | 18. How barred; effect of a contract upon curtesy.                 |
| 8. Birth of issue.   |  |
| 11. Aliens.  |  |

§ 1. THE two most common and important estates for life, are those which grow out of the relations of *husband and wife*—namely *curtesy* and *dower*. In treating of these respective interests, it should be remarked at the outset, that upon no subject whatever has American legislation been so abundant and so various as that of *marriage*, and the rights and duties arising therefrom; rendering obsolete and practically useless very many of the ancient rules relating to the estates in question.<sup>(a)</sup> In a treatise like the present, it seems proper, therefore, to state those rules with proportional brevity, and, as concisely and intelligibly as the nature of the case admits, the statutory provisions

(a) Some of the legislation referred to, as applicable to existing rights, has been questioned on the ground of constitutionality. Thus it is held, that a widow's right of dower in the real estate of her husband accrues at the time of his death, and becomes vested before assignment, and a subsequent statute can neither reduce nor take it away. *Burke v. Barron*, 8 Clarke, 182.

Also, that a statute, purporting to abolish tenancies by the curtesy and in dower already in enjoyment, is uncon-

stitutional and void, except so far as it operates upon rights merely inchoate at the time of its enactment. *Strong v. Clem*, 12 Ind. 87; *Logan v. Walton*, Ib. 689; *Frantz v. Harrow*, 18 Ib. 507; *Strong v. Dennis*, Ib. 514.

So an act, that land in the hands of a purchaser, liable to the dower of the vendor's wife, shall belong to her in fee-simple as to one third, in lieu of dower, is held unconstitutional as to land so sold before its enactment. Ib.

by which they have been so extensively modified. *Curtesy* will make the subject of the present chapter.

§ 2. The name *curtesy* has been variously accounted for, upon the grounds that the estate is *peculiar to England*, that the tenant was entitled to attend upon the lord's *court*, and that it has no *moral* foundation. In the time of Glanville an estate existed, somewhat resembling curtesy, being the interest of a husband in lands given with the wife in *marriagehood*. The birth of issue gave him a life estate in the lands.<sup>(a)</sup> From this interest, curtesy seems to have been derived. By the custom of Normandy, the husband held only during his *widowhood*.<sup>1</sup>

§ 3. Where a wife is seised of lands in fee-simple or fee tail general, or as heir in tail special, and the husband and wife have issue born alive; after the wife's death the husband shall hold the lands for his life, and this estate is a tenancy by the curtesy.<sup>2(b)</sup>

<sup>1</sup> 1 Cruise, 106-7; 2 Black. Com. 100; Glanville Tr. 198; Bracton, lib. 5, c. 80, s. 7; Hale's His. of C. L. 1, 219.

<sup>2</sup> Lit. s. 35; Mass. Rev. Sts. 411; Dela. Rev. Sts. 277.

(a) A tenant by the curtesy initiate is said to have a life estate in his own right. *Foster v. Marshall*, 34 Maine. 491.

(b) This estate has been termed *custodiam hæreditatis uxoris*. Co. Lit. 80 a, n. 5. It is a *legal estate*, not a mere *charge* or *incumbrance*, and is said to be rather a title by *descent* than by *purchase*. *Watson v. Watson*, 13 Conn. 88.

It may be sold by the husband. *Wells v. Thompson*. 13 Ala. 793. His deed of bargain and sale will pass only his title; and the statute of limitations will not begin to run against the heirs of the wife till his death. *Meraman v. Caldwell*, 8 B. Mon. 82.

With the exception of the changes resulting from legislation upon the general rights of married women, which is very abundant, curtesy exists in most of the United States as at common law, being generally noticed in the statutes, if at all, merely by a recognition of the common law rule. In a few of the States, the estate is abolished or greatly modified. In New York and Indiana it is abolished. In Iowa, the husband takes an estate corresponding with dower. Rev. St. 1860, p. 420. There is no curtesy in Louisiana. 1 Washb. 129. So, in California, there

is no curtesy; but all real estate acquired during coverture belongs to husband and wife in common, and the survivor takes one half in severalty. Cal. Sts. 1850, c. 147, s. 10; Wood's Dig. 488, s. 10.

In Kansas, upon the decease of a wife intestate, leaving issue, the husband takes one half of her property, absolutely. If no issue, the whole. Comp. Sts. 1862, c. 141, ss. 4, 5. In Georgia, it is provided, both that a husband shall be heir to his wife, and also that the real estate of the wife shall, like her personal estate, vest absolutely in her husband upon the marriage. Of course, curtesy is unknown. In Indiana, the husband inherits to the wife.\* In South Carolina, the husband takes the same interest in the wife's lands upon her death, that

\*A statute (1888) provided, that, on the death of a feme covert intestate, her husband should have one-third of her estate in fee, and be tenant by the curtesy, as at common law, of the residue. Held, this statute did not change the common law right as to the two-thirds; and, where no children have been born alive of the wife, he takes no estate therein. *Cunningham v. Doe*, 1 Smith, 84.

§ 4. Four circumstances are necessary to the existence of this estate; viz., *marriage, seisin of the wife, issue, and death of the wife*. And it is wholly immaterial in what order these events occur, provided they all at some time take place. Thus, if the wife is disseised after marriage, but before the birth of issue; or if the lands come to her after the death of the issue; the husband still has curtesy.<sup>1</sup>

§ 5. A *void* marriage gives no right to curtesy. It is otherwise with a marriage merely *voidable*, but not actually avoided during the wife's life—because it cannot be avoided afterwards.<sup>2</sup>

§ 6. It is the general rule, that the wife, or the husband in her right, must have been *seised* of the lands. It is said the husband is bound to strengthen the title of the wife by possession, so as to protect the lands against adverse claims. Of corporeal hereditaments there must be a *seisin in deed*. Thus, if lands descend to a woman, who afterwards marries and has issue, the husband shall not have curtesy. So, where persons claiming adverse title were in possession.<sup>3</sup>(a) But the rule has been held

<sup>1</sup> 1 Cruise, 107; Co. Lit. 30 a; Paine's Case, 8 Rep. 35 b; Menville's Case, 18 Rep. 23; Jackson v. Johnson, 5 Cow. 74.

<sup>2</sup> 1 Cruise, 107.

<sup>3</sup> Co. Lit. 29 a; Mercer v. Selden, 1 How. 37; Adair v. Lott, 8 Hill, 182; Orr v. Hollidays, 9 B. Mon. 59; Neely v. Butler, 11 B. Mon. 48.

she would take in his lands upon his death. In Vermont, it seems, the husband formerly had curtesy in a fee-simple, only where the issue had died under age and without children; but now curtesy is at common law; with the exception, that, if the wife leaves issue by a former husband, curtesy does not attach to such lands as descend to them. See Prince's Dig. 225, 251; S. C. Sts. 1791; 1 Vt. L. 142; Me. Rev. Sts. 381; M'Corry v. King, 3 Humph. 267; Verm. L. 359; Verm. Rev. Sts. 291; Ind. Sts. 1850; 1 Rev. Sts. c. 27. Cunningham v. Doe, 1 Cart. 94; Burnsides v. Wall, 9 B. Mon. 318.

In Pennsylvania, it is said, the husband's curtesy, by statute in 1833, is good though there be no issue of the marriage. 4 Kent, 29 n. So in Wisconsin. (Rev. Sts. 336.) In the same State, if the wife leave issue by a former husband, who may inherit from her, there shall be no curtesy. *Ib.*

The act of 1841, ch. 161, of Maryland, does not destroy the tenancy by the curtesy, but suspends the right of execution

during the life of the wife, leaving the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife. Since that act, the rent of a farm devised to a married woman cannot, during the life of the wife, be made liable to execution for the debts of the husband. Logan v. M'Gill, 8 Md. 461.

(a) This rule has been changed in Connecticut, Pennsylvania and Tennessee; and a *right to seisin* or *potential seisin*, merely, there being no adverse possession, and whether such seisin were acquired by descent, devise or conveyance, is there sufficient to give curtesy.

On the ground, in Connecticut, that in all other respects, in that State, ownership is held equivalent to actual seisin. Thus lands descend from, or may be devised by, the owner, though not seised. So, he may maintain trespass. (Two justices dissented.) To bar curtesy, adverse possession must have existed through the whole period of marriage. Parker v. Carter, 4 Hare, 400.

not applicable to wild lands,(a) whether claimed by inheritance, deed or devise, of which the mere ownership is, in general, equivalent to actual possession, unless they are held adversely to the wife. Nor to incorporeal hereditaments, where no actual seisin is possible. Thus, where a wife seised of a rent dies before it falls due, the husband shall have curtesy. "*Impotentia excusat legem.*"<sup>1</sup>(b) If the lands are leased for years when they descend upon the wife, the possession of the lessee is equivalent to actual seisin of the husband and wife, and he shall have curtesy, although she die before receiving any rent, and although the rent before her death was greatly in arrear. It might be otherwise, if the rent were paid to any other claim-

<sup>1</sup> *Gulon v. Anderson*, 8 Humph. 298; *Bush v. Bradley*, 4 Day, 298; *Jackson v. Sellick*, 8 John. 262; *Davis v. Mason*, 1 Pet. 508; *Smoot v. Lecatt*, 1 Stew. 590;

*Kline v. Bebee*, 6 Conn. 494; *Ellsworth v. Cook*, 8 Paige, 648; *Barr v. Galloway*, 1 M'Lean, 576; *Co. Lit.* 28 a; *Wells v. Thompson*, 18 Ala. 798.

(a) Johnson J., remarks: "It would indeed be idle, to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines, in order to break a twig, or turn a sod, or read a deed, before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the Conqueror introduced this tenure, the necessity of actual seisin would never have found its way across the channel." 1 Pet. 507. In Maine, curtesy is allowed in lands *under improvement*. Revised Stat. 898. If the owner of wild and unoccupied land dies intestate, the husband of one of the heirs is to be regarded as in possession as tenant by the curtesy, though he states that he never owned the premises, nor ever went through the ceremony of putting his foot upon the land. *Pierce v. Wannett*, 10 Ired. 446. In Kentucky, there is no curtesy in wild land, where neither husband nor wife has had actual possession, although he has paid the taxes ever since the marriage, and there has been no adverse claim. *Neely v. Butler*, 10 B. Mon. 48.

(b) In New York, the husband of a woman who is either heir or devisee, but has never entered, shall not have curtesy. It is said, the requisition of actual seisin is limited to these two cases, and is not applicable where the wife claims under a

deed; which, by the statute of uses, transfers actual seisin, without entry. So, if husband and wife recover her lands by suit, this is a sufficient seisin for curtesy. So, with a decree for partition. In Pennsylvania, the husband shall not have curtesy, where the wife has a mere naked seisin as trustee of the freehold, though she also holds a beneficial interest in the reversion. *Jackson v. Johnson*, 5 Cow. 74; *Ib.* 98; *Adair v. Lott*, 8 Hill, 82; *Ellsworth v. Cook*, 8 Paige, 648; *Chew v. Commrs. &c.* 5 Rawle, 160.

A husband, in right of his wife, became a partner in the ownership of a cotton factory and other mills, and the management of the business thereof, and received a proportionate share of the profits from the time she became interested in them till after her death. Held, there was a sufficient seisin to give the husband curtesy. *Buckley v. Buckley*, 11 Barb. 43.

Possession of an immediate or remote vendee of the husband is sufficient to give him curtesy. *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401.

In Missouri and Ohio, there may be curtesy without actual seisin. *Stephens v. Hume*, 25 Mis. 349; *Merritt v. Horne*, 5 Ohio N. S. 307. In Kentucky, receipt of rents and profits is enough. *Powell v. Gossom*, 18 B. Mon. 179.

ant.<sup>1</sup> So where a woman, before marriage, grants a term for seventy-five years, to a trustee, in trust for her use during coverture; the husband has curtesy.<sup>2</sup> So, where lands descend to a woman subject to a devise to executors for payment of debts, and until the debts are paid; although the executors enter and the wife dies before the debts are paid, the husband still shall have curtesy. But, at common law, where lands come to a woman subject to a life estate, she has no seisin, and therefore there shall be no curtesy.(a) Whether there shall be curtesy in the rent reserved, if any, seems doubtful. In equity, reversions are subject to curtesy. Where an intervening life estate is merely *equitable*, it is no bar to curtesy.<sup>3</sup>

§ 7 a. The same principle of *estoppel*, which precludes the tenant in an action for *dower* from denying the seisin of the husband, (*infra*, ch. 8,) applies to tenant by the curtesy. Thus a *feme sole* claimed land under a location by the proprietors. Having intermarried with A, he entered under the location, and after her death retained possession as tenant by the curtesy. Her heirs conveyed to B, who brings an action of waste against A. Held, A was estopped to allege a defective location. A party may also be estopped, by his own acts, from claiming curtesy. Thus, where a person petitioned a commission, under the act of Congress of 1803, for a confirmation of a British grant, and represented himself as "the only surviving heir and legal representative" of the grantee; such petitioner was estopped from claiming as tenant by the curtesy.<sup>4</sup>

<sup>1</sup> De Gray v. Richardson, 3 Atk. 469; Carter v. Williams, 8 Ired. Equ. 177.

<sup>2</sup> Lowry v. Steele, 4 Ohio, 171.

<sup>3</sup> 1 Cruise, 108 (cites Guavara's case, 8 Rep. 96 a); Robertson v. Stevens, 1 Ired. Eq. 247; McCorry v. King, 3 Humph. 267; Co. Lit. 29 a & n. 7; Oxford v. Benson, 36 N. H. 395; 1 Cruise, 108-9; Gen-

try v. Wagstaff, 8 Dev. 270; Stoddard v. Gibbs, 1 Sumn. 268; Taylor v. Gould, 10 Barb. 388; Mackey v. Proctor, 12 B. Mon. 488; Carter v. Williams, 8 Ired. Eq. 177; Adair v. Lott, 8 Hill, 182.

<sup>4</sup> Morgan v. Larned, 10 Met. 50; Montgomery v. Ives, 18 S. & M. 161.

(a) Where lands are conveyed during coverture to the separate use of the wife in fee, and the deed reserves a life estate to the grantor, the husband does not, on the death of the wife, living the grantor, become tenant by the curtesy. Planters' Bank v. Davis, 31 Ala. 626.

In New Hampshire, a tenant by curte-

sy of the reversion, expectant upon an estate in dower, cannot maintain trespass *de bonis* for trees or other things severed and removed by the dowress; the property belongs to the owner of the inheritance. Mathews v. Bennett, 20 N. H. 21.

§ 8. Another requisite to curtesy, is *the birth of issue*; after which, the husband is called tenant by the curtesy *initiate*. (a) The issue must be *born alive*. It was formerly held that the only admissible proof of this fact was its being *heard to cry*; (b) and that this proof must come from men, not from women. But other evidence has been held sufficient, even as early as the reign of Henry 8; "for peradventure it may be born dumb."<sup>1</sup> The issue must also be born during the mother's life. If she die in childbirth, and the child be taken away by the *Cæsarean operation*, at the death of the wife the husband has no title, the issue not being born, but the estate descends to the child in the womb, and shall not afterwards be divested from it in favor of the husband. Curtesy ought to *begin* by the birth of the issue, and *be consummated* by the death of the wife.<sup>2</sup> The issue must be such as can inherit the estate. Therefore, if lands are given to the wife and the heirs male of her body, and she has issue a daughter only, the husband shall not have curtesy.<sup>3</sup> But a mere possibility of inheriting is sufficient. Thus, if a woman has issue by a first husband, and afterwards issue by a second husband, and both issue are dead; inasmuch as the latter issue might by possibility inherit, the second husband is tenant by the curtesy.<sup>4</sup>

§ 9. The last-named requisite is of course intimately connected with that of the wife's actual seisin, which has been before

<sup>1</sup> Co. Lit. 30 a. 67 a, 29 b & n, 5. Brac. 438 a; Paine's case, 8 Rep. 84 b; Dyer, 25 b; Benl. Rep. 25; 2 Bl. Com. 101.

<sup>2</sup> Co. Lit. 29 b; 8 Rep. 85 a; Marsellis v. Thalhimer, 2 Paige, 85.

<sup>3</sup> Co. Lit. 29 b; 8 Rep. 85 b.

<sup>4</sup> 8 Rep. 84 b; Pres on Est. 516.

(a) Anciently, this gave him a right to do *homage* alone. Co. Lit. 30 a, 67 a. See Mattocks v. Stearns, 9 Vern. 826; Oldham v. Henderson, 5 Dana, 256. In Massachusetts, the birth of living children after the conveyance by a married woman of land held by her to her sole use, under statute 1845, c. 208, gives a right to curtesy. Comer v. Chamberlain, 6 Allen, 166. In Mississippi, under St. 1846, as at common law, the husband has no curtesy, if there was no issue. Ryan v. Freeman, 36 Miss. 175. In Ohio, birth of issue is not necessary.

Ohio Rev. Sts. c. 88; s. 17, p. 504. So in Oregon. Oreg. Sts. 1855, 409. And Wisconsin. Wis. Rev. Sts. 886. And, it is said, in Pennsylvania. 4 Kent, 29 n.

(b) This is one of many instances of the extreme jealousy exhibited by the ancient law to guard the rights of the *heir*. See 8 Rep. 84. Bracton says, though the child were called, baptized, and buried as a christian, this would be insufficient to give curtesy. In Scotland, it is said, the old rule still prevails. Dyer 25, b, n, 2.



considered; because, unless actually seised, her issue cannot inherit the estate from her.<sup>1</sup>

§ 10. The last requisite, is *the death of the wife*, by which the husband's estate becomes consummate.<sup>2(a)</sup>

§ 11. By the English law, *an alien* cannot be tenant by the curtesy, because this is an estate created by *act of law*, and the law never casts an estate upon a person, which is liable to be immediately divested. It will be seen hereafter, (see *Dower, Alien*,) that in many of the States the common law rule upon this subject has been abolished, and, in some of them, where it still for the most part remains unchanged, a special exception has been made in favor of *dower*. The particular case of tenant by the curtesy seems to have been generally, if not wholly, omitted in the statutory provisions.<sup>(b)</sup>

§ 12. It has already been stated, generally, in what lands a husband shall have curtesy. A few particular illustrations will here be added.

§ 13. Both conditional fees and estate tail are subject to curtesy, even notwithstanding an express proviso or condition to the contrary. And, in both cases, though the estate of the wife comes to an end by her own death, and that of her issue, the husband shall still have his curtesy as against the reversioner or remainder-man. This rule proceeds upon the grounds, that the incident of curtesy is a privilege impliedly annexed to the creation of the estate, and not derived merely from the interest of the wife; and that by the birth of issue the husband gains an initiate title, which cannot afterwards be divested by act of God.<sup>3</sup>

<sup>1</sup> Co. Lit. 40 a; 1 Cruise, 110.

<sup>2</sup> 1 Cruise, 110.

<sup>3</sup> 1 Cruise, 112; (Paine's case, 8 Rep.

84;) Co. Lit. 80 a; See Paine v. Paine, 11 B. Mon. 188

(a) See *Presumption of Death*, c 4.

(b) In England, if an alien be made a denizen, and afterwards have issue, he may be tenant by the curtesy in respect of such issue; though he would not be entitled on account of previous issue. In Massachusetts, if an alien makes the preliminary declaration of his intention to be naturalized before the death of his wife, and completes his naturalization

after her death, he is not entitled to curtesy. *Foss v. Crisp*, 20 Pick. 121. In Pennsylvania, an alien can gain no title to real estate as tenant by the curtesy initiate. *Reese v. Waters*, 4 W. & Serg. 145. Where there were several plaintiffs in ejectment, one of whom was a married woman, and her husband an alien; held, the action would lie. *Doe v. Rogers*, 1 Carr. & K. 390.

Thus in case of devise to a woman in fee, with a devise over, if she die under age, without issue, the woman marries, has issue which dies, and dies herself, under age. This is a contingent limitation, not a conditional limitation, and the husband shall have curtesy.<sup>1</sup> As a general rule, however, *cessante statu primitivo, cessat derivativus*; and the case above mentioned is to be regarded as an exception from this principle. With regard to curtesy as well as dower, if the primitive estate terminates by force of a *condition*, instead of a *limitation*, the derivative interest is also defeated. The distinction is, that by a condition the old paramount title is re-assumed; while a limitation merely shifts the estate from one person to another.<sup>2</sup> In other words, where the fee in its original creation is only to continue to a certain period, the husband or wife shall have curtesy or dower after the expiration of such period; but where the estate is first given in fee or in tail, and by subsequent words made determinable upon a certain event, if that event happen, the curtesy or dower ceases.<sup>3(a)</sup>

§ 14. In general, curtesy is allowed only in a *legal* estate. But, in equity, there shall be curtesy in money directed or agreed to be laid out in land.(b) So, at law, where the land of one

<sup>1</sup> *Buckworth v. Thurkell*, 3 B. & P. 652, n. a.\* See *Moody v. King*, 2 Bing. 447.

\*It is said by Lord Alvanley, "this case occasioned some noise in the profes-

sion at the time it was decided." 3 B. & P. 653.

<sup>2</sup> 4 Kent, 82-3, and n.

<sup>3</sup> Co. Lit. 241, a. n. 170; *Doe v. Hutton*, 3 B. & P. 654.

(a) See *Follett v. Tyrer*, 14 Sim. 125. In Vermont, sect. 74 of the act of November 15, 1821, was by implication repealed by the act of October 31, 1823, and, after the passage of the latter act, a husband did not become tenant by the curtesy of the land of his deceased wife, held by her in fee tail. *Giddings v. Cox*, 31 Vt. 607.

(b) Devise of £800 to the testator's daughter A, to be laid out by the executrix in land, to be settled to the use of A and her children. If she died without issue, the lands to be equally divided between her brothers and sisters. The money not having been applied as directed, the plaintiff, being the husband of A, brings a bill in equity, praying that the land might be purchased and settled

on him for life as tenant by the curtesy, or the interest paid to him for life. Held, inasmuch as A would have been tenant in tail of the land, the plaintiff, as tenant by the curtesy, should have the interest for life. *Sweetapple v. Bindon*, 2 Ver. 536.

In Pennsylvania, dower and curtesy are incident to both legal and equitable estates. Thus, where a testator devised lands, in trust for his daughter A and her heirs, to be held for her separate use, free from the control of any future husband, and without the power of alienation, or of anticipation of the income thereof; and A married and died: it was held, that the surviving husband was entitled to curtesy. *Dubs v. Dubs*, 31 Penn. 142.

deceased is sold for payment of debts, the husband of a devisee, who takes subject to such sale, shall have curtesy in the proceeds. Thus a testator, whose personal estate was insufficient for payment of debts, devised the residue of his estate after such payment to his daughters; if the residue exceeded \$1,000 in value to each, the overplus to be divided, &c. The estate, consisting of wild land, was sold and bought by the executor. The sale was declared voidable in the probate court after the death of a married daughter, but her heirs afterwards elected to affirm it. Held, the husband of such daughter, on releasing his title to the land, should have a share of the proceeds, being the interest already accrued, with the present value of what would accrue during his life.<sup>1(a)</sup> But there is no tenancy by the curtesy, in an estate held in trust for the benefit of a married woman, as if she were a *feme sole*, and so that the same shall not be in the power, or subject to the debt, contract, or engagements of her husband, with the remainder to her heirs or appointees.<sup>2</sup> So a husband, who has conveyed land to another in trust for his wife, is not entitled, on her death, to a tenancy by the curtesy in the trust estate.<sup>3</sup>

§ 15. Only *estates of inheritance* are subject to curtesy, which is indeed merely a continuance of the inheritance. It is said to come out of the inheritance and not out of the freehold, and cannot exist unless, at the very moment when the husband takes, the inheritance descends upon the children, if living; nor where the estate is to be determined by express limitation or condition upon the wife's death.<sup>4(b)</sup> If the issue take as purchasers, the husband shall not have curtesy,—as where there was a devise

<sup>1</sup> Houghton v. Hapgood, 13 Pick. 154.

<sup>2</sup> Stokes v. McKibbin, 1 Harris, 267.

<sup>3</sup> Rigler v. Cloud, 2 Harris, 361.

<sup>4</sup> Sumner v. Partridge, 2 Atk. 47;

Boothby v. Vernon, 9 Mod. 151; Simmons v. Gooding, 5 Ired. Eq. 382; Janney v. Sprigg, 7 Gill, 197.

(a) If the wife's lands be sold in partition after her death, the husband, as tenant by the curtesy, shall have the use of the proceeds for life, upon giving security for re-payment at his death. Clapper v. Livergood, 5 Watts, 113.

(b) Devise to A and her assigns for life. If she should marry, and die leaving issue

male, then to such issue and his heirs male forever. A married, had issue, and died leaving her husband. Held, as A never had an inheritance, the husband could not have curtesy, and this was manifestly the intent of the testator. Boothby v. Vernon, 9 Mod. 147.

to the wife and her heirs; but, if she died leaving issue, then to such issue and their heirs. So, in case of a trust for the wife during her life, then to her children; the husband takes nothing.<sup>1</sup> So there was a devise to A and her heirs. If she died before her husband, he to have £20 a year for life; the remainder to go to the children. A having died before her husband, held, he should not have curtesy.<sup>2</sup>(a) Nor shall there be curtesy where the issue take as purchasers, though the ultimate remainder or reversion in fee is in the wife. Thus, in *Boothby v. Vernon*, (*supra*, s. 15,) the wife was heir to the testator, and therefore seised of the reversion in fee.

§ 16. The question is not known to have been ever directly raised, whether a husband shall have curtesy in *wild lands*. From what has been said (*supra*, s. 6) as to seisin, there would seem so be no doubt upon the point. In one case in Massachusetts,<sup>3</sup> curtesy was allowed in such lands, though no question was made upon the subject. On principle, the same considerations would seem applicable to curtesy and dower. It will be seen that a husband, not tenant by the curtesy initiate has no right to clear wild lands of the wife during her life.(b),

§ 17. Curtesy being an estate vested immediately by law in the husband upon the wife's death, and he having had an initiate title during her life; no *entry* is necessary to complete his ownership. When once vested, the estate becomes liable for his debts, and cannot be divested by his disclaimer. It may be taken on execution, and a voluntary settlement of it upon a wife will be void against creditors.<sup>4</sup>

<sup>1</sup> *Barker v. Barker*, 2 Sim. 249; *Green v. Otter*, 3 B. Monr. 105.

<sup>2</sup> *Sumner v. Partridge*, 2 Atk. 47.

<sup>3</sup> *Houghton v. Hapgood*, 13 Pick. 154.

<sup>4</sup> *Steadman v. Palling*, 3 Atk. 423; *Watson v. Watson*, 18 Conn. 83; *Vanduzer v. Vanduzer*, 6 Paige, 366; *Wickes v. Clarke*, 8, 161.

(a) A woman, tenant in tail, conveys by lease and release to trustees, for the use of herself till marriage, remainder to her intended husband for life, remainder to herself for life, remainder to the issue in tail. Held, the husband could not claim after her death, either under the settlement, because this inter-

fered with the estate of the issue in tail, or as tenant by the curtesy, because upon the marriage he took an estate for the life of the wife, and she had no inheritance in possession. *Doe v. Rivers*, 7 T. B. 276. See 8 Gray, 390.

(b) *Infra*, ch. 7, sec. 2; *Babb v. Perley*, 1 Greenl. 6.

§ 18. It will be seen hereafter, (chap. 10,) that a woman may be barred of dower by other provisions for her benefit. But, it seems, no such principle is adopted in regard to curtesy.(a)

§ 19. At common law, a husband does not lose his curtesy by leaving his wife and living in adultery with another woman.<sup>1</sup> St. Westm. 2, c. 34, provides a forfeiture only in case of dower. Nor does he lose curtesy by a divorce for adultery, which is only *a mensa, &c.* A divorce *a vinculo*, granted upon the ground that the marriage was void, of course destroys the right of curtesy.(b) But the general rule of law upon this subject will be controlled by any special contract inconsistent therewith. Thus an indenture was made between A, B, his wife, and a trustee,

<sup>1</sup> Ind. Rev. L. 211; Md. L. 580.

(a) See *Dower—Divorce*. By marriage articles, a woman granted to her intended husband, the interest of her money and the rents of her estate in fee-simple for her life, to maintain the house and educate their children until they were of age or married. Held, the husband should have curtesy, as if no such articles had been made, it being a mere executory contract as to the manner in which the general funds should be applied, of which their estates consisted. *Sidney v. Sidney*, 3 P. Wms. 276; *Smoot v. Le-catt*, 1 Stew. 590; *Wells v. Thompson*, 13 Ala. 793.

(b) In some of the United States, the principle above stated has been changed by statute.

In Indiana, a husband loses curtesy by leaving his wife and living in adultery. But a reconciliation restores his right to curtesy. In Maryland, curtesy is lost by a conviction of bigamy. Ind. Rev. L. 211; Md. L. 580.

In treating of *dower*, and the circumstances which operate as a bar thereof, some remarks will be made upon the distinctions between the English and American law of *divorce*. These are for the most part equally applicable to curtesy. The general principle of American law seems to be, that, where a marriage is dissolved by divorce, all the rights of the respective parties, growing out of such marriage, come to an end; and, of course, that the husband loses his right to curtesy. Such is the express provision of the statutes in North Carolina and Penn-

sylvania, and such is stated to be the law in Connecticut. 1 N. C. Rev. St. 241; *Purd.* 214; 1 *Swift*, 25. See *Starr v. Pease*, 8 Conn. 541; *Wheeler v. Hotchkiss*, 10 Ib. 226.

The general principle above stated is undoubtedly applicable in all the States, independently of any statutory provision, in cases where a divorce is decreed for causes which render the marriage void *ab initio*. But, inasmuch as divorces are granted in this country for causes *arising after marriage*, a distinction is made in several states, as to the effect upon property, of divorces granted for causes arising after marriage, and those granted for causes arising before marriage, which render the marriage void. In Maine and Rhode Island, if the divorce is granted for consanguinity, affinity or impotence, and in Rhode Island for idiocy or lunacy, all the wife's real estate is restored to her. So if granted for the husband's adultery, or, if there be no issue, for his cruelty, desertion or neglect to support her, in Maine; in Rhode Island, for his gross misbehavior. On the other hand, in case of divorce for her cruelty, in Maine, the court may restore her lands; while upon a divorce for her adultery, or, in Rhode Island, her cruelty, desertion or misbehavior, the husband shall have curtesy, subject in Rhode Island to an allowance by the court to the wife. 1 *Smith St.* 427-8-9; R. I. L. 869.

In New York, Illinois and Michigan, if the divorce is for the husband's adultery, the wife's lands are restored to her; and

reciting that A had before marriage agreed that B's real estate should be "satisfactorily secured to her sole and separate use," and on the part of A and B conveying her real estate, upon the trusts that the income should be paid her during coverture, and, if she should survive A, the estate re-conveyed to her; but, if he should survive her, the income to be paid him for life, and at his death the estate conveyed to her heirs. A and B were subsequently divorced for his adultery, which, by the general rule of law, would have restored the real estate to her. Held, this rule of law was controlled by the contract, and A, if he should survive B, would be entitled to the income for his life.<sup>1(a)</sup>

<sup>1</sup> Babcock v. Smith, 22 Pick. 61.

in New York, Illinois and Massachusetts, if for her adultery, he has curtesy, subject in Massachusetts to an allowance to the wife. 2 N. Y. Rev. St. 146; Mass. Ib. 488. (See Gen Sts.; Kriger v. Day, 2 Pick. 816; Illin. Rev. L. 238; Mich L. 140.

In New Hampshire, the court may restore the wife's lands upon divorce. In Vermont they are restored to her except in case of her adultery, when the husband holds them for her life, and afterwards has curtesy. N. H. L. 837; Verm. Rev. St. 325-6.

In Ohio, it is said the husband loses his curtesy by divorce for his adultery, and also, it seems, for aggression on the part of the wife; though in the latter case he may hold the land during her life. Walk. Intr. 280, 828; Swan. 29.

In Delaware, in case of aggression by the husband, her real estate is restored to her. In case of her aggression, it may be, in the discretion of the court. In Indiana and Alabama, the disposal of property is at the discretion of the court. But neither party shall be obliged to part with real estate. In Missouri, the guilty party loses all rights acquired under the marriage. In Arkansas, if the wife obtain a divorce, all property which came to her husband by marriage goes to her and her heirs. Misso. St. 226; Ark. Rev. St. 335; Dela. Rev. Sts. 238; Ind. Rev. L. 214; Alab. L. 256.

In Wisconsin, the wife's real estate is restored to her upon divorce, except for adultery. Rev Sts. 396.

In Massachusetts it has been held, that

a divorce *a vinculo* has the same effect upon the title of the respective parties to the wife's lands, as a dissolution of the marriage by the death of either. Barber v. Root, 10 Mass. 260; acc. Matlocks v. Stearns, 9 Verm. 826. By Stat. 1789, ch. 65, sec. 5, upon divorce *a mensa*. for cruelty of the husband, if there were no issue living at the time, the wife was restored to all her lands, &c. And this provision was held to include all lands of hers, owned before or acquired since the marriage, though alienated by the husband; unless she had done something to divest her title. Kriger v. Day, 2 Pick. 816. The husband cannot convey any greater interest in the real estate of his wife than he possesses. And where his right to such estate was during coverture, it is terminated by a divorce *a vinculo*, granted for his misconduct. Howey v. Goings, 18 Ill. 95.

(a) The heir of a mother cannot recover against one who entered under the father, while the latter is tenant by the curtesy. Grout v. Townsend, 2 Hill, 554. It has been held in Kentucky, that, where the husband is tenant by the curtesy initiate at the time of a divorce, and thus forfeits his title to the wife's lands during her life, he has no remaining right which the law will notice, although, after her death, his right might possibly revive. Oldham v. Henderson, 5 Dana, 256.

Upon the termination of an estate by the curtesy, the heir may bring ejectment. Foster v. Dugan, 8 Ohio, 87.

## CHAPTER VII.

## LIFE ESTATE OF THE HUSBAND IN LANDS OF THE WIFE.

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|--|---|
| 1. Description of estate.              | 4 b. Contract by and rights of the husband.                             |
| 2. Description and incidents.          | 8. Conveyances by husband and wife, and statutory law relating thereto. |
| 3 n. Statute law as to conveyance, &c. | 14. Separate trust estate of the wife.                                  |
| 4. Liability to creditors.             |   |
| 4 a. Rents and profits.                |   |

§ 1. It has already been remarked, that by marriage, seisin, and the birth of issue, a husband becomes, during the life of the wife, *tenant by the curtesy initiate*. Intimately connected with such incipient title, is the estate which a husband has in his wife's lands, independently of the birth of issue. It has been remarked, that the case of a tenant by the curtesy may be said to be a continuance of this relation in that appropriate manner.<sup>1</sup>

§ 2. Where a wife has an inheritance in lands, the husband has a freehold interest *jure uxoris*, or the husband and wife are seised in her right. (a) The husband's interest is a life estate,

<sup>1</sup> Barber v. Root, 10 Mass. 263. See Croft. v. Wilbar, 7 Allen, 248; Turner v. Nye, 7 Allen, 176.

(a) "The husband by marriage, acquires no right in the inheritance of the wife; he is only entitled to the possession and the purnancy of the profits during coverture." Per Wilde, J., 2 Pick. 519. But, in a later case, the same judge remarks, that they are seised *in fee in her right*. Melvin v. Proprietors, &c. 16 Pick. 165.

By marriage. the husband derives an estate of freehold in the real estate of the wife. He is jointly seised with his wife, and during the existence of the co-

verture he is not tenant by the curtesy; and cannot be, unless he survive her. Weisinger v. Murphy, 2 Head, 674.

It has been held, that, where a right of entry arises from an *ouster* of the wife's title, the demise may be laid either in the husband's name alone, or in their joint names. Woodward v. Brown, 13 Pet. 1; Ingraham v. Baldwin, 12 Barb 9.

A declaration by husband and wife, that they are "well seised and possessed," is sufficient. Kelsey v. Hanmer, 18 Conn. 311.



being of indeterminate duration. It is a title to the rents and profits during coverture, which, according to Lord Coke, he shall receive as "governor of the family." The estate remains entire to the wife or her heirs, upon dissolution of the marriage. Upon the wife's death, the husband becomes a tenant at sufferance. Like other tenants for life, he is entitled to emblements. He has no right to commit *waste*; which, although the wife can maintain no action at law against him, yet a court of chancery will undoubtedly restrain by injunction. So, also, the wife may bring a bill in equity by her next friend, to protect her property or secure a support from it. If the husband and wife join in a bill to recover her property, he may release the suit. But the wife may institute a new one, by her next friend, against the husband and the former defendant jointly.<sup>1</sup>(a)

§ 3. The husband's interest is assignable, and subject to be taken on execution.(b) The *land* is liable to the wife's debts;

<sup>1</sup> Polyblank v. Hawkins, Doug. 829; Co. Lit. 351 a; 2 Kent, 110; Barber v. Root, 10 Mass. 260; Co. Lit. 351; Jack-

son v. Cairns, 20 John. 301; Dewall v. Covenhoven, 5 Paige, 581; Jackson v. Leed, 19 Wend. 339.

Upon a mortgage to husband and wife, the consideration moving from him, and the condition being to support them and the survivor of them for life, the husband may sue alone. Blake v. Freeman, 1 Shepl. 130. But, in general, they must join in a suit for her land. Bratton v. Mitchell, 7 Watts, 113; Atkinson v. Rittenhouse, 5 Barr, 103; a disseisin of the inheritance of the wife being a disseisin of the entire joint estate. Guion v. Anderson, 8 Humph. 298. If the joint right of husband and wife is barred by the statute of limitations, the husband's interest is extinguished. And if he survive his wife, he has no right to, or interest in, her real estate, as tenant by the curtesy. Weisinger v. Murphy, 2 Head, 674.

A wife acquires a title by adverse occupation for more than twenty years. Steel v. Johnson, 4 Allen, 425.

The rents and profits of real estate, held in actual possession by a co-parcener with the wife, belong absolutely to the husband; and he may maintain an action for them without joining the wife. Dold v. Geiger, 2 Gratt. 98. See Jones v. Sherrard, 2 Dev. & B. 184; Dejarnatte v. Allen, 5 Gratt. 499; Riddick

v. Walsh, 15 Mis. 519; Miss. Sts. 1846, 152.

(a) The proceeds of the sale of a wife's real estate cannot properly be paid over, to either her guardian or husband, without leave of court. Daniel v. Daniel, 2 Rich. Eq. 115.

(b) In North Carolina, a statute provides, that the husband cannot sell or lease the wife's lands, without her consent, expressed upon private examination, as in case of conveyances in which she joins. Also, that the land shall not be taken on execution against him. N.C. Sts. 1848-9, 90. Similar acts have been passed in Virginia, Kentucky, Mississippi, Georgia, Vermont, Pennsylvania and Maryland. Verm. Sts. 1847, 26; 1850, 13; Virg. Sts. 1853, 323; Ky. Sts. 1846, 43; Ga. Sts. 1849-50, 63; Penns. Sts. 1850, No. 842, s. 20; Md. Sts. 1853, 323; Miss. Sts. 1846, 152.

The levy of an execution against a husband upon his wife's land, during his life, passes his interest, though the return does not state whether he is entitled to curtesy. Litchfield v. Cudworth, 15 Pick. 23.

So an extent upon all his interest, &c., in her land, passes all his interest

the *profits*, to those of the husband. With reference to the right of *assignment*, if he is tenant by the curtesy, or after the birth of issue, he may transfer the estate for his own life; otherwise, only for the joint lives of himself and the wife. It is said that he may even convey the entire inheritance; that is, so as to vest in the purchaser a wrongful fee, liable to be defeated by the entry or action of the wife after his death.<sup>1</sup> Where the wife was a tenant in common, and the husband and the other tenant

<sup>1</sup> See *Larcom v. Cheever*, 16 Pick. 260; 2 Kent. 112; *Eldridge v. Preble*, 84 Maine, 148; *Coffin v. Morrill*, Ib. 852; *M'Claim v. Gregg*, 2 Marsh. 457; *Evans v. Kings-*

*berry*, 2 Rand. 120; 1 Prest. Abstr. 884, 435, 436; *Oldham v. Henderson*, 5 Dana, 256.

however acquired, though the return does not describe the land as held in her right. Ib. In Massachusetts, a husband's interest in land of the wife may be levied on, either by taking the rents and profits for a certain time, or the whole estate, at an appraisal founded on the probable duration of his life. Ib. But, where the amount of the execution is less than the value of the estate, it seems, the former mode of levy is the proper, if not the only legal one. Ib.

An execution was extended upon land held by the debtor in right of his wife, as upon an estate in fee-simple, but no entry was made, and husband and wife continued to occupy till she died, leaving no children. Held, the proceeding was no disseisin of her, and her heirs might maintain a writ of entry, declaring upon their own seisin, without an actual entry. *Larcom v. Cheever*, 16 Pick. 260.

The husband having erected buildings during the wife's life; held, neither he, after her death, nor the creditor, could make a claim for *betterments*, as against the heirs. Ib.

As to the levy of an execution against the husband upon a crop on land which is the wife's separate property, see *McIntyre v. Knowlton*, 6 Allen, 565. See also *Mattocks v. Stearns*, 9 Verm. 326; *Canby v. Porter*, 12 Ohio, 79; *McComike v. Sawyer*, 12 N. H. 397. Where an execution against a tenant by the curtesy initiate is extended upon his land, as if he owned the fee, the creditor acquires a freehold for the life of the debtor. *Mechanics, &c. v. Williams*, 17 Pick. 438. In Maryland, the husband's interest is not liable to his creditors, living the wife. Md. St. 1841-2, ch. 161. In Connecti-

cut, during the life of her or her issue. Conn. St. 1845, 86. Such interest passes to the sheriff under insolvency proceedings; and a purchaser from the sheriff becomes a tenant for life, liable to an action of waste by the husband and wife. *Dejarnatte v. Allen*, 2 Gratt. 499.

Where a husband has possession of his wife's real estate, equity will not enjoin the sale of his life estate, for the payment of meritorious judgments against him; nor make a provision for her therefrom. *Mitchell v. Sevier*, 9 Humph. 146.

Where a debtor had a fee-simple in an undivided half of certain premises, and curtesy in the remainder, and the creditor levied upon a portion of the premises by metes and bounds, treating it as an estate by the curtesy; held, the levy was void, and passed no title, as against a creditor of the same debtor, who acquired title to the land by a subsequent valid levy. *Howe v. Blanden*, 21 Verm. 815.

Where property is conveyed absolutely to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife and the creditors of the husband; it is therefore unimportant, whether the instrument is, or is not, *recorded*. *Newman v. James*, 12 Ala. 29.

In Tennessee, where a husband became a debtor to his wife by the use of an estate held in trust for her, and afterwards, with his own means, purchased an estate for her in payment of the debt; it was held, that her equity was superior to that of his creditors. *Wilkinson v. Wilkinson*, 1 Head, 305. So of improvements made on her land by him for the same purpose. Ib.

made partition, it was held, that the husband's release destroyed her tenancy in common, at least during the husband's life.<sup>1</sup> But the law will not permit a husband to hold, or to put in the possession of another, to be held adversely, any property placed in his possession belonging to his wife, during her coverture;<sup>2</sup> and possession of the lands of a wife; under authority of her husband, is not adverse to the right of a wife, but consistent with it.<sup>3(a)</sup>

§ 4. An assignee of the husband's estate, by levy of an execution, is liable to an action of trespass by husband and wife for *waste*. The husband's ability to commit waste without subjecting himself to an action, is a mere *power*, or exemption from suit, resulting from the conjugal relation; not a *right*, nor transferable. The effect of a levy on the husband's interest, is the same as that of a conveyance by him, which would pass the freehold, leaving the reversion in fee in the wife. The husband's joining in the suit is merely made necessary by the general rule of pleading.<sup>4</sup>

§ 4 a. The rents and profits of the wife's lands belong absolutely to the husband, and, upon his death, do not pass to the

<sup>1</sup> Trask v. Patterson, 29 Maine, 499.

<sup>2</sup> Meraman v. Caldwell, 8 B. Mon. 82.

<sup>3</sup> Vanarsdall v. Fauntleroy, 7 B. Mon. 401.

<sup>4</sup> Babb v. Perley, 1 Greenl. 6.

(a) In Kentucky and Wisconsin, it is provided, that a wife, after the husband's death, may enter and sue for her lands lost by his default. Also, that, in case of suit against them, which the husband will not defend, she may make defence at any time before judgment, and that no conveyance or other act of the husband shall affect the title of her or her heirs, or others having title by her death. In Kentucky and Virginia, if her land is lost by a judgment against him by default, she may, in a suit against the tenant, put him to proof of his title. 1 Ky. Rev. L. 581-2; 1 Virg. Rev. C. 171; Wis. Rev. Sts. 584.

In Alabama, a married woman may convey her lands, by a deed in which the husband joins, attested by two witnesses. She may also devise them. Ala. Code, 1852, ss. 1982-84-89.

In New Jersey, a statute provides for an entry by the wife, her heirs, or other

owner of the estate, notwithstanding any feoffment, fine, &c., by the husband. N. J. Rev. C. 263.

In Connecticut, the husband's separate conveyance of the wife's inheritance is *ipso facto* void. In Ohio and South Carolina, it will pass his estate, and, in Ohio, may, as an *agreement*, bind him to procure her conveyance, or make compensation. The statute of limitation does not run against the wife till the husband's death. Anth. Shep. 160; Brown v. Spand, 4 Con. S. C. 12; Newcomb v. Smith, Wright, 208; Reynolds v. Clark, Ib. 656; Williams v. Pope, Ib. 406.

It seems, at common law, alienation, by the husband, of the wife's land, was a *discontinuance*. But this rule was changed by St. Hen. 8, ch. 28. (See Detheridge v. Woodruff, 8 Mon. 245.) This statute is part of the common law of Massachusetts. Bruce v. Wood, 1 Met. 542.

wife. On the other hand, no contract of his binds her, if she survive him. Thus a purchaser from him of trees on the land cannot cut them after his death.<sup>1(a)</sup>

§ 5. A judgment creditor has no lien upon the wife's real estate for money laid out on it in repairs by the husband.<sup>2</sup> So the estate held in trust for a married woman, or the interest and income thereof, cannot be charged with an order, drawn by her husband, for repairs done upon other real estate of the wife, not included in the trust deed.<sup>3</sup>

§ 6. When lands of the wife have been sold by an agent, the money received therefor, in his hands, belongs to the husband, and, after his death, may be received by his administrator. The widow cannot recover such money from the agent, either in law or equity.<sup>4</sup>

§ 7. A husband, after the death of his wife, may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife during coverture.<sup>5</sup>

§ 8. It will be seen hereafter, that the deed of a married woman is in general void, even though made for a full consideration. So although the husband deserted without providing for her support, and the proceeds of the sale were necessary to and used for the maintenance of herself and family. But, by statute 3 & 4 Wm. 4, ch. 74, a wife may convey, with the husband's consent, and with a private acknowledgment; and it is the settled rule in all the States, founded in most of them upon express statutes, that the joint deed of husband and wife will pass the whole estate of both. Unless the husband join, the deed is void. Parol evidence of his assent is inadmissible.<sup>6(a)</sup> In some of the States,

<sup>1</sup> Clapp v. Stoughton, 10 Pick. 463; Plow. 219.

<sup>2</sup> 1 Harr. 565.

<sup>3</sup> L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34.

<sup>4</sup> Crosby v. Otis, 32 Maine, 256.

<sup>5</sup> Jones v. Patterson, 11 Barb. 572.

<sup>6</sup> Watts v. Wadelle, 1 M'L. 203; Tay-

lor, 8 Harr. Dig. (Suppl.) 715; Trimmer v. Heagg, 4, 484; Scott v. Purcell, 7 Blackf. 66. See Ward v. Amory, Curtis, 419; Ky. Sts. 1846, 43; Martin v. Martin, 1 Comst. 473; Calhoun v. Calhoun, 2 Strobb. Eq. 236; Richards v. McClelland, 5 Cas. 385

(a) A *feme covert* was entitled to real estate for her separate use, and her husband entered into a contract for the sale of the property. Before the contract

was completed, the wife died, having devised the estate to her husband. Held, on a claim filed by the husband surviving to enforce the contract, that a decree

where such conveyance is authorized by express statutes, it seems that, prior to the enactment of such statutes, the practice had become a common one. But the court in South Carolina said, they would not sustain a *vulgar error* in direct opposition to the law of the land.<sup>1</sup> In that State, however, an act was passed to give effect to prior deeds of this nature.(a)

§ 9. It has been sometimes held, that the wife's conveyance may be effectual, although some statutory requisitions merely formal are not complied with. Thus an acknowledgment that the wife executed the deed, without "fear, threat or compulsion of her husband," but not saying "freely;" there being no evidence of force or compulsion, was held sufficient.<sup>2</sup> But *substantial* devia-

<sup>1</sup> 4 Con. S. C. 15; *Bool v. Mix*, 17 Wend. 119; *Gillett v. Stanley*, 1 Hill, 121.

<sup>2</sup> *Meriam v. Harsen*, 2 Edw. Ch. 70.

to that effect could not be made in the absence of the wife's heir. *Harris v. Mott*, 7 Eng. L. & Equ. 245.

(a) A deed by the husband alone passes his own interest, though made without the wife's knowledge or assent. *Rangleley v. Spring*, 8 Shepl. 180.

An *alien* husband may join with his wife in the conveyance of her real estate. *Kottman v. Ayer*, 1 Strobb. 552.

A testator left a legacy to a married woman, to be invested by his executors in real estate, which should be conveyed to her for her sole and separate use, and to her heirs and assigns forever, but not be liable for the debts of her husband. Land was purchased and conveyed to the wife accordingly, but, the legacy proving less than the purchase money, the husband and wife jointly made up the balance. The estate was afterwards sold on a judgment against the husband. Held, the purchaser was entitled to hold it only until he was paid the portion of the purchase-money advanced by the husband and wife. *Lichty v. Hager*, 1 Harr. 565.

A conveyance by husband and wife to a third person, for the purpose of having the land conveyed to the husband, and thus transferring it to him, will be sustained, where no fraud has been practised on the wife. *Shepperson v. Shepperson*, 2 Gratt. 501.

The separate deed of a married woman to a third person has been held to be good consideration for a note to her, in

the absence of fraud or mistake. *Sambord v. French*, 2 Fost. 246.

In nearly all the States, except those of New England, and in Rhode Island, to render such deed effectual, the wife must undergo an *examination*, for the purpose of ascertaining whether she acts voluntarily, or by undue influence of the husband. It is essential that the examination be made *apart* from the husband, except in Georgia, where this requisition seems to be omitted. 1 Vir. R. L. 158; 1 N. C. R. S. 227; Mich. L. 158; Anth. Shep. 55, 284, 281, 889, 539, 548, 598; Prince's Dig. 160; Ala. L. 98; *Whiting v. Stevens*, 4 Conn. 44; Ind. Rev. L. 271; 1 Ind. R. 379; Illin. Rev. L. 133-4; Misso. St. 122; 1 Ky. Rev. L. 440; Dela. St. 1829, 89; 4 Griff. 756 660; *Elliott v. Piersoll*, 1 M'Lean, 18; *Howell v. Ashmore*, 2 N. J. 261.

In Virginia, it has been held that the private examination or something equivalent is necessary to pass merely equitable rights. *Countz v. Geiger*, 1 Call, 167. See *Bryan v. Stump. &c.*, 8 Gratt. 241.

In Illinois, if the examining magistrate does not personally know the woman, her identity must be proved by one witness. In the same state, she is capable of conveying, if over eighteen years of age. In Missouri, the identity is to be proved by two witnesses. *Ib. sup.*

In Indiana, no peculiar acknowledgment is required. Rev. Sts. 232.

The acknowledgment of the deed of a married woman is held absolutely neces-

tions from the form prescribed will render the deed invalid. Thus, where a statute requires the wife to renounce her right to lands, in the manner required in a case of *dower*, and to renounce all her estate, interest and inheritance; a renunciation of *all her interest and estate*, and also *all her right and claim of dower*, will not pass her land. So, in case of a conveyance by a husband, in his own name, of his wife's land, she merely signing and sealing the deed "in token of her relinquishment of all her right in the bargained premises;" held, her interest did not pass, and, after his death, she might maintain a writ of entry for the land, on her own seisin. And no amendment will be allowed in the defective acknowledgment of a wife, upon parol evidence. It must appear *by the certificate* that the acknowledgment was legal.<sup>1(a)</sup>

<sup>1</sup> *Platt v. Battells*, 28 Vt. 685; *Churchill v. Monroe*, 1 R. I. 209; *Brown v. Spaul*, 4 Con. S. C. 12; *Bruce v. Wood*, 1 Met. 542; *Elliot v. Piersoll*, 1 M'L. 13; *Raymond v. Holden*, 2 Cush. 264; *Mc-*

*Daniel v. Priest*, 12 Miss. 544; *James v. Fisk*, 9 S. & M. 144; *Jordan v. Corey*, 2 Cart. 385; *Elwood v. Klock*, 18 Barb. 50. See *Trimmer v. Heaggy*, 4 Harr. 484.

sary to its validity, even between the parties; while, in other cases, it is necessary only in reference to third persons claiming adversely to the grantee. *Hepburn v. Dubois*, 12 Pet. 345. It is not sufficient, that the husband, after signing himself, by her direction, and in her presence, signs her name, though both afterwards acknowledge the deed. *Linslee v. Brown*, 18 Conn. 192. In Delaware, it is provided by statute, (Rev. Sts. 269.) that the private examination of the wife shall be effectual, though the deed is not recorded.

In Ohio, where the magistrate's certificate stated only the substance of the transaction, this was held sufficient. And a statute of Pennsylvania declares valid all deeds made prior to September 1, 1836, though the certificate be defective. A similar statute exists in North Carolina. *Walk. Intr* 326; *Purd. Dig.* 205; *Beckwith v. Lamb*, 18 Ired. 400.

In New York, it is an ancient usage for femes covert to convey their lands. But acknowledgment has always been held necessary. Hence, such conveyance made in New Jersey, in 1760, without acknowledgment, was held void. *Constantine v. Van Winkle*, 2 Hill, 240. It has been held in Ohio, that a law, giving

effect to the deed of a feme covert, which was invalid at the time of its execution, is unconstitutional and void. *Good v. Zercher*, 12 Ohio; 864. In New Hampshire, where a husband is under guardianship, the wife may validly join with the guardian in a deed. Rev. Sts. 297.

(a) Deed by husband and wife of her land. The acknowledgment was as follows: "Then the above-named Ansell Churchill, (meaning the grantor,) personally appearing, acknowledged the above written instrument to be his voluntary act and deed, and the said Lillis (wife) being examined separately and apart from her husband, also acknowledged the same before me," &c.; signed by the justice. Held, only the life estate of the husband passed. *Churchill v. Monroe*, 1 R. I. 209.

It has been held in Pennsylvania, that the act of 1770 requires both husband and wife to join in a conveyance of real estate, to which she was entitled in fee. Its directions are imperative. Such a deed, executed by her alone, is void, and parol evidence, that she executed the deed with the assent and by the direction of her husband, is inadmissible. But a conveyance of the wife's land by deed, in which she and her husband join, passes her title, though not to a purchaser



§ 10. In conformity with the principles above stated, a usage or statute, authorizing a married woman to convey her land, being a departure from the common law, will be strictly limited to an *actual transfer* of the property. Thus a mere *agreement* by her to convey, though made for valuable consideration, and with consent of the husband, is void, even in Chancery, and mere knowledge of, or verbal assent to the husband's deed, will not bind her. So she is not bound by a *power of attorney* to convey. So a husband and wife cannot be restrained, by injunction, from bringing ejectment for land belonging to the wife, on the ground that she, when an infant, gave a bond of conveyance, with security, for the land, conditioned to convey when she became of age. Though, where a female infant gave such bond, and the purchase-money was paid to her husband, after his marriage; held, he could be restrained, by injunction, from recovering the land at law, during his lifetime.<sup>1</sup> So, in general, she is not bound, nor her heirs, by the covenants in the deed, though expressed in her name as well as the husband's, or by estoppel.(a) But

<sup>1</sup> Sumner v. Conant, 10 Verm. 9; Brawner v. Franklin, 4 Gill, 463.

for a valuable consideration. Goundie v. Northampton, &c., 7 Barr, 288.

The converse of the rule in the text applies to a release of dower. A, a widow administratrix, in conjunction with B, her co-administrator, executed a deed, pursuant to and reciting a contract by her deceased husband, and the decree of the court upon it, ordering the conveyance. The deed purported to convey all the estate of the husband in his lifetime, and of them the said A and B, since his decease, and she signed and sealed the same without adding a description of her office. Held, her dower did not pass. Shurts v. Thomas, 8 Barr, 859.

(a) If husband and wife make a deed, ineffectual against her, under which the grantee enters and occupies; and after her death her heir brings a suit for the land: the grantee is estopped to deny his title. Drane v. Gregory, 8 B. Mon. 619.

Though in general an estoppel must be *mutual*; yet, where a conveyance was made by husband and wife, and possession taken under their deed, of land claimed by the wife; though the deed be ineffectual from defect in the acknowl-

edgment, to pass the title of the wife, the grantees are estopped to assert an outstanding title to a third person, in a contest with the heirs of the wife, after the death of the husband. Gill v. Fauntleroy, 8 B. Mon. 177. So, on the other hand, such deed is binding upon all except the wife and those claiming under her. Lewis v. Cook, 18 Ired. 198.

A statute of Delaware provides, that the wife shall be bound by no warranty, except a special warranty against herself, her heirs, and those claiming under her; and a statute of Kentucky, that the wife's deed shall not pass her estate, but "shall be as effectual for every other purpose, as if she were unmarried." Wadleigh v. Glines, 6 N. H. 17; Dominick v. Michael, 4 Sandf. 874; Dela St. 1829, 89; Whitbeck v. Cook, 15 John. 483; 1 Ky. Rev. L. 440; Colcord v. Swan, 7 Mass. 291; Dut. Dig. 15; Illin. Rev. L. 184; Misso. St. 122; Butler v. Buckingham, 5 Day, 492; Watrous v. Chalker, 7 Conn. 228; Ex parte Thomes, 3 Greenl. 50; Lane v. McKeen, 8 Shepl. 304; Rangeley v. Spring, 8, 130; Aldridge v. Burlison, 3 Blackf. 201; Verm. Rev. St



though an agreement by the wife to convey cannot be enforced, an agreement by the husband, though merely parol, and made directly with the wife, in consideration of her conveying her land, will be enforced even against his heirs. Thus a husband agreed, in consideration of such conveyance, to purchase and build on other lands, and convey them to the wife. He did buy and build upon the land, but died without conveying. The husband was very poor at the time of marriage, but the property agreed to be conveyed to the wife greatly exceeded in value the land which the wife parted with. The agreement was enforced against the heirs.<sup>1</sup> And, on the other hand, where it was verbally agreed between husband and wife, that he should purchase land in her name, build a house upon it, and be reimbursed the expense from the sale of other land belonging to her; and the husband fulfilled his part of the contract, but the wife died before a conveyance of her land; it was decreed in Chancery, that the guardian of her infant heirs should convey with the husband, and the proceeds of the sale be applied according to the contract.<sup>2</sup>

§ 11. A statute requiring private examination of the wife does not apply to a conveyance made by an executrix under a devise it sell, nor need the husband join in the deed. Such statute does not apply to a deed of the wife's separate trust property.<sup>3</sup>

<sup>1</sup> *Gooden v. Tucker*, 6 Mun. 1.

<sup>2</sup> *Livingston v. Livingston*, 2 John. Ch. 637.

<sup>3</sup> *Tyree v. Williams*, 8 Bibb, 368; *Brandige v. Poor*, 2 Gill & J. 1.

311; *Horsey v. Horsey*, 4 Harring, 517; *Dea v. Demarest*, 1 N. J. 525.

In New York, the wife is estopped from denying any essential fact admitted in the deed. So, all who claim under her. *Constantine v. Van Winkle*, 2 Hill, 240. In Michigan, she is not bound by the covenants. Rev. St. 258. In Maine, neither by covenants nor estoppel. R. S. 372. In Ohio, it is doubted whether she is bound by the covenants. *Hill v. West*, 8 Ohio, 222. It has been held in Massachusetts, that she is estopped by covenant of warranty, to deny her title at the time of conveyance. *Nash v. Spoford*, 10 Met. 192. See *Raymond v. Holden*, 2 Cush. 264.

Where a feme covert conveys her separate estate, she is liable on the covenants, though the husband join. *Basford v. Pearson*, 7 Allen, 504. A feme covert may validly agree to sell her separate estate. *Baker v. Hathaway*, 5 Allen, 108.

Where a husband conveyed his wife's land, she not legally executing the deed, and took a conveyance of other land in exchange, the wife not objecting, and declaring herself pleased with the exchange; her heirs are not estopped in equity to claim the land, it not appearing that she was acquainted with her title, and there being no evidence of fraud on her part. *McClure v. Douthitt*, 6 Barr, 414.

§ 12. Where the husband and wife join in conveying her land, a note for the price, given to her alone, survives to her upon the death of the husband.<sup>1</sup>

§ 13. Husband and wife may join in a mortgage of the wife's land, as well as an absolute deed. But the wife's interest shall be thereby incumbered, only to the amount of the mortgage debt. Hence, if the husband's right of redemption be taken by his creditors and sold, the wife may redeem the land by paying the mortgage debt only, without the additional sum for which the equity was purchased.<sup>2</sup> Where such mortgage is made for the husband's debt, the wife, though not personally bound, is a mere surety, and the mortgage will be discharged by any such new credit given to the principal, as would discharge a common surety.<sup>3</sup>(a) Where a feme covert purchases real estate, and for a part of the consideration gives back a mortgage, in which the husband does not join; upon a bill for foreclosure, the mortgage shall constitute an equitable lien upon the land, as against one who purchased with notice of, and expressly subject to, the mortgage.<sup>4</sup>

§ 14. It will be seen,(b) that, where an estate is limited to the

<sup>1</sup> Dean v. Richmond, 5 Pick. 461.

<sup>2</sup> Peabody v. Patten, 2 Pick. 517.

<sup>3</sup> Gahn v. Niemcewicz, 11 Wend. 312.

<sup>4</sup> Hatch v. Morris, 8 Edw. 318.

(a) Where a wife owned a dower interest in four-sixths of certain real estate, of which her former husband died seised, and owned in fee the remaining two-sixths, and the husband and wife united in a sale, and out of the proceeds of such sale the sum of \$3,000 was paid, without the husband's assent, upon a mortgage which incumbered the wife's separate estate; held, the husband had a claim upon such separate estate to that extent. But another sum of \$2,000, out of such proceeds, appearing to have been paid upon the same mortgage, with the husband's unqualified assent; held, such payment was a valid appropriation of that sum to the wife's separate use, and, in respect to it, the husband had no claim upon the separate estate. *Martin v. Martin*, 1 Comst. 473.

(b) See chap. 22, *Trust*. A deed to a wife and her heirs does not of itself vest in her a *separate estate*, in the technical sense. *Hall v. Sayre*, 10 B. Mon. 46.

In New York, since the act of April 7, 1848, for the more effectual protection of the property of married women, the husband during coverture has no interest in the wife's lands which he can use or transfer, or which his creditors can reach. Upon the death of the wife after issue born, leaving her husband, it descends to her heirs, charged with his rights as tenant by the curtesy; and, if there has been no issue, the estate becomes perfect and absolute in her heirs. *Hurd v. Cass*, 9 Barb. 366. A similar act exists in Pennsylvania. Sts. 1848, No. 372, p. 536.

A wife's *separate estate* is an equitable estate merely, and where the legal title is vested in some other person for her benefit, to the exclusion of her husband. *Albany v. Bay*, 4 Comst. 9.

The legal estate which a wife has in reversion in lands, where the husband has disposed of his life estate as tenant by the curtesy, is not a *separate estate*. *Ibid*.

*separate use* of a married woman, the husband shall not be entitled to curtesy in such estate. Upon the same principle, an estate thus limited shall be owned, in equity, by the wife alone, to all intents and purposes as if she were a *feme sole*, subject to her disposition, and entirely free from the control of the husband. No actual conveyance to trustees for her separate use is necessary, but a mere ante-nuptial agreement between husband and wife will have the same effect. Under these circumstances, the wife may convey the estate even to the husband, provided no undue influence be used on his part; and it has been settled in New York, though against the opinion of the Chancellor, that her conveyance will be valid without the assent of the trustees, unless such assent were expressly required in the instrument by which the trust was created.<sup>1</sup> This subject will be more fully considered hereafter.(a)

<sup>1</sup> Jacques v. Trustees, &c. 17 John. 548; Bradish v. Gibbs, 8 John. Cha. 540. See also Demarest v. Wyncoop, 8 Ib. 144; Smith v. Paythress, 2 Flori. 92; Cruger v. Cruger, 5 Barb. 225; Ladd v. Ladd, 8 How. U. S. 10; Strong v. Skinner. 4 Barb. 546; Wright v. Miller, Ib. 600; Watson v. Bonney, 2 Sandf. 405; Cherry v. Clements, 10 Humph. 552;

Boarman v. Groves, 28 Miss. 280; Martin v. Martin, 1 Comst. 478; Clarke v. Windham, 12 Ala. 798; Jasper v. Howard, Ib. 652; Moore v. Jones, 18, 296; Goodman v. Goodman, 8 Ired. Equ. 818; Hatton v. Weir, 19 Ala. 127; Cuthbert v. Wolfe, Ib. 878; Barron v. Barron, 24 Verm. 875.

In South Carolina, a court of equity will not sustain the sale by a *feme covert* of her separate estate, although there is no restriction on such sale in the deed of settlement, unless it were the voluntary act of the wife, and under such circumstances that the court, on her examination, if applied to, would have ordered it. Calhoun v. Calhoun, 2 Strobb. Eq. 231.

A court of equity has no power either to make or confirm the sale of a *feme covert's* separate estate, which, by the deed creating it, is expressly prohibited from being sold. Ib.

A married woman who has a separate estate cannot charge or dispose of it, unless in pursuance of a power of appointment expressly given. The mode prescribed must be strictly pursued; and no alienation or charge is valid, unless she has been examined by the court. Ib.

(a) See *Conveyance, Devise, Powers*. The separate estate of a *feme covert*, in the hands of the trustees, is in equity chargeable with debts contracted for the

benefit of the estate. So this estate is chargeable, where a portion of it has been converted into other property, according to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property. Dyett v. N. A. Coal Co. 20 Wend. 570. So the separate estate of a *feme covert* is bound for any debt contracted by her. But she is not personally liable. Nor, where the property is held in trust for her and her children, can she bind their interest. American, &c. v. Dyett, 7 Paige, 9; Gardner v. Gardner, Ib. 112. See Sts. 1848, 807.

The separate estate of a married woman is not liable at common law for her debts contracted before marriage; and the only ground, on which it can be reached in equity, is that of appointment; that is, some act of hers, after marriage, indicating an intention to charge the property. Vanderheyden v. Mallory, 1 Comst. 452.

A *feme covert*, in disposing of her

separate estate, is strictly limited by the terms of the instrument under which she claims. *Wallace v. Coston*, 9 Watts, 187. In New Hampshire, if a *feme covert* is entitled to hold lands in her own right, and to her separate use, she may dispose of them, and they shall descend, as if she were sole. Rev. St. 296. So the wife of one not a citizen, residing in the State six months successively, may acquire and hold lands. *Ib.* In Maine, by a recent statute, a *feme covert* may hold property in her own right, but cannot take it from the husband. The property belonging to her before, continues hers after marriage, not subject to his debts.

She may, however, release the control of it to him, so long as it may be for their mutual benefit. Sts. 1844, 104-5. The statute is prospective merely, and the interest which a husband had acquired in the real estate of his wife, by a marriage prior to that act, is not affected by it. *McLellan v. Nelson*, 27 Maine, 129; *Eldridge v. Preble*, 84 *Ib.* 148. See *Parker v. Kane*, 4 Allen, 346; *Bartlett v. Bartlett*, *Ib.* 440; *Chapman v. Foster*, 6 Allen, 186; *Stewart v. Jenkins*, 6 Allen, 800; *Thomson v. O'Sullivan*, 6 Allen, 808; Miss. Sts. 1846, 152. See, as to the subjects of this chapter, Ill. Sts. 1847, 87; Mass. Sts. 1849, c. 87.

## CHAPTER VIII.

## DOWER. NATURE AND REQUISITES OF DOWER.

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|---|---|
| 1. Definition of dower.                 | 10. Elopement, &c.                                |
| 1 n.-3. Dower in the United States.     | 12. Seisin of husband; reversions and remainders. |
| 2. Origin and history of dower.         | 14. <i>Dos de dote</i> .                          |
| 4. Dower favored.                       | 16 a. Instantaneous seisin.                       |
| 5. Requisites of dower; marriage.       | 19. Whether husband's seisin may be denied.       |
| 7. Void and voidable marriage.          | 20. Death of the husband; presumption of death.   |
| 8. Marriage—how proved.                 |   |
| 9. Marriage and divorce in England.     |   |
| 9 n. Marriage and divorce in U. States. |   |

§ 1. THE third estate for life, created by *act of law*, is *Dower*. *Dower* is a technical term, and applicable only to real property.<sup>1</sup>(a) The common law description of this estate is as follows: When a man is seised during coverture, of an inheritance in lands and tenements, which by possibility any issue of his wife might inherit,(b) such wife shall hold after his death

<sup>1</sup> Brackett v. Leighton, 7 Greenl. 285.

See Young v. Smith, 2 Met. Ky. 408; Caillanet v. Bernard, 7 S. & M. 816.

(a) A testator, by his will, left his property, real and personal, in the possession of his wife during her widowhood, for the education and maintenance of his children, but, in the event of her marriage, he provided that she should "have her dower under the law, the balance to remain in common stock for the children." Held, the manifest intent of the testator, in case his widow married again, was, that she should have such portion of his real and personal estate, as the law entitled her to have, where the husband dies intestate, and that the word "dower"

should be so construed. Paine v. Gup-ton, 11 Humph. 402.

Dower arises by *operation of law*, not by *contract*. Lawrence v. Miller, 1 Sandf. 516. The *statute of frauds* has therefore no application to dower. Davis v. Tingle, 8 B. Mon. 589. In Iowa, by statute, a husband has dower like a widow. Iowa Code, ch. 88, sec. 142.

(b) A petition for dower, alleging that the husband died seised of land, and that his estate was one of inheritance, sufficiently shows the character of the husband's title, as being a freehold of inheritance. Lecompte v. Wash, 9 Mis. 551.

one-third part of these lands and tenements for her natural life,  
(a) as an estate in dower.(b)

§ 2. It is said, that the idea of dower is derived from the

(a) The estate ceases on her death, and a sale then made of her interest passes nothing. *Holmes v. M'Gee*, 12 Sm. & M. 411.

(b) It is recently defined, as "the provision which the law makes for a widow out of the lands or tenements of her husband, for her support, and the nurture of her children." 1 Washb. R. P. 146; Co. Lit. 80 a; 2 Bl. Comm. 180. In pursuing this subject, it will be seen that the definition in the text is inapplicable in many of the United States.

In several of them, as will appear under the title of *Descent*, the widow in certain cases *inherits* the estate of her husband. See *Spangler v. Stanler*, 1 Md. Ch. 86. The common law definition is applied in Delaware to all cases arising subsequent to the year 1816. Dela. Rev. Sts. 290. See *Heimershits v. Bernhard*, 1 Harr. 518; *Riddick v. Walsh*, 15 Mis. 519. The common law description of dower has been recently rendered obsolete in England. By St. 8 & 4 Wm. 4, c. 105, dower is allotted in equitable inheritances and mere rights of entry without seisin. On the other hand, there is no dower in land conveyed by the husband, or devised or exempted from dower by will; and it is subject to all incumbrances, debts and partial dispositions made by the husband. A devise of land to the widow is made a bar of dower, but not a bequest of personal property, unless so expressed. In England, anciently, by virtue of local and peculiar customs, the right of dower was often varied from the common law rule. Thus, by the custom of *Gavelkind*, the widow had half of all the lands held by that tenure; forfeitable by a second marriage, or the birth of a bastard child. In some boroughs, the wife had for her dower *all* the tenements that were her husband's. Dower *ad ostium ecclesiæ*, was where a man, coming to the *church door* to be married, endowed his wife of so much of his land. Dower *ex assensu patris* was the same, except that the land bestowed was the property of the husband's father, and given with his consent. The two last named kinds of dower did not bind the wife, but she might still waive them, and claim dower at common law. Co. Lit. 83 b; Robin. Gavelk. 159; Lit. 166, 89; Brac. lib. 2, c. 89.

In a late work it is said, "in every State, with the exception of Louisiana, Indiana, and practically of California, dower will be found to exist in some form, and substantially in most of them, like the dower of the common law." 1 Washb. R. P. 149.

In Iowa it is held, that, at no time during its existence as a Territory, was dower changed from what it was under the organic acts of Wisconsin and Iowa, or different from what it was at common law. *Pease v. Hixon*, 8 Clarke, 402.

In Pennsylvania, by later statutes, the widow shall have the real or personal estate, not exceeding \$300. Stat. 1851, 618. In Indiana, dower is abolished. Rev. St. 232. In estates aliened by the husband before the Indiana Code of 1852 took effect, the wife has no dower except in case of his death before the taking effect of the Code. *Giles v. Gullion*, 18 Ind. 487. (See *Purd. Dig.* 102; *Anth. Shep.* 800, 808; *Ind. Rev. L.* 208; *Parke & J.* 284.) If an intestate leave a widow, and no lawful issue, the former shall have one-half of the real estate, including the mansion-house; or, in Pennsylvania, the rents and profits thereof, if a division is improper, for her life, in Pennsylvania, but, it seems, absolutely, in Indiana, in lieu of dower. *Ub. sup.*

In Massachusetts, she may take one-half for life, if there is no issue. In Delaware, if there is no child or lawful issue of a child, the widow takes one-half of the land for life; if no kindred, she takes the whole. So, in Wisconsin, for life, if no issue. In New Hampshire, where there is no lineal descendant, and no provision by will, or waiver thereof, and the husband dies testate, she receives, in addition to dower, one-third of what remains after payment of debts. If intestate, one-half. If in either case she so elect, she may take, including her dower, what remains after payment of debts, &c., not exceeding what the husband received from her, or in her right. These provisions do not apply, in case of an antenuptial settlement. Dela. St. 1829, 316; 1848, 489; Rev. Sts. 278; N. H. Rev. Sts. 829, 880; Wis. Rev. Sts. 838; Mass. St. 1854, 72; Gen. Sts. 90, s. 15.

In South Carolina and Illinois, the widow takes one-half of the real, and all the personal estate, belonging to the



Germans, and was familiar to the Saxons when they became established in England. Dower then consisted of one moiety of the husband's property, held for life, and liable to forfeiture

husband at his death, subject to debts, and also her dower. Anth. Shep. 586, 608; Sammers v. Babb, 13 Ill. 483; Tyson v. Postlethwaite, Ib. 727. See Gratton v. Gratton, 18 Ib. 167. In Illinois, she may elect one-half the estate after payment of debts, whether the husband died intestate or not. Sturges v. Ewing, 18 Ib. 176. In Missouri, the word used is *descendant*. In this State a statute provides that, when a husband dies, leaving a child by a former marriage, and a second wife, but no child by her, the widow may elect to take the personal estate brought to her husband by marriage, in lieu of dower. Held, where she so elects, such estate is still liable for debts, before the real estate. Chinn v. Stout, 10 Mis. 709. In the same State, a statute gives a dower in *leaseholds*, and the assignment of dower in leasehold estates is governed by the same rules which prevail in estates of inheritance. Rankin v. Oliphant, 9 Mis. 289. Where a husband dies seised of a leasehold estate, which is sold by his administrator, in an action by his widow against the purchasers for her dower, she will be entitled to damages from the death of her husband; and, where improvements are placed upon the land by the purchasers, they are to be taken into consideration in assessing damages after the time when they are placed upon the land. In such case, no demand is necessary to entitle her to damages, and the purchaser cannot therefore plead *tout tempus prius*. Ib. In Georgia, the same code (Prince 233,) provides as in Delaware, &c., and also makes the wife sole heir to her husband, where he leaves no issue, (Ib. 253.) It is difficult to see how both rules can be in force. In South Carolina, Illinois and Missouri, she has the same right as in Delaware, (it seems, in fee,) for want of lineal descendants, in lieu of dower. Anth. Shep. 586; Ill. Rev. L. 625; Mis. St. 228; Anth. Shep. 608. In South Carolina, if an intestate leave no father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor, the widow shall have two-thirds of the real estate, in lieu of dower. Anth. Shep. 587-9.

In Georgia, where there are children, the widow may, at her election, have

dower, or an equal share of both real and personal estate (subject to debts). Anth. Shep. 607. See *supra*.

In Missouri, if the husband leave a child or descendant by another marriage, the widow may take, in lieu of dower, the personal property that came to him by her marriage, subject to debts. If the husband leave no child or descendant, she may take her dower at common law free from debts, or the personal property above named, subject to them. But her election must be written, acknowledged, and filed within six months from the granting of administration. Dower in personalty can be had only in property belonging to the husband *at his death*. Misso. St. 228; McLaughlin v. McLaughlin, Bennett, (Mis.) 242.

In Arkansas, a widow is entitled to dower in lands, slaves, and other personal property; to one-third of the personal property absolutely; to one-third of the proceeds thereof, in case the administrator sells it without allotting her dower; to dower in the increase of slaves, accruing between the death of her husband and the time of the allotment of her dower; also, to one-third of the rents of land and hire of slaves; and she may hold the mansion and farm attached, free of rent, until her dower is assigned. In Alabama, a wife having a separate estate takes only so much for dower as will give her in the whole a child's portion. Meniffee v. Meniffee, 3 Eng. 9; Ala. Sts.

In California, the widow takes half of the common property of herself and her husband, but no dower. Beard v. Knox, 5 Cal. 252.

The remark made by the court in Indiana is undoubtedly of general applicability; that it is not dower itself which the law holds sacred, but its purpose, the support of the widow. And as, by the State law, a third in fee is substituted for a third for life, courts must regard the substitute with the same favor and administer it with the same liberality as is extended to dower. Noel v. Ewing, 9 Ind. 87.

Where the statute law provides a substitute for the right of dower, it is not to be regarded as creating a new interest, but as declaratory or in affirmance of the common law. Brown v. Adams, 2 Whart. 192.



upon breach of chastity, or a second marriage. Afterwards, by the charter of Hen. 1, the condition of forfeiture was dispensed with, except where there was issue. In the reign of Hen. 2, a wife was endowed by her husband *at the time of marriage* of one-third of the lands which he then held. By the charter of 1217 and 1224, dower was established as one-third part of all lands held by the husband during his life, unless a smaller portion had been assigned *at the church door*.<sup>1(a)</sup>

§ 3. The only kind of dower known in practice in this country is that estate, which, according to the above definition (sec. 1), the law confers upon a wife after her husband's death; or dower at common law.<sup>2(b)</sup>

§ 4. While, as has been already remarked, (ch. 6. s. 1.) *curtesy* is an estate of mere positive institution, dower is held to have a strong moral as well as legal foundation. The wife, by marriage, loses most of her rights of property, and would in general be wholly destitute after her husband's death, were not some provision made for her from his real estate. It is said, moreover, that in ancient times the personal estates of the richest were very inconsiderable, and the husband could not give his wife anything during his life or after his death, both trusts and devises being then unknown.<sup>3</sup> For these reasons, a dowress is in the care of the law and a favorite of the law. Hence, neither her husband nor the law can deprive her of this right, though only *inchoate*. Her voluntary relinquishment alone can divest it.<sup>4</sup> *Magna Charta*<sup>5</sup> provides, that a widow shall forthwith, and without any difficulty, have her marriage and her inheritance;

<sup>1</sup> 1 Cruise, 118. See 2 Bl. Com. 102; Doe v. Gwinnell, 1 Ad. & El. N. S. 682.

<sup>2</sup> Mass. Rev. St. 409; Iowa Sts. 1852. 97; Anth. Shep. 21, 100; Mich. L. 30; 1 Smith's St. 158; McMahan v. Kimball, 3 Blackf. 6.

<sup>3</sup> Banks v. Sutton, 2 P. Wms. 702;

Curtis v. Curtis, 2 Bro. Ch. 620-30-81; Moody v. King, 2 Bing. 451-2; Co. Lit. 80 b, n. 8; see Ga. St. 1845, 80.

<sup>4</sup> 1 Story on Eq. 588; Lasher v. Lasher, 13 Barb. 106; 21 Geo. 161.

<sup>5</sup> Magn. Char. sec. 8; 6 Conn. 462.

(a) Dower *ad ostium ecclesiae*, and dower *ex assensu patris*, are both expressly abolished by stat. 3 & 4 Wm. 4, ch. 105, sec. 18; 1 Steph. Comm. 258.

(b) The statute laws of Vermont, Connecticut, New Hampshire, Michigan

and Maine, refer to provisions made for the wife before marriage, under the name of dower, undoubtedly intending thereby a *jointure*, which will be considered hereafter. Chap. 13.

nor shall she give anything for her dower, or her marriage, or her inheritance, which her husband and she held at the day of his death. At common law, a dowress enjoyed the privilege of exemption from tolls and taxes.<sup>1(a)</sup> It is said, there be three things favored in law—life, liberty and dower;<sup>2</sup> that dower is an equitable and a moral right, favored in a high degree by law, and next to life and liberty held sacred.<sup>3</sup> As a mark of peculiar favor to the tenant in dower, although damages were not generally allowed in real actions, they were given to her. Particular relief was also provided for her *quarantine*, (a term hereafter to be explained. See chap. 11.) By the statute of Merton, (20 Hen. 3, c. 1,) deforcers of dower were to be *in mercy*, or fined at the pleasure of the king. Where to a suit for dower the defendant pleaded a false plea, the widow recovered damages from the husband's death, though she had been always in receipt of one-half the profits; and the rules of pleading are construed liberally in her favor.<sup>4</sup> The celebrated *Ordinance* of 1787, for government of the North West Territory, expressly secures the right of dower.<sup>(b)</sup> It is said, however, that the object of dower is not to enrich the widow, to the detriment of creditors and impoverishment of the rest of a man's family, but to give an equal third part in value, for the sustenance of the wife and the nurture and education of younger children. Nor does the law give her any preferences over heirs and devisees.<sup>5</sup>

§ 5. There are three circumstances necessary to give a title to dower, viz.: *marriage, seisin and death of the husband*.

§ 6. The *marriage* must be had between parties legally capable of contracting it, and duly celebrated. "*Ubi nullum matrimonium, ibi nullum dos*."<sup>6(c)</sup>

<sup>1</sup> 2 Bl. Com. 138.

<sup>2</sup> Co. Lit. 124 b.

<sup>3</sup> Kennedy v. Nedrow, 1 Dal. 417.

Curtis v. Curtis, 2 Bro. Cha. 620; Co. Lit. 32 b, 33 a; Smith v. Paysenger,

4 Con. S. C. 59; McDonald v. Aten, 1 McCook (Ohio,) 298.

<sup>4</sup> Heyward v. Cuthbert, 2 Con. S. C. 628; 7 J. J. Mar. 637.

<sup>5</sup> Co. Lit. 23 a; 1 Cruise, 121.

(a) In Tennessee, (Stat. 1825-6, p. 58) land held in dower is expressly made taxable.

(b) The ordinance has made the law of dower one of the fundamental laws of Iowa. O'Ferrall v. Simplot, 4 Iowa, 881.

(c) Long continued cohabitation and general reputation are *prima facie* evidence of the marriage. Young v. Foster, 14 N. H. 114. See Conert v. Hertzog, 4 Barr, 145.

So long cohabitation, continued until

§ 7. A marriage may be either *void* or *voidable*; and the consideration, whether it is the one or the other, will materially affect the widow's claim of dower. In general, if the marriage were void, there shall be no dower. Thus the second wife of a man who has a former wife living has no dower, though the first wife dies before the husband.<sup>(a)</sup> But although the marriage were contracted before the age of consent, which at common law is fourteen in men and twelve in women,<sup>(b)</sup> and therefore voidable by either party—according to the maxim "*consensus non concubitus, facit matrimonium*"—; yet, if at the death of the husband the wife have passed the age of nine years, she shall have her dower. The marriage is accounted "*legitimum matrimonium quoad dotem*," though for other purposes only "*sponsalia de futuro*." And, if at the time of marriage the wife is under nine years of age, and before she reaches that age the husband parts with the land; she shall still have dower, if she live till nine.<sup>1</sup> A *voidable* marriage can be avoided only during the life of the parties, and by *divorce*. Hence, if in case of such marriage the

<sup>1</sup> Dyer, 869 a, 868 b; Co. Lit. 83 a, n. 10; Higgins v. Breen, 9 Mis. 497; Donnelly v. Donnelly, 8 B. Mon. 113.

the death of the alleged husband, the woman's being received and treated as his wife, and their bringing up and educating a family of children as their own. Carter v. Parker, 28 Maine, 509. The presumption arising from cohabitation may be rebutted, by evidence of a permanent separation without apparent cause, and another marriage of one party. Weatherford v. Weatherford, 20 Ala. 548. Even reputation has been held sufficient proof of marriage. Trimble v. Trimble, 2 Cart. 76.

An administrator's deed warranted the title, "excepting only the widow's right of dower." Held, the purchaser was not estopped to deny the marriage of the intestate, nor the legitimacy of the children, in a suit by them for the land. Stevenson v. McReary, 12 S. & M. 9. A and B cohabited as man and wife. They separated in 1781, and in 1783 B, the wife, removed from the State and was never afterwards heard of. In 1781 A married again, lived with his second wife thirty-eight years, and died leaving children by her. Held, though the second marriage was void at its inception, yet a valid sub-

sequent marriage might be presumed, from the cohabitation and good character of the parties, and the wife was allowed dower. Jackson v. Claw, 18 John. 346.

(a) A man, having a wife in Maryland, left her and married again in Kentucky. Subsequently his first wife died, and he continued to live and cohabit with the Kentucky wife for several years, and recognize her as such until his death. Held, the court would presume a marriage in fact after the death of the Maryland wife, and give dower to the last wife. Donnelly v. Donnelly, 8 B. Mon. 113.

Where a man who has a wife living fraudulently marries another woman, who believes herself to be his lawful wife, obtains her property and earnings, and invests them in lands more than the value of her dower, if she had been entitled thereto; his heirs cannot in equity deprive her of the dower estate after it has been allotted to her. Ib.

(b) In Arkansas, a marriage is void if the husband is under seventeen, or the wife under fourteen years of age. Ark. Rev. St. 535.

husband die before any divorce is obtained, his widow shall have dower.<sup>1</sup>

§ 8. In England, the fact of marriage is ordinarily tried, not by jury, but by a certificate of the bishop, the sentence of the Ecclesiastical Court being held conclusive upon this question. Under special circumstances, however, this mode of trial is not adopted; and, in the United States, this fact, like others, is tried by jury.

§ 9. The English law, on the subject of marriage and divorce, is materially different from that which generally prevails in the United States. In England, there are said to be two classes of disabilities or impediments to marriage—*civil* and *canonical*. Of the former class, are prior marriage, want of age, moral ability or will; and probably a neglect of the particular mode of celebration prescribed by law. Of the latter, are consanguinity, affinity and corporeal infirmity. Civil disabilities render the contract void *ab initio*, without divorce; canonical disabilities render it only voidable by divorce. Divorce *a vinculo matrimonii* is granted only for causes which existed at the time of marriage, or *canonical* disabilities. Hence, the marriage being avoided as originally unlawful, dower is as effectually barred, as if the marriage had been absolutely void. *Adultery*, being a cause arising after marriage, is a ground for divorce *a mensa et thoro*. Contrary to some ancient opinions, this has been settled not to be a bar of dower, being merely a *separation of the parties*, and not a *dissolution of the marriage*. The same is true of a divorce *a mensa* for any other cause than adultery.<sup>2(a)</sup> It may be laid down as the general rule of Amer-

<sup>1</sup> Co. Lit. 33 b.

<sup>2</sup> Robins v. Crutchley, 2 Wil. 122; Ilderton v. Ilderton, 2 H. Bl. 156; 4 Dane, 678.

<sup>3</sup> Rolle, Abr. Dower, 18; Co. Lit. 33 b; Lady Stowell's case, Godb. 145; Dame, &c. v. Weeks, Noy, 108.

(a) In the United States, the statute law often allows a divorce for causes which in England render the marriage void *ab initio*. Thus, in New Hampshire, New Jersey, Ohio, Indiana, Illinois, Missouri and Alabama, on account of a prior marriage. Whether such provisions have the effect to convert *void* into *voidable* marriages, so that dower will not be barred without divorce, may perhaps be a questionable point. In Pennsylvania, on the other hand, a marriage within the prohibited degrees, which is a *canonical* disability, is declared *void to*

*all intents and purposes*. So in New Hampshire. But still it is to be dissolved by divorce, and, after the death of either party, its validity cannot be disputed.

In North Carolina, marriage is void, where the parties are nearer than *first cousins*. N. C. St. 1842, 142. In Wisconsin, in case of consanguinity, &c., or a former marriage, the marriage is *per se* void. Rev. Sts. 898. It may be declared null from the time of such declaration, for want of age or understanding, force or fraud, if there have been no sub-

can law, that divorce *a vinculo* bars dower;(a) though this rule is not universally adopted.

sequent voluntary cohabitation. *Ib.* In case of infancy or insanity, cohabitation after the impediment is removed renders the marriage valid. In the former case, the other party cannot avoid the marriage; nor in the latter, if he had knowledge of the insanity. *Ib.* 894. In New Hampshire, the marriage of one incapable of contracting is void. *True v. Ramsey*, 1 Fost. 52.

In Pennsylvania, an agreement to live separate, each to take their own property, and neither to claim anything from the other, which is not under seal, nor acknowledged separately by the wife, will not bar dower. *Walsh v. Kelly*, 84 Penn. 84. Where there is a divorce and separation, or decree that the marriage is null and void; all the duties, rights and claims, accruing to either party in pursuance of the marriage, shall cease. In this sweeping clause, dower is of course included. In New Jersey, Alabama and Mississippi, a marriage contracted while a former husband or wife is living, is declared to be "invalid from the beginning, and absolutely void," but is still dissolved by divorce. In Arkansas, New York and Massachusetts, a process is provided for declaring void a marriage which was void at its inception, by a *decree of nullity*; though, in Massachusetts, such decree is declared to be unnecessary. In Kentucky, the same process is applied to a marriage within the prohibited degrees. In Vermont, consanguinity or a prior marriage renders the marriage *absolutely void*. A process is provided for annulling a doubtful marriage, for non-age, idiocy, &c., force or fraud, or impotency. In Delaware, a marriage may be annulled, in case of unlawful consanguinity or affinity, where one of the parties is white, and the other a negro or mulatto; in case of a former husband or wife living; or of insanity. In Maine, where one of the parties was insane, the marriage is void, and may be so decreed. (See *Walk.* 229; *Ind. Rev. L.* 213; *Ill. Rev. L.* 232, 233; *Miss. St.* 225; *N. H. L.* 386; *Ala. L.* 252; 1 *N. J. L.* 667; *Purd.* 213; *Verm. Rev. St.* 322; *Dela. Rev. St.* 238; *Keyes v. Keyes*, 34 *Maine*, 553.)

By the act of 1838, c. 342, of Maine, a woman is entitled to dower, though divorced from her husband, on the ground that he had become "a confirmed, habitual and common drunkard." But the

statute cannot have a retro-active operation. *Curtis v. Hobart*, 1 *Adams*, 230.

In Iowa, where there is a decree of divorce *a vinculo* in favor of the husband, for the default of the wife, of the pendency of the application for which she had personal service after his death, she is not entitled to dower; nor to a portion of his estate, by virtue of the former marital relation, so long as such sentence of divorce remains in force. And a decree in Chancery, avoiding a sentence of divorce so far as it affected the wife's portion in her husband's estate, and otherwise leaving it in force, is inconsistent, and of no effect, and will not entitle her to dower. *McCraney v. McCraney*, 5 *Clarke*, 232.

(a) In New York, notwithstanding a divorce *a vinculo*, for the adultery of the husband, the wife will be entitled to dower. *Forrest v. Forrest*, 6 *Duer*, 102. In Connecticut, Ohio, Michigan, and, it seems, Illinois, dower is not barred by divorce for the fault of the husband; but it is barred, as also in Arkansas and Delaware, by a divorce for the wife's own fault, or, in Illinois, on the ground that the marriage was originally void. (See *N. Y. Rev. St.* 741; *Illin. Rev. L.* 238; *Mich. L.* 138; *Dela. St.* 1832, 149; *Swan*, 291; *Ark. Rev. St.* 337 )

In Ohio, in case of *aggression* by the wife, dower is barred in lands owned at or after the filing of the petition. *Swan*, 291. A woman having a husband living, but from whom she had separated, marrying another, can have no dower in the real estate of the latter; the second marriage is absolutely void. The statute (*Swan's Sts.* 325, § 1,) does not render such marriage voidable. *Smith v. Smith*, 5 *Ohio*, (N. S.) 82

In Indiana, there shall be a fair division of property, but no title to land shall be divested. Except in cases of adultery by the wife, illegality in the marriage, or allowance of alimony expressly in lieu of dower; dower is not barred. *Rev. St.* 244. Where, before the statute of 1843, the husband conveyed away his land, and a divorce was decreed for misconduct; held, the wife should not have dower. *Comly v. Strader*, 1 *Cart.* 134. Where in a case of cruelty alimony was allowed upon divorce in lieu of dower; held, dower should be decreed. *Russell v. Russell*, *Ib.* 510. There is no dower in case of

§ 10. Although, in England, a divorce for adultery does not bar dower; yet, by statute (Westminster II. c. 34), if a wife willingly leaves her husband and continues with an adulterer, she shall be barred of her dower, if she be convicted thereupon, (a) except her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him. (b) The burden of proof is upon the party making this defence to a suit for dower.<sup>1</sup> And the same consequence follows, though the wife were originally taken away against her will, if she afterwards willingly remain with the adulterer. So if she be with him criminally, without remaining; or once remain with him, and he then detain

<sup>1</sup> Co. Lit. 32 b; *Cochrane v. Libby*; 5 Shepl 39. Where the wife married again within three years after the husband's leaving home, but after it was reputed in

the family that he was dead; held, not sufficient proof of adultery to bar dower. Ib.

divorce for the misconduct of both parties. *Cunningham v. Cunningham*, 2 Cart. 283. In Michigan, upon a divorce for adultery of the husband, the wife has dower. Rev. St. 340.

Ordinarily, the distinction made in favor of the wife, where the divorce is granted for the fault of the husband, is, that a provision is made for her, distinct from dower, either under that name, or in some other mode. But dower, as such, is barred. In Massachusetts, where a man and woman are divorced for the cause of adultery committed by him, or on account of his being sentenced to hard labor; the wife has her dower. Mass. Rev. St. 483, 617. See Gen. Sts.: *Smith v. Smith*, 13 Mass. 281. In Maine, where the divorce is for the husband's fault, she is entitled to dower.

(A husband sold land in 1823, in which his wife did not release her dower. In 1842, the wife obtained a divorce on the ground of desertion, under the statute of 1828, which provides, that a wife obtaining divorce for that cause shall have dower as if her husband was dead. Held, she was not entitled to dower in the land sold; as the statute could not, constitutionally, have a retrospective effect. *Given v. Marr*, 27 Maine, 212.)

So the law of 1838, c. 342, making a woman, divorced from her husband because of his drunkenness, dowerable in his estate, has no retrospective operation upon lands conveyed by the husband before that enactment. *Curtis v. Hobart*, 41 Maine, 230.)

So in Connecticut, unless some part of the husband's estate has been assigned to her. In Kentucky (by the Revised Laws) and Alabama, neither party can by divorce be divested of a title to real estate; but, in Kentucky, by a late statute, a divorce for the husband's fault gives the wife the same rights as if he were dead. In Wisconsin, where a divorce is had for imprisonment or adultery by the husband, the wife has dower. In New Hampshire, where the wife of one not a citizen, by residence in the State, gains the right of acquiring and holding real estate, and is divorced; she retains such property, unless it appear from other evidence than the divorce, that she was guilty of misconduct. 1 Ky. Rev. L. 124; Ky. St. 1836-7, 824; Alab. L. 256; N. H. Rev. Sts. 296; Me. Ib. 608; Conn. Sts. 188; Wis. Rev. Sts. 897. In Connecticut, a sum in gross paid to the wife upon divorce, is called *dower*.

(a) In England, the ecclesiastical court alone has jurisdiction of adultery. Perhaps, therefore, conviction may there be requisite to bar dower. But in the United States the fact must be tried collaterally, if at all, in the suit for dower.

(b) All which (says Lord Coke) is comprehended shortly in two hexameters. Sponte virum mulier fugiens, et adultera facta,

Dote sua careat, nisi sponsi sponte retracta.

See *Lecompte v. Wash*, 9 Mis. 551.



her against her will; or if he turn her away. So, if with her husband's consent she goes away with another man, who afterward has criminal connection with her; or if she refuses to accompany her husband, on account of objections from her parents, and reports of his marriage to another woman; or refuses to return to him, having been driven away by cruelty. It is sufficient that she is in an open state of adultery, whether she live in the same house with, or be formally married to, the adulterer or not. And it has been held immaterial with whom the adultery is committed, or whether it be before or after she leaves. But merely *living in adultery*, without *elopement*, which means *a freedom from the husband's control*, is no bar of dower. The circumstances of the elopement are immaterial.<sup>1(a)</sup>

<sup>1</sup> Hetherington v. Graham, 6 Bing. 185; Stegall v. Stegall, 2 Brock. 256; Bell v. Neely, 1 Bai. 812; Cogswell v. Tibbetts,

8 N. H. 41; Walters v. Jordan, 18 Ired. 861.

(a) A man by deed granted his wife to another, ("concessio mirabilis et inaudita."—Coke,) with whom she eloped and lived adulterously, and after her first husband's death intermarried. Held, the deed was void as a grant or a license; that no averment was admissible, "*quod non fuit adulterium*;" and that the wife was barred of dower, notwithstanding a purgation of adultery in the ecclesiastical court. But where the friends of a husband removed him from his wife, published that he was dead, and persuaded her to marry another, and release all her rights under the first marriage; held, she did not leave her husband *sponte*, and therefore was not barred of her dower. Co. Lit. 82 a, n. 10; Green v. Harvey, 1 Rolle's Abr. 680.

In Connecticut, a woman has dower if living with her husband at his death, or absent by his consent or default, or inevitable accident. And where the husband was a naturalized foreigner, and his wife had always lived abroad, she was barred of her dower upon the principle above stated. In Maryland, conviction of bigamy bars dower. Dut. 58; Sistare v. Sistare, 2 Root, 468; Md. L. 579.

The old English statute upon this subject has been generally adopted in this country, and in the States of Virginia, North Carolina, Delaware, New Jersey, Illinois, Missouri and Indiana, expressly or substantially re-enacted.

The English statute was never in force in Missouri, until the act of 1825. Le-compte v. Wash, 9 Mis. 551. It is not in force in Massachusetts. Lakin v. Lakin, 2 Allen; 45.

In New York, by the Revised Statutes, there must be a divorce for misconduct, or a conviction of adultery, upon a bill in chancery by the husband, to bar dower. (See Stearns, 810; 1 Swift, 86; 4 Dane, 672-6; 4 Kent, 52; 1 Virg. Rev. C. 171; Code, 474; 1 N. J. R. C. 400; \* 1 N. C. Rev. Sts. 615; Ind. Rev. L. 211; Ill. do. 288; Misso. Sts. 229; \* Dela. St. 1829, 165; Rev. Sts. 291; Foy v. Foy, 18 Ired. 90; Walters v. Jordan, Ib. 861.)

So, also, though before 1830, when the (N. Y.) Rev. Code was enacted, the wife long lived in open adultery, separate from the husband; although, if he had died prior to 1830, she would have been barred of dower under the act of 1787. Reynolds v. Reynolds, 24 Wend. 198. So, where the parties were married in 1810, the wife immediately deserted her husband, and ever afterwards lived in adultery; and the husband died since the Revised Statutes took effect. Cooper v. Whitney, 8 Hill, 95. In Ohio, a divorce in another State, for wilful abandonment of the wife by the husband, does not bar dower in

\* In this statute the old term "ravisher" is used.



§ 11. In England, the reconciliation, which will avoid the effect of elopement, must be, not by coercion of the church, (a proceeding unknown to our laws,) but *voluntary* on the part of the husband. And the better opinion seems to be, that *cohabitation* subsequent to the elopement—as, for instance, the parties sleeping together at several times and places, although they do not permanently occupy the same house—is sufficient proof of reconciliation.<sup>1</sup> And reconciliation has a retrospective effect upon the rights of the wife. Thus, if the husband purchase and aliene lands during the elopement, she shall still have her dower therein.<sup>2</sup>

§ 12. To give a title to dower, either at law or in equity, the husband must have been *seised* of the lands. (a) He must have had a present freehold interest. But a *seisin in law* is sufficient; upon the ground that the husband alone has power to obtain actual possession during coverture, and therefore a different rule would

<sup>1</sup> Haworth v. Herbert, Dyer, 106.

<sup>2</sup> Co. Lit. 88 a, n. 8.

lands lying in Ohio. *Mansfield v. M'Intyre*, 1 Willc. 27. (In Alabama, a husband and wife having separated, the husband went to another State, married again, and had children. The woman also became mother of illegitimate children. Forty years after the first marriage, the husband conveyed in trust for the second wife and children. Upon his death, the first wife applies for dower. Held, it should not be allowed. *Ford v. Ford*, 4 Ala. N. S. 142.)

(a) The phrase *beneficial seisin* is sometimes used. *Oldham v. Sale*, 1 B. Monr. 77. See *Northcut v. Whipp*, 12 B. Mon. 65. The owner of the inheritance in land is "possessed" of it for the purpose of dower and curtesy. *Weir v. Tate*, 4 Ired. Eq. 264.

Where a deed had been delivered to the husband, but abstracted from him before registration; held, there could be no dower at law, but the widow must resort to a court of equity. *Tyson v. Harrington*, 6 Ired. Equ. 329. Acc. *Thomas v. Thomas*, 10 Ired. 123. In a declaration in dower, it is unnecessary to aver the *possession* of the husband. But, by the general rules of pleading, it is necessary to show his *seisin*, which may be

done by implication from the form of the declaration. *Foxworth v. White*, 5 Strobb. 118. In Tennessee, the widow is not dowable of lands which her deceased husband had conveyed by mortgage, for he did not die *seised and possessed* of them. *McIver v. Cherry*, 8 Humph. 718. On a petition for dower, although the widow will not be held to strict proof of title in the husband, to make out a *prima facie* right; yet, upon a plea of *non seisin*, she must either show title in the husband, actual possession, or that the defendant holds under the husband. *Gentry v. Woodson*, 10 Mis. 224.

It has been held, that, although the husband was not seised during coverture; yet, if he had conveyed the land, with an agreement, that the rights of those claiming under him after his death should be saved, his widow shall have dower. Thus a grantor gave an absolute deed of real estate, and took from the grantee, at the same time, an acknowledgment that he held the land charged with the settlement of the just debts of the grantor. Held, the widow of the grantor, who had intermarried with him since the deed, was entitled to dower. *Doe v. Bernard*, 9 S. & M. 319.

enable him at pleasure to debar his wife from her dower.<sup>1</sup> Thus, in case of a conveyance by an absolute deed, but with a verbal agreement to reconvey upon repayment of certain money loaned; the grantee never entered nor claimed possession. Held, his wife was entitled to dower, a seisin in law being sufficient for that purpose.<sup>2</sup> So where an heir dies before entry upon the land descended to him, or where a stranger enters by *abatement*; the widow of the heir shall still have dower. But if the heir married after the abatement, and died without taking possession; his widow shall not have dower, because during the coverture he had no seisin in law.<sup>3</sup> So the widow of an heir has no right of dower in land sold by the executor under a power in the will of the ancestor.<sup>4</sup> So, where the husband had only a remainder or reversion expectant upon a freehold, there shall be no dower.<sup>5</sup>(a) And if a man leases for life, reserving rent to him and his heirs, and then marries and dies, his widow shall be endowed neither of the reversion nor the rent; because he had no seisin of the former, and only a particular estate, not an inheritance in, the latter. The same rule applies, where the particular estate terminates during coverture, either by limitation or forfeiture, but the husband does not actually enter. But if the life estate cease for a time, though afterwards re-instated, the widow of the reversioner has dower,

<sup>1</sup> Co. Lit. 31 a; Perk. 366; Dennis v. Dennis, 7 Blackf. 572; Pritts v. Richey, 29 Penn. 71; Yancy v. Smith, 2 Met. Ky. 408; Welch v. Buckins, 9 Ohio St. 331.

<sup>2</sup> Atwood v. Atwood, 22 Pick. 283.

<sup>3</sup> Lit. 448; Perk. 371; Ib. 367; Dunham v. Osborne, 1 Paige, 635; Sherwood v. Vanderburgh, 2 Hill, 803.

<sup>4</sup> Weir v. Tate, 4 Ired. Equ. 264.

<sup>5</sup> Blow v. Maynard, 2 Leigh, 30; Robinson v. Codman, 1 Sumn. 130; Eldredge v. Forestal, 7 Mass. 258; Dunham v. Osborne, 1 Paige, 634; Otis v. Parshley, 10 N. H. 403; Arnold v. Arnold, 8 B. Mon. 202; Weir v. Tate, 4 Ired. Eq. 264; Green v. Putnam, 1 Barb. 500.

(a) A conveys to B in fee, and B, at the same time, reconveys to A and his wife, for their lives and that of the survivor. B conveys to C, subject to his deed to A. A and his wife and C jointly occupy the land. A dies, then C, then A's wife. C's wife remains on the land, and dower is assigned her, C's administrator having previously sold the land under a license from court to D. E, a purchaser from D, brings suit for the land against the widow, and recovers. Fisk v. Eastman, 5 N. H. 240.

It has been held in Pennsylvania, that

there is no dower in a remainder expectant upon a life estate, which the husband has aliened before his death. Whether without such alienation there would be, is doubted. Shoemaker v. Walker, 2 S. & R. 554.

A woman is not dowable out of lands, in which her husband, during the coverture, had only a vested remainder in fee, expectant upon the determination of an estate during widowhood, which remainder he sold and absolutely conveyed pending the particular estate. Gardner v. Greene, 5 R. I. 104.

on account of the temporary seisin. Thus, if a lessee for life surrender to the reversioner on condition, and enter for condition broken, the widow of the latter shall be endowed.<sup>1(a)</sup> But where the lease is for years and not for life, the widow is entitled to a third of the reversion, and a third of the rent, if any. And this, notwithstanding a release from the wife to the lessee; which amounts only to a confirmation of the lessee's title. If no rent is reserved, her judgment for a third of the reversion will be with a *cessat executio* during the term; or dower will be assigned, with a proviso that the tenant for years shall not be disturbed.<sup>2(b)</sup> Thus in case of a devise to executors for payment of debts, then to the testator's son in tail; if the son marries and dies before the debts are paid, as the estate of the executors is only a chattel interest, the son had a seisin which entitled his widow to dower after payment of the debts.<sup>3(c)</sup>

§ 13. To entitle the widow to dower, the husband must have had the freehold and inheritance in him *simul et semel*. Thus, if A have an estate for life, remainder to B for life, remainder to A in fee, and A die, living B, A's widow shall not be endowed. The same rule has been adopted, though the intervening estate is a mere possibility. Thus, where A is a tenant for life, remainder to B and his heirs for A's life, remainder to the heirs male of A's body, A's wife shall not have dower. And the prevailing modern doctrine is, that the interposition of a mere contingent estate between the husband's particular estate and his inheritance—notwithstanding a union *sub modo*—is sufficient to

<sup>1</sup> Co. Lit. 32 a; Perk. sec. 366, *et seq.*; Co. Lit. 131 a. n. 4.

<sup>2</sup> Co. Lit. 32 b; Wheatley v. Best,

Cro. El. 564; Williams v. Cox, 8 Ed. 178; Weir v. Tate, 4 Ired. Equ. 264.

<sup>3</sup> 8 Rep. 96 a; Hitchins v. Hitchins, 2 Vern. 404.

(a) But when land is conveyed, reserving an estate therein during the lives of the grantor and his wife, the wife not being party to the deed; the estate descends, upon the decease of the husband, to his personal representatives, and the wife is entitled to dower therein. Gorham v. Daniels, 23 Vt. 600.

(b) Where a rent is reserved, the judgment for dower will be general, but the execution special; and the sheriff shall not oust the tenant, but merely enter and demand seisin for the widow.

(c) By a Massachusetts colony law of 1641, the wife was allowed dower of a reversion or remainder. But this has been construed to mean, a reversion, &c., upon an estate less than freehold. 4 Dane 664.

A statute of Maine provides for dower in estates in possession, remainder and reversion. In Connecticut, it is said, a reversion after a freehold is subject to dower. 1 Smith's Sts. 170; Reeve, Dom. R. 57.

deprive the wife of her dower. Thus, where an estate is limited to A and B for their lives, and after their deaths to the heirs of B, the wife of B shall not have dower. The learning upon this subject is said to be abstruse and unprofitable.<sup>1</sup>

§ 14. Upon the principle above stated is founded the rule, that a widow is not dowable of lands assigned to another woman in dower—" *dos de dote peti non debet.*" When dower is assigned, the assignment relates back to the owner's death, and the heir is regarded as never having been seised of this portion of the land. Thus it is no bar to a suit for dower, that the widow of an earlier owner has recovered her dower in the same land; although the plaintiff may recover only one-third of the remaining two-thirds, subject, under some circumstances, to a contingent right of dower in the other third, when the former right of dower ceases.<sup>2</sup> So if a grandfather dies seised of land, from which his widow is endowed; and then the father dies, leaving a widow: the widow of the father shall have dower only in two-thirds of the land, the other third being in the father's hands a reversion expectant upon a freehold, viz: the dower of the grandfather's widow.<sup>3</sup>(a) But if the grandfather *conveyed* to the father before his death, the widow of the father would have dower in the whole, subject to the dower of the grandfather's widow; because, before the death of the latter, the father was actually seised.<sup>4</sup>(b) The same principle applies, where the land has been

<sup>1</sup> Apple v. Apple, 1 Head, 348; Moore v. Esty, 5 N. H. 492; Duncomb v. Duncomb, 8 Lev. 437; 4 Kent, 40, n.

<sup>2</sup> 4 Dane, 664; Apple v. Apple, 1 Head, 348; 5 R. I. 104; Windham v. Portland, 4 Mass. 388; Manning v. Laboree, 33 Maine, 343. But see ch. 12.

<sup>3</sup> Co. Lit. 31 a. b; Reynolds v. Reynolds, 5 Paige, 161; Safford v. Safford, 7 Paige, 259.

<sup>4</sup> Co. Lit. 31 a, b; Geer v. Hamblin, 1 Greenl. 54, n.

(a) But in New York it has been held, that in such case the heir's widow shall have dower in the land assigned to the widow of the ancestor, after the death of the latter. Bear v. Snyder, 11 Wend. 592.

It would seem, that, in making this decision, the court overlooked the distinction (laid down in the books which they cite, and noticed in the text) between the case where the son holds *by purchase*, and that in which he holds *by descent*.

The point really decided is, that the heir is *seised* of the reversion expectant upon the widow's dower, which is a departure from the common law rule. The decision seems directly contradictory to 5 Paige, 161. *Supra*, n. 8.

(b) Judge Reeve supposes a case, where, upon this principle, the widows of the grantor and four successive purchasers, respectively, claim dower in the same land. Reeve's Dom. Rel. 58.

sold on execution. Thus A owns land, which is sold on execution against him to B. B dies, and then A. B's widow has dower in the land, subject to the dower of A's widow.<sup>1</sup> But the above-stated rule is not applicable, unless dower has been actually assigned to the first widow.<sup>2</sup> And it is said that the widow of a devisee may recover dower in the whole land devised, the widow of the testator having never made any claim.<sup>3</sup>

§ 15. Upon the question, whether a *release* by the widow first entitled gives the other dower *in the whole land*; where two widows were entitled to dower in the same land, and the one having the prior right recovered judgment for her dower, but, without having it set off, conveyed it to the tenant; in a suit by the other widow for her dower, held, she could claim it in only two-thirds of the land. But to an action of dower, a prior right of dower, which has been released to the tenant without being enforced, has been held no defence.<sup>4(a)</sup>

§ 16. It is said, that, if the widow of a grantee sue the grantee's heir for her dower in the whole land, pending a suit against him by the widow of the grantor for her dower; the former suit shall await the judgment of the latter.<sup>5(b)</sup>

§ 16 a. It is held, that, when the husband has a *seisin for an instant*, beneficially for his own use, the title of dower will arise, and a case is mentioned, where a father and son were hanged in one cart, and, as the son appeared to survive the father by struggling the longest, the son's widow was endowed.<sup>6</sup> So, where a purchaser of land mortgaged it on the same day to creditors of the vendor; held, his wife should have dower.<sup>7</sup> But

<sup>1</sup> Dunham v. Osborn, 1 Paige, 635.

<sup>2</sup> Elwood v. Klock, 18 Barb. 50.

<sup>3</sup> 1 Cruise. 153; Hilchins v. Hilchins, 2 Vern. 408.

<sup>4</sup> Leavitt v. Lamprey, 18 Pick. 382. (But see *infra*.) Atwood v. Atwood, 22 Pick. 283; Elwood v. Klock, 18 Barb. 50.

<sup>5</sup> Lit. 54.

<sup>6</sup> Douglas v. Dickson, 11 Rich. 417

<sup>7</sup> 2 Bl. Com. 182; Broughton v. Randall, Cro. Eliz. 602; Stanwood v. Dunning, 2 Shepl. 290.

<sup>8</sup> McClure v. Harris, 12 B. Monr. 261.

(a) Mr. Cruise thus states the law. But the case, (2 Vern. 408) which he cites, was one where the title of the former widow was disputed on the ground of a devise to her in satisfaction of dower.

Devise to the testator's wife of her thirds of the land occupied by him, and of the whole tract to his son, who occu-

pied with him. Hold, the son took the whole, subject to her dower; and, if not assigned in the son's life, his widow should have dower in the whole. Robinson v. Miller, 2 B. Monr. 287.

(b) But Lord Coke says, "this snaff came never out of Littleton's quiver of choice arrows."

there is an instantaneous seisin of another description, which will not entitle the widow to dower. This is where the same act, which gives the husband an estate, also passes it out of him, or where he is a mere instrument to pass the estate. Thus, where land is conveyed to A to the use of B, A has but an instantaneous seisin, and his widow shall not have dower. So where A conveys to B, and B at the same time mortgages back to A, or, according to a previous agreement, mortgages to C; the widow of B shall have dower only in the equity of redemption. Though it is otherwise, where the re-conveyance is subsequent in time to the original deed; or where the mortgage, made with the deed, having never been recorded, is surrendered to the mortgagor, who gives a new note and mortgage, in which the wife does not join.<sup>1(a)</sup> So where the conveyance and mortgage are acknowledged and recorded at the same time, although the mortgage is not made to the vendor, it will be presumed to have been executed for the purchase-money, at the same time with the conveyance. Such case is not within the statute of New York, (1 Rev. Sta. 740,) declaring that a widow shall be dowable of lands mortgaged by the husband before marriage, as against all persons except the mortgagee and those holding under him.<sup>2</sup> So where it was a condition of a sale of land to the husband, that he should give back a mortgage of the land to secure the price, and a deed was made, the day after the conveyance, and signed by the wife,

<sup>1</sup> Co. Lit. 31 b; 1 N. Y. R. S. 740; Ark. Rev. St. 337; Holbrook v. Finney, 4 Mass. 566; Moore v. Rollins, 45 Maine, 492; Mills v. VanVoorhees, 20 N. Y. 412; Welch v. Buckins, 9 Ohio St. 331; Clark v. Munroe, 14 Mass. 351; 1 Bay, 312; 2 M'Cord, 54; Ancots v. Cath-erick, Cro. Jac. 615; Stanwood v. Duu-

ning, 14 Maine, 290; McCauley v. Grimes, 2 Gill & J. 318; Eilliam v. Moore, 4 Leigh, 30; Mayburry v. Brien, 15 Pet. 21; Sherwood v. Vandenburg, 2 Hill, 30; Hobbs v. Harney, 4 Shepl. 80; Bullard v. Bowers, 10 N. H. 500; Nottingham v. Calvert, 1 Smith, 399.

<sup>2</sup> Cunningham v. Knight, 1 Barb. 399.

(a) A had given his note to B for a tract of land. By agreement, B conveyed the land to C, who therefor at the same time conveyed a farm to A, and A at the same time gave a mortgage of the farm to B, as security for the note. Held, the instantaneous seisin of A did not entitle his wife to dower. Gammon v. Freeman, 31 Maine, 243.

Where A makes a deed to B, and gives it to his (A's) agent, to be delivered to B on payment of the price, and B dies, after conveying it to C, and C then pays the price, and receives the deed; this does not entitle the widow of B to dower. Junk v. Canon, 34 Penn. 286.



but she refused privately to acknowledge it; held, she could not have dower.<sup>1(a)</sup>

§ 17. Where a man before marriage makes a conveyance of lands, which is never acknowledged or legally recorded, his widow shall not have dower.<sup>2</sup> But where the defendant was a purchaser under a judgment entered on the same day with the marriage; but there was no evidence, which in fact was first, the marriage or the entry of the judgment: the plaintiff recovered her dower.

§ 18. And in an action of dower, possession by the husband, unless impeached or explained, is conclusive evidence of title, Proof of the conveyance of the premises to the husband, by deed of warranty, and of his conveying the same to another person during the coverture, *prima facie*, is sufficient to prove the seisin of the husband;<sup>3</sup> more especially with the additional proof of possession by the husband and his grantee.<sup>4(b)</sup>

§ 19. It has been laid down, that, where a widow demands dower from one claiming under her husband, he cannot dispute the husband's seisin.<sup>5</sup> But this rule has been criticised, and the

<sup>1</sup> Bogue v. Rutledge, 1 Bay. 312; McArthur v. Porter, 1 Ohio, 102.

<sup>2</sup> Blood v. Blood, 23 Pick. 80.

<sup>3</sup> Ingram v. Morris, 4 Harring, 111.

<sup>4</sup> Stevens v. Reed, 37 N. H. 49.

<sup>5</sup> Carter v. Parker, 28 Maine, 509.

<sup>6</sup> Wall v. Hill, 7 Dana, 174. See Evans v. Evans, 5 Cas. 275.

<sup>7</sup> Bancroft v. White, 1 Caines, 185. See Elliott v. Stuart, 3 Shepl. 160; 2 Hill, 302; Stevenson v. McReary, 12 S. & M. 9; Finn v. Sleight, 8 Barb. 401.

(a) But where a vendor of land, having a lien for the price, brings a suit for it, recovers judgment, and sells the land upon execution; the lien is extinguished, and the widow of the first vendee shall have dower against the execution purchaser. McArthur v. Porter, 1 Ohio, 102.

In Virginia, where the husband, receiving a deed of land, gave a deed of trust to secure the price, and the land was afterwards sold to raise the price; it was left a doubtful point whether the widow should have dower. Moore v. Gilliam, 5 Munf. 346.

(b) Where the defendant appears and denies the plaintiff's right, he thereby claims to be tenant of the freehold, and cannot set up title in a mere stranger, under whom no one is claiming the premises. 5 Cas. 277.

The demandant cannot rely, except as secondary evidence, upon recitals in the

deed, under which the defendant claims, acknowledging her right to dower. Jewell v. Harrington, 19 Wend. 471.

Upon a similar principle to that above stated, acceptance of dower estops a widow from disputing her husband's title. Perry v. Calhoun, 8 Humph. 551. So, where the widow remains in possession of the land, she is estopped to deny the husband's title; even though she surrenders to one claiming under an execution prior to the husband's deed, and then resumes possession under him. Grady v. Baily, 18 Ired. 221.

Where the legal title was in the defendant, but the plaintiff held his receipt for the purchase money paid by her deceased husband for the land, and the defendant's written agreement to convey it to him on request; held, parol evidence was inadmissible to defeat this equitable title. Evans v. Evans, 5 Cas. 277.



cases which have been supposed to establish it, examined by the court in New Hampshire and elsewhere; and the conclusion is, that, although there may be cases where the tenant is technically and absolutely *estopped* to deny the seisin of the husband, under whom he claims; yet, in general, the husband's conveyance is only *prima facie* evidence of such a seisin as entitles the widow to dower, and the defendant may contest this point. Thus the tenant may defend, upon the ground that the husband had only a remainder after a freehold, or a leasehold interest, though he conveyed in fee. And, in general, dower will not be allowed against a purchaser from the husband upon a doubtful right.<sup>1</sup>(a)

<sup>1</sup> Moore v. Esty, 5 N. H. 492; Otis v. Parshley, 10, 408. Acc. Sparrow v. Kingman, 1 Comst. 242; Kingman v. Sparrow, 12 Barb. 201; Gammon v. Freeman,

81 Maine, 243. See Bell v. Twilight, 2 Fost, 500; Crittenden v. Woodruff, 6 Eng. 82; Alsberry v. Hawkins, 9 Dana, 181; Davis v. Logan, ib. 186.

(a) In an action of dower, the husband's seisin is established by proof of a deed to him; of a deed from him with covenants of general warranty; and of a similar deed from his grantee to the tenant, though his deed was executed, soon after a judgment in his favor upon a writ of entry on his own seisin, and before he had paid to the tenant in that action the amount assessed by the jury for betterments; provided the value of the betterments was actually paid within the time prescribed by statute. The covenants of warranty estop the tenant from denying the husband's seisin. Thorndike v. Spear, 81 Maine, 91.

Where two grantors conveyed land by deed of warranty, without any designation of the manner in which it was held by them, one died, and his widow brought her action of dower, claiming to be endowed of one-half of the premises; held, the grantee was estopped by his deed from showing that the living grantor was seised in severalty of a much greater proportion, and the deceased of a much less proportion than an undivided moiety. Stimpson v. Thomaston Bank, 28 Maine, 259.

So, in a suit for dower against one who entered under a deed from the husband's grantee, the defendant has been held estopped to deny the husband's title, or to aver that, after the purchase of the land, an action being brought against him by the true owner, he bought a true and

permanent title. Browne v. Potter, 17 Wend. 164. See Norwood v. Marrow, 4 Dev. & B. 442. So one is estopped, who holds under a deed from the widow, as executrix of the husband, conveying the land subject to dower. Smith v. Ingalls, 1 Shepl. 284. So, where the husband was in possession, and an execution levied upon the land, under which the tenant claims title; this is sufficient proof of seisin in the husband. Cochrane v. Libby, 5 Shepl. 39. See Osterhout v. Shoemaker, 8 Hill, 513.

Where, to a suit for dower, the defence is set up that the defendant was not seised, and the plaintiff prevails; this judgment is conclusive in her favor, upon a subsequent bill in equity for mesne profits. Tellman v. Bowen, 8 Gill & J. 383.

Where, to support her action for dower, the wife introduced a mortgage given many years before, by her husband, on which appeared an assignment thereof, by the mortgagee, to one from whom the tenant, through several mesne conveyances, derived title; if there be no evidence that the assignee ever claimed title under the mortgage, or had any knowledge of the assignment to him, the tenant will not be estopped thereby from denying that the husband had title during coverture. Kidder v. Blaisdell, 45 Maine, 461.

A took possession of vacant land owned by the State, made improvements, and

§ 20. The last circumstance requisite to dower, is *the death of the husband*. This renders *absolute* and *consummate*, an interest before *contingent*, *inchoate* and *initiate*.<sup>1</sup> Whether it must be a *natural* death, seems to have been an unsettled point. In England, the prevailing opinion is, that a mere *civil* death, as in case of becoming a monk, is insufficient. Mr. Dane remarks, that this question is not known ever to have been started in this country, or the existence of any such thing as a civil death contended for; although Quakers and others have been banished, and many criminals are imprisoned for life; but that, in New York, it has been decided that they are dead in law.<sup>2(a)</sup> A natural death, however, may be presumed from circumstances, or proved, *prima facie*, by reputation in the family; and, in such case, the widow unquestionably has the same right to dower as if the death of the husband were positively proved. The English statute (19 Cha. 2, c. 6) provides merely for the taking effect of remainders and reversions, expectant upon life estates. But the principle of the statute has been extended to most other cases; more especially to those where the title to land is concerned, and the property would therefore remain unimpaired, if the party should prove to be alive. Thus, where a husband had been more than seven years absent from the State, and it was reported that he was drowned; held, a second marriage by his wife was valid,

<sup>1</sup> Moore v. City, &c., 4 Sandf. 456; Riddick v. Walsh, 15 Mis. 519.

<sup>2</sup> 3 Mas. 368; 2 Crabb. 39; Sutliff v. Forgey, 1 Cow. 89; Co, Lit. 33 b. 132 b;

Jenk. Cent. Ca. 4; 1 Cruise, 124; 4 Dane, 677. See Gregory v. Paul, 15 Mass. 33; Wright v. Wright, 2 Desaus. 244.

occupied fifteen years. The State granted the land to B, son of A, after A's death, reserving to the wife of A a life estate, in the same manner she would have been entitled to dower, if A had died seised in his own right. The wife of A brings an action for her dower. Held, A's possession was evidence of seisin, and threw the burden of disproving it upon B; that A was seised against everybody but the State, as a mortgagor is seised against all but the mortgagee; and that B had nothing to set up against the claim of dower except his grant, which expressly saved the right of dower. Judgment for the plaintiff. Smith v. Paysenger, 4 Con.

S. C. 62; Knight v. Mains, 3 Fairf. 41; Reid v. Stevenson, 3 Rich. 66. A grantee enters into possession, mistaking the lot described, and continues in possession until his death; the land is then sold and conveyed by his administrator by license of court, and the purchaser enters into possession, and afterwards takes a quitclaim deed from the grantor of the deceased, describing the land as being the same intended to be conveyed by his deed. Held, the widow of the deceased was entitled to dower as against such purchaser. Hale v. Munn, 4 Gray, 182.

(a) In South Carolina, a husband banished has been held *civiliter mortuus*.

and entitled her to dower or a distributive share from the second husband's estate.<sup>1</sup> And a party claiming under the heirs of the husband cannot deny his death.<sup>2</sup>

<sup>1</sup> Woods v. Woods, 2 Bay, 476; Cochrane v. Libby, 5 Shepl. 89. See Miller v. Bates. 3 S. & R. 400.

<sup>2</sup> Hitchcock v. Carpenter, 9 John. 344

2 Desans. 244 Under the Kentucky statute of 1802, the wife of one *convicted of felony* is not entitled to dower, as in case of his decease. Wooldridge v. Lucas, 7 B. Mon. 40. The estate is not forfeited, but the wife's right to alimony, and the right of the children to support, and of

the other creditors, are recognized; and the right of the offender, after his release from imprisonment, to what has not been disposed of for either of these purposes, is complete. Nor does his estate descend to his heirs, but remains in the convict. Ib.

## CHAPTER IX.

## DOWER. WHAT PERSONS MAY BE ENDOWED, AND IN WHAT THINGS.

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| 1. Aliens; English and American law.                 | extrinsic causes.                           |
| 2. Dower—in what things.                             | 13. Land appropriated to public use.        |
| 3. Things incorporeal.                               | 13 n. Mill and fishery; annuities; lands    |
| 4. Mines and quarries.                               | held by improvement, &c.; lands             |
| 5. Wild lands.                                       | contracted for; slaves.                     |
| 6. State of cultivation—what.                        | 14. Estates tail, &c.; for years; uses, &c. |
| 7. Improvement or depreciation by heir or purchaser. | 15. Estates <i>pour autre vie</i> .         |
| 12. Increase or diminution of value from             | 16. Wrongful estates.                       |

§ 1. WITH respect to the persons who may take an estate in dower, the only personal disability seems to be that of *aliens*. At common law, an alien cannot *hold* real estate, acquired in any mode; and cannot even *take* it by *act of law*. An alien woman therefore cannot be endowed. A statute of Hen. 5 made an exception in favor of aliens married to Englishmen under a license of the king. And, if naturalized, an alien, in general, shall have dower in all the lands of which the husband was seised during coverture.<sup>1(a)</sup>

<sup>1</sup> 1 Cruise, 125; 2 Chit. Black. 108, n. 28; Buchanan v. Deshon, 1 Harr & G. 289; Alsberry v. Hawkins, 9 Dana, 177.

(a) Decided otherwise in New York. Priest v. Cummings, 16 Wend. 617.

The rights and powers of aliens, as to real estate, will be considered hereafter. See *Alien*. The common law rule is recognized in Kentucky. Thus, where a woman emigrated with her husband to Texas, where he died, and she returned upon a visit; held, she had expatriated herself, and was not entitled to dower. 9 Dana 177.

The *domicil* of the husband does not affect the right of dower. Thus the wife

of one, domiciled in Georgia, may claim dower in all lands in South Carolina of which he was seised at any time during coverture. Lamar v. Scott, 8 Strobb. 562.

In Wisconsin, a widow out of the State may claim dower. Rev. Sts. 835.

By St. 7 & 8 Vict. ch. 66, an alien woman becomes naturalized by marrying a British subject.

In those States where aliens may hold lands, of course they are entitled to dower. But, in some of the other States,

§ 2. With respect to *the things in which dower shall be had*, the first and most comprehensive rule, is that which has been already stated in giving the definition of dower, viz.: that the widow shall be endowed of all lands and tenements in which her husband had an estate of inheritance at any time during coverture, and of which any issue that she might have had might, by possibility, have been heir.<sup>1</sup> The last clause of this definition, in consequence of the peculiarities of American law as to *entailments*, seems to be, in this country, obsolete and superfluous. It is accordingly omitted in American statutes, which define dower, where any such exist.

§ 3. Dower shall be had, not only in lands themselves, but also in all *incorporeal hereditaments* that savor of the realty, (a) because it is incident to the estates to which they are appendant. It is said, that, in the United States, dower is principally confined to houses, lands and mills.<sup>2</sup>

<sup>1</sup> 2 Chit. Bl. 104; *Brewer v. Van Ars-  
dale*, 6 Dana, 204.

<sup>2</sup> 1 Cruise, 127; 4 Kent, 40; *Bucker-  
idge v. Ingram*, 2 Ves. jun. 664; 4 Dane,  
670.

a special exception from the common law rule has been made in favor of alien women and the widows of aliens.

In Massachusetts, Connecticut, Maine, Arkansas, Wisconsin, Indiana, Michigan, alien women are dowable; except, in Massachusetts and Maine, of land conveyed or levied on before February 23, 1818. Mass. Rev. St. 411; (See Gen. Sts.) Conn. Sts. 1848, 47; Me. Ib. 392; Mich. Ib. 265; Ark. Ib. 337; Wisc. Ib. 335; Ind. Ib. *Descent*, sec. 43.

They are dowable, also, in New Jersey, and, if residents, in Maryland. *Buchanan v. Deshon*, 1 Harr. & G. 289; 4 Kent, 36.

In Maine, the alien widow of a citizen is said to be dowable without the exception above stated. See 1 Smith's Sts. 170.

In New York, the widows of aliens, who at their death were capable of holding lands, if such widows are inhabitants of the State, shall have dower. 1 N. Y. Rev. Sts. 740. (See *Mick v. Mick*, 10 Wend. 379.)

In the same State, an alien *feme covert* may be naturalized; but her naturalization has not, under the general act of Congress, a retro-active operation, so as to entitle her to lands of which her hus-

band was seised during coverture, and which he had obtained before her naturalization. *Priest v. Cummings*, 20 Wend. 338. Nor can an alien widow have dower, though at the time of the marriage the husband was an alien, and held the land under the enabling act of 1825. *Connolly v. Smith*, 21 Wend. 59. By a later act, the widow of an alien has dower, whether herself an alien or not. St. 1845, 94; *Currin v. Finn*, 3 Denio, 220.

The alien widow of a citizen, who was an inhabitant of the State when the act of 1802 was passed, enabling aliens to hold lands, has been held entitled to dower. *Priest v. Cummings*, 16 Wend. 617.

In Kentucky, a widow, who was an alien at the husband's death, has no dower. *Alsberry v. Hawkins*, 9 Dana, 177. In Alabama, where the widow of one, who conveyed his land while a non-resident, claims dower in such land, lying in the State, the claim will be barred, unless made within twelve months from his death. Clay, 174. The wife of an alien, though herself an American citizen, is not dowable of his lands. *Congregational Church v. Morris*, 8 Ala. 182.

(a) Not in railroad shares. *Johns v. Johns*, 1 McCook, (Ohio) 850.

§ 4. There shall be dower in *mines* or *quarries*, if they have been opened before the husband's death; otherwise, not.<sup>(a)</sup> But it matters not whether they have been wrought by the husband or by his lessee, or whether he owned the land itself, or merely the whole stratum of the mine or quarry, upon the land of another.<sup>1</sup> So a tenant in dower of coal lands may take coal to any extent from a mine already opened, or sink new shafts into the same veins of coal, or dig into a new seam through one already opened above it.<sup>2</sup> And where a husband died seised of a tract of land of four acres consisting of a slate quarry mostly below, but partly above, the surface of the ground; and one-quarter of an acre of the quarry had been dug over, and the practice was, to take a section of ten or twelve feet square on the top, to go down to a certain depth, and then recommence on the top: held, the whole quarry must be regarded as opened, and therefore subject to dower.<sup>3</sup>

§ 5. The peculiar situation of the land in this country, as being to a very great extent wild and uncleared, has given rise to a question of dower, which seems unknown to the English law, viz.: whether a widow shall have dower in *wild lands*. This question seems to be involved in another viz.: whether, if endowed of such lands, the widow could clear them, without committing *waste*. The latter question will be noticed hereafter, in connection with the subject of waste. (See ch. 18.) It is sufficient to say here, that the former has been differently settled in different States. In Massachusetts, Maine and New Hampshire, there shall be no dower in wild lands, because the clearing of them would be waste, and forfeit the estate. And there shall be no dower in such lands, whether the husband died seised of them, or whether they were conveyed by him, and subsequently cleared by the purchaser. But the rea-

<sup>1</sup> *Stoughton v. Leigh*, 1 Taun. 402. 480;) *Quarrington v. Arthur*, 10 M. & W. 335; *Moore v. Robbins*, 45 Maine, 498.  
 See *The King v. Dunsford*. 2 Adol. & El. 568-93; *Coates v. Cheever*, 1 Cow. 460.

<sup>2</sup> *Billings v. Taylor*, 10 Pick. 460.  
<sup>3</sup> *Crouch v. Puryear*, 1 Rand. 258.

(a) Because to open them would be waste. If in any State, according to the established law, it would not be waste, it would seem to follow that dower should be allowed in a mine, though unopened. (See *infra*, 5, as to wild lands.)

son of the rule furnishes an exception to it. A widow shall be endowed of a wood lot or other lands contiguous to and used with a farm or dwelling-house, as for fuel, fencing, repairs, pasturing, &c., though not cleared; because she would be entitled to *estovers*, for the use of the house or cultivated land assigned to her, and at the same time could not lawfully take them as incident thereto, without a special assignment.<sup>1(a)</sup> But it has been said in New Hampshire, that *perhaps* the widow might, without waste, cut *ordinary fuel*. In Rhode Island, dower is allowed in woodland. In Michigan and Ohio, in wild lands. Commissioners estimate the annual growth, and assign one-third thereof, either by the number of cords or quantity of land.<sup>2</sup> And in those states, where either statutes or judicial decisions authorize a tenant in dower to cut trees and timber, it would seem to be necessarily implied, whether so expressly declared or not, that a widow is dowable of wild lands.

<sup>1</sup> Conner v. Sheperd, 15 Mass. 164; Webb v. Townsend, 1 Pick. 21; White v. Willis, 7, 148; Mass. Rev. Sts. 460; N. H. L. 190; Rev. Sts. 829; Me. Rev. Sts. 891.

<sup>2</sup> 2 N. H. 56; R. I. St. 1840, 2022; Campbell, 2 Dougl. 141; Allen v. McCoy, 6 Ohio, 418.

(a) In North Carolina it has been held, that the widow has no authority to make turpentine, unless done by the husband. But in the ordinary mode of making it, she may use trees *boxed* or *tended* for turpentine in his lifetime, and may also box new ones, as the others become unfit for use, not increasing the amount beyond that obtained at the time when dower was assigned. Carr v. Carr, 4 Dev. & B. 179. Where commissioners divided an estate into eight parts, and assigned a third of each division to the widow, and one lot consisted chiefly of wood and the others of arable lands; held, the widow was not bound to use each parcel, as if the husband had left only the lot to which it belonged; but might take from the wood lot fuel and timber for the use of the cultivated lands. Childs v. Smith, 1 Md. Ch. 483.

Where the husband, during coverture, was seised of a five-acre lot. "partially improved," and "partly covered with bushes and unfenced," at the time of his conveyance thereof; held, the widow was entitled to dower in the whole lot. Stevens v. Owen, 25 Maine, 94. Dower cannot be claimed in land covered with

growing wood and timber, though used by the husband in raising wood, &c., for profit, unless it be assigned in connection with buildings or cultivated land. And if it is, the widow can cut only enough to supply the dower estate, in the way of actual use and consumption, or in connection with the proper occupation and enjoyment of such estate. White v. Cutler, 17 Pick. 248. After the assignment of dower in a dwelling-house and the land connected with it, it being partly woodland, the whole having been occupied by the husband as one farm, the widow leased the dower estate, removed from the land, and boarded in another family, where she was supplied with food. The house, having become untenable, was taken down by consent of all parties. Held, neither the widow nor lessee could cut wood for fuel; and if they did, the reversioner might take it. *Ib.* A tenant in dower cannot cut wood for fuel, unless the house was on the land at the time when dower was assigned. Fuller v. Wasson, 7 N. H. 841. And she can use it only in such house. If otherwise, she is guilty of waste. *Ib.*



§ 6. A *state of cultivation* is the converse to a *state of nature*, and exists where lands have been wrought with a view to a crop, till they are abandoned for every purpose of agriculture, and designedly permitted to revert to a condition like the original one. It is not material, in regard to the question of dower, whether the lands have yielded an *income* or not. At common law, the income or annual value had no bearing upon the title to dower; and although a statute, after allowing to the widow one-third of the husband's lands, adds that she shall have so much as will yield one-third of the income which he derived from them, this is not to be regarded as any limitation of the right, but only as a secondary guide to the sheriff in making the assignment. So, dower shall be assigned in land, which, when owned by the husband during coverture, was wood and pasture, situated a mile from the homestead, and divided from it by land of strangers, but used by him as a pasture appurtenant to the homestead; though subsequently it has become wholly woodland. But not in woodland which the husband sold from the homestead, retaining till his death, as part of the farm, an abundant supply of wood for fuel, fencing and repairs.<sup>1</sup>

§ 7. Intimately connected with the subject just considered, is the question of a widow's right to dower in *improvements*, made upon the land since the husband was in possession of it. These may be made either by the heir, after the husband's death and before assignment of dower, or by one who purchased the land from the husband in his lifetime.

§ 8. Where improvements are made by the heir, the widow shall be allowed the benefit of them.(a) The reason is said to be, that it is the folly of the heir not to assign dower before making the improvements. Another reason is, that, as will be seen hereafter, the assignment of dower *relates back* to the death of the husband, and the heir is regarded as never having been seised

<sup>1</sup> Johnson v. Perley, 2 N. H. 56; (but Pick. 88; Kuhn v. Kaler, 2 Shepl. 409 see 15 Mass. 167;) Shattuck v. Gragg, 23 Mosher v. Mosher, 3, 871

(a) Otherwise, it seems, in Wisconsin. Rev. Sts. 836.

of this portion of the lands;(a) and, upon general principles, the improvements belong to the owner of the soil. Judge Story regards the latter as the true reason of the rule.(b) In a late case it has been held, that, in a suit against the heir, the widow shall have dower according to the increased value, independently of his labor and expenditures.<sup>1</sup> On the other hand, it is said, that, if the value of the land is impaired in the hands of the heir, dower shall still be assigned according to the value at the time of assignment; although it may be questioned whether such depreciation may not be taken into account, in estimating the damages awarded to the widow.<sup>2</sup>

§ 9. Where improvements have been made by one who purchased the land from the husband without any release of dower, it is the general rule, that dower shall be estimated according to the value of the land at the time of transfer, whether the improvements be made before or after the husband's death, with or without notice of the widow's right of dower. So, where an old building is torn down by the purchaser and replaced by a new one, the widow is not entitled to dower in the latter. She must seek compensation in a court of equity. The reason of the rule is said to be, that such purchaser, in a suit upon the husband's warranty, could recover only the value of the land without the improvements. Chancellor Kent remarks, that this

<sup>1</sup> *Powell v. M. & B. Manuf. Co.*, 8 Mas. 347; *Gore v. Brazier*, 3 Mass. 544; *Humphrey v. Phinney*, 2 John. 484; *Taylor v. Broderick*, 1 Dana, 347; *Thompson v. Morrow*, 5 S. & R. 289; *Ayer v. Spring*, 10 Mass. 80; Co. Lit. 82 a, and n. 8; *Russell v. Gee*, 2 Const. S. C. 254;

*Wilson v. Oatman*, 2 Blackf. 228; *Tod v. Baylor*, 4 Leigh, 498; *Mahoney v. Young*, 3 Dana, 588; *Woolridge v. Wilkins*, 8 How. Miss. 360; *Lawson v. Morton*, 6 Dana, 471; *Manning v. Laboree*, 33 Maine, 343.

<sup>2</sup> Co. Lit. 82 a; 3 Mas. 368.

(a) This is the English doctrine. It seems to be somewhat shaken in the United States (See *Descent*.) Also, ch. 12. It is said the claim of dower in reference to those whose title originates concurrently with that of the widow, is governed by the law in force at the death of the husband. But, as against parties having specific rights in the property prior to the husband's death, by the law in force when such rights were acquired. *Kennerly v. Missouri, &c.*, 11 Mis. 204.

(b) Land was assigned for dower by commissioners of the Probate Court, with the assent of the heir and widow, and the report of the commissioners was subsequently accepted. Held, after the assignment, the widow might enter, and cut and carry away the growing crops sown by the heir previous to the assignment, though such entry was made before the acceptance of the report. *Parker v. Parker*, 17 Pick. 236.

reason has been ably criticised and questioned in this country, (a) but the rule itself is founded in justice and sound policy.<sup>1</sup>

§ 10. Where the husband conveyed the land by way of mortgage, but remained in possession and improved, and the mortgage was afterwards foreclosed; the dower shall be of the improved value, because the alienation is regarded by the law as made at the time of foreclosure.<sup>2</sup> So, if the husband, having mortgaged, make improvements, and then convey the land, the widow shall have dower of the value at the time of the latter conveyance. But where the husband merely gave a bond for the land, and a deed was given after his death; held, the deed had relation to

<sup>1</sup> 3 Mas. 370; *Parks v. Hardey*, 4 Bradf. 15; *Throp v. Johnson*, 3 Ind. 348; 10 Wend. 480; *Waters v. Gooch*, 6 J. J. Mar. 591; 4 Kent, 65; *Hobbs v. Harney*, 4 Shepl. 80; *Beavers v. Smith*, 11 Ala. 20. In a late case in England, dower by custom was allowed in improvements made

by a purchaser. Lord Denman goes into a learned and extended discussion of the subject. *Doe v. Gwinnell*, 1 Ad. & El. (N. S.) 682. See *Summers v. Babb*, 18 Ill. 483; *Barney v. Frownar*, 9 Ala. 901; Wisc. Rev. Sts. 383-4.

<sup>2</sup> *Hale v. James*, 6 John. Cha. 258.

(a) Particularly by Judge Story (in 3 Mas. 369-70.) and Ch. J. Tilghman (in 5 S. & R. 289.) For supposing the husband conveyed without warranty, the widow (it seems) would still have no dower in improvements. The former learned judge also criticises another reason which has sometimes been assigned, namely, that the husband was not *the owner* of the improvements, and dower is allowed only in what the husband owned. For the same reason would prevent dower in improvements made by the heir, which is always allowed. The rule may have originated in the policy of promoting the prosperity of the country by encouraging improvements in agriculture and building; and in an anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burdens.

A purchaser at a Chancery sale, supposing his title good, made improvements for manufacturing purposes. A widow afterwards filed a bill for dower, and her right was established. Decreed, that she should receive an annual sum in lieu of dower, equivalent to her interest without the improvements. *Lewis v. James*, 8 Humph. 537. It seems, the sum ascertained to be due a widow for her portion of back rents collected by her hus-

band's grantee, is not properly chargeable as a lien on the estate. *Johnson v. Elliott*, 12 Ala. 112.

In Maryland, where the husband has aliened the land, if a compensation in money is made to the widow for her dower, the value of the land at the husband's death is the criterion, unless the increased value has arisen from the labor and money of the purchaser. *Bowie v. Berry*, 1 Md. Ch. 452. In Pennsylvania and Ohio, (*Thompson v. Morrow*, 5 S. & R. 289; *Purd. Dig.* 221, n; *Walk. Intro.* 327; *Dunseth v. Bank, &c.*, 6 Ohio, 77; *Seirtz v. Shirtz*, 5 Watts, 365,) dower is said to be estimated according to the value of the land at the time of the application for dower, without the improvements. In New Hampshire, a statute provides, that, where the husband has parted with his title to the land, the widow shall be endowed of so much as will yield one-third of the income derived from it at the time of alienation. N. H. L. 1829, p. 510. The same rule is adopted in Maine. *Carter v. Parker*, 28 Maine, 509.

In Virginia, it has been held, that the widow cannot claim one-third of the *proceeds* of land sold by the husband. *Fitzhugh v. Foote*, 3 Call, 18.

the bond, and dower should not be allowed in improvements made by the purchaser.<sup>1</sup>

§ 11. If a purchaser from the husband, instead of making improvements, impair the value of the property, by neglect or waste, as by tearing down buildings, it is held that the wife has no remedy against him, her title being merely initiate at that time.<sup>2</sup>

§ 12. Where, since the conveyance made by the husband, the land has risen in value from extrinsic causes, such as the increase of commerce or population in the neighborhood; it seems to be an unsettled point, whether the widow shall be endowed of the original or the increased value. The former standard has been approved in New York and Virginia, and the latter in Massachusetts, Maine, Pennsylvania, Kentucky, (it seems,) Illinois, Maryland and Ohio.<sup>3</sup> Judge Story suggests a distinction, between the case where an erection upon a part of the land itself increases the value of the remainder, and an increase of value arising from causes unconnected with such erection; and also between erections which in themselves raise the value of the land, and those which increase it by the business carried on and the capital employed in them, such as manufactories. His conclusion is, that dower is to be allowed according to the value of the land at the time of assignment, excluding all the increased value from the improvements actually made upon the premises by the alienee; leaving the dowress the full benefit of any increase of value, arising from circumstances unconnected with those improvements.<sup>4</sup> On the other hand, the court in New York hold, that, both at common law and by a fair construction of the statutes of the State, the widow shall have her dower according to the value at the time of alienation, whether it has since increased or diminished.<sup>5</sup>

<sup>1</sup> 3 Mass. 459; *Wilson v. Oatman*, 2 Blackf. 224.

<sup>2</sup> 3 Mas. 367; *M'Clanahan v. Porter*, 10 Mis. 746.

<sup>3</sup> 4 Kent. 66-7; *Thompson v. Morrow*, 5 S. & R. 289; 8 Mass. 375; *Dorchester v. Coventry*, 11 John. 510; *Walker v. Schuyler*, 10 Wend. 480; *Tod v. Baylor*,

4 Leigh, 498; *Dunseth v. Bank, &c.*, 6 Ohio, 76; *Mosher v. Mosher*, 8 Shepl. 871; *Summers v. Babb*, 18 Illin. 483; *Bowie v. Berry*, 1 Md. Ch. 452; see *Barney v. Frownar*, 9 Ala. 901.

<sup>4</sup> 3 Mas. 375.

<sup>5</sup> 11 John. 510; *Shaw v. White*, 13, 179; *Hale v. James*, 6 John. Cha. 258.

§ 13. In England, Magna Charta provides that a widow shall not be dowable of a *castle* or *fortress*.<sup>1</sup> No case, probably, has occurred, or will occur, in this country, for the application of this particular rule. But an *analogous principle* has been adopted, in one instance, in Ohio. Several owners of land in Cincinnati, of whom A was one, mutually agreed to appropriate their land to public use for a street and a market-house. The city council carried the appropriation into effect by erecting the house; but A never conveyed the land on which it stood. Held, A's widow could not have dower in the market-house, for the same reason that in England a woman was not dowable in a castle: it could yield nothing to her support by a direct participation in the possession, without such an interference with the public right to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible.<sup>2</sup> There shall be dower from the profits of a mill or fishery. But not in the right of using for hydraulic purposes part of the surplus waters of the Erie Canal, under a grant from the commissioners.<sup>3(a)</sup>

<sup>1</sup> 1 Cruise, 129.

<sup>2</sup> Gwynne v. Cincinnati, 1 Ohio, 459.

<sup>3</sup> Co. Lit. 82 a; Kingman v. Sparrow, 12 Barb. 201.

(a) In Virginia, dower is allowed upon annuities as well as rents, charged upon or issuing out of real estate. Anth. Shep. 477.

In Florida, as elsewhere, a wife is not entitled to dower in shares of stock in a land company which the husband had disposed of in his lifetime. McDougal v. Hepburn, 5 Florida, 568. In Pennsylvania, in lands held by improvement or warrant and survey, but not those held by warrant merely. Purd. Dig. 221. In Alabama, where the husband had purchased from a reserve of Indian lands under the Creek treaty, with the approbation of the President, held, his wife should have dower. Parks v. Brooks, 16 Ala. 529.

In Illinois, one having possession under a preemption right has no higher estate than that of a tenant for years, and not one subject to dower. Davenport v. Farrar, 1 Scam. 316.

In Pennsylvania, where a man purchases land, pays a small part of the price, becomes insolvent, and assigns his right to another, who performs the re-

mainder of the contract and obtains a deed from the vendor, and then the vendor dies; his widow is not entitled to dower, at common law. Pritts v. Ritchey, 29 Penn. 71.

In Iowa, A, owning a land warrant not assignable by delivery, delivered it to E, and afterwards gave him a bond for title; E sold it to B, who obtained a decree against E, and another decree against the heirs of A, who had died in the meantime, for a conveyance. The warrant having been located, the widow claimed dower in the land, and was held to be entitled thereto. Burke v. Barron, 8 Clarke, 182.

In Illinois and Virginia, dower is allowed in lands merely contracted for, where the title may be completed, although, in Virginia, the contract were parol. But, in Illinois, a right to dower in equitable estates does not extend to land contracted for, if the contract had been assigned. Owen v. Robbins, 19 Ill. 545.

In Virginia, dower is allowed in lands possessed by the husband. In Alabama,

§ 14. It has been seen, that in general all *estates of inheritance* are subject to dower. Thus there is dower in *base* or *qualified* fees. So also in *estates tail*.<sup>1</sup> And liability to dower has even been mentioned as the distinguishing criterion of an estate tail.<sup>2(a)</sup> With respect to qualified and conditional fees,

<sup>1</sup> 1 Cruise, 127; *Buckbridge v. Ingram*, 2 Ves. jun. 664; 4 Kent, 40.

<sup>2</sup> *Low v. Burrow*, 3 P. Wms. 263.

in lands contracted and paid for. In Kentucky, in lands contracted for by bond. But only where the husband holds the contract at his death; not where he has assigned it. Illin. Rev. L. 627; *Rowton v. Rowton*, 1 Hen. & M. 91; *Dean v. Mitchell*, 4 J. J. Mar. 451; *Stephens v. Smith*, Ib. 66; *Hamilton v. Hughes*, 6 Ib. 582; *Lewis v. Moorman*, 7 Port. 522; Virg. Code, 474.

And where A, having an equitable title only, sold to B, and put B in possession, and afterwards received a conveyance of the legal estate for the purpose of conveying it to B; held, the seisin of A was not such a beneficial seisin as would entitle his widow to dower. *Gully v. Ray*, 18 B. Mon. 107. The purchaser, in such case, is not estopped by the husband's deed, from explaining the nature of his seisin, and showing that it was not of such a character as entitles his wife to dower. Ib.

In Massachusetts, where statutes provide for specific performance of a contract, dower is allowed to the vendee's widow. *Reed v. Whitney*, 7 Gray, 588.

In Maryland, a statute of 1818 gave dower in equitable estates. Held, not applicable to lands in which the husband held leases, with covenants to convey in fee when requested; such leases not operating by way of lease and release, but passing a legal title. *Spangler v. Stanler*, 1 Md. Ch. 86.

Nor is dower allowed in an equitable estate which the husband disposes of in his lifetime. *Bowie v. Berry*, 1 Md. Ch. 452. Nor an equity of redemption, where the mortgage was made previous to the statute. *Hopkins v. Frey*, 2 Gill. 359.

In Tennessee, where the legal title is vested as security for the purchase-money, the widow of the equitable owner cannot have dower without payment of this sum; but she may require a sale for this purpose, and have dower in a third of the surplus. *Thompson v. Cochran*, 7 Humph. 72.

In Kentucky it is held, that, as there

cannot be two cotemporary rights of dower in the same land, the widow of an obligor is not entitled to dower. But if, instead of requiring specific performance, the obligee sues and recovers damages for a breach of the bond, after the obligor's death, the widow of the latter is restored to her dower. *Dean v. Mitchell*, 4 J. J. Mar. 451; *Aaron v. Bayne*, 28 Geo. 107.

In Indiana, upon a sale of land, part of the price was paid, a note given for the balance, and a bond to convey upon full payment. The vendee took possession and died; the vendor brought a bill for sale of the land, and it was sold, the vendor having previously married and died. Held, the widow of the vendor was not entitled to dower. *Kintner v. McRea*, 2 Cart. 453.

In Ohio, dower shall be had in all lands in which the husband was interested by bond, article, lease, or other evidence of claim. So, in land which he purchased without deed, paying a part of the price, and afterwards making improvements. But only in such estates of this description, as the husband owned at his death. 2 Chase, Sts. 1814; *Smiley v. Wright*, 2 Ohio, 507; *Derush v. Brown*, 8 Ohio, 412. He must have had a legal estate during the coverture, or an equitable interest at his death. *Miller v. Willson*, 15 Ohio, 108; *Rands v. Kendall*, 15 Ohio, 671.

In Iowa, a widow has no dower, as against the vendor, in land which he is to convey upon payment, but which he never conveyed, because payment has never been made. Though, probably, if the heirs or administrator of her husband were to complete the contract and obtain the title, she might have dower by paying her share of the money due at her husband's death. *Barnes v. Gay*, 7 Clarke, 26.

A wife has dower of her husband's equitable interest, under the Code. Ib.

(a) In Massachusetts, estate for years, where the term was limited for a hun-



substantially the same remarks will apply to curtesy and to dower.(a) (See ch. 6,) In the case of an estate tail, it has been seen that curtesy does not cease, with a determination of the estate, from or in connection with which it arises.<sup>1</sup> But there are several instances, where such determination puts an end to the curtesy of the husband, and to the dower of the wife: 1. Where there is an eviction by paramount title; 2. An entry for breach of condition; 3. Where a qualified or base fee terminates by its own limitation; 4. Where a fee terminates by the happening of an event on which it is made determinable. Or, in general, the estate is terminated, by every subsisting claim or incumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin.<sup>2</sup> It has been said, that the reason why estates tail are subject to dower is, because they may in certain ways be enlarged into estates in fee-simple. But this has lately been declared an erroneous opinion; since dower was allowed both in conditional fees, when first introduced, and also in estates tail after the statute *de donis*, and before the introduction of the common recov-

<sup>1</sup> Ch. 6.

<sup>2</sup> Co. Lit. 241 a; Edward Seymour's

case, 10 Rep. 97 b; 4 Dane, 667; 4 Kent. 49; Davenport v. Farrar, 1 Scam. 816.

dred years or more, and fifty years remain unexpired, are subject to dower, the dowress paying one-third of the rent, if any. Mass. Rev. St. 411. See Gen. Sts. In Missouri, there is dower in leaseholds for more than twenty years. Mo. St. 228. In Maryland, a lease for ninety-nine years, renewable forever, is not subject to dower. Spangler v. Stanler, 1 Md. Ch. 36.

The subject of dower in uses and trusts, equities of redemption, and equitable estates generally, rents, commons, joint tenancies, &c., will be considered hereafter, under those respective titles. See Costar v. Clarke, 3 Edw. 47; Lyon v. Lyon, 8 Ired. Equ. 201.

(a) Devise to A and his heirs forever, (charged with an annuity.) and, if A should have no issue, upon his death, to the heir at law, subject to legacies to be given by A to the younger branches of the family. A dies without issue. A's widow has dower. Moody v. King, 2 Bingh. 447.

By section 4 of the act concerning conveyances, (Rev. Code, 1825,) in Missouri, the conveyance of an estate to one and the heirs of her body vested in her a life estate, remainder in fee in her heirs, not subject to dower or curtesy. Burris v. Page, 12 Misso. 358.

A widow is dowable of a fee-simple, determinable by executory devise on her husband's dying without living at the time of his death. Evans v. Evans, 9 Barr, 190.

A, for a consideration paid by B, conveyed land to C, in trust for the use of B, his heirs and assigns forever, and to permit the said B to have and possess the same, &c., and in trust, to convey the same to such person, &c., as the said B shall, &c., direct and appoint. Held, B took, under the statute of uses, at least a qualified or determinable fee, and, in the absence of any appointment, his widow was entitled to dower Peay v. Peay, 2 Rich. Equ. 409.



ery for the purpose of barring them. In case of escheat for want of heirs, the widow still has dower.<sup>1</sup>

§ 15. An estate *pour autre vie* is not subject to dower. Thus, where one purchases the life estate of a tenant by the curtesy initiate, sold upon execution, the widow of such purchaser has no dower.<sup>2</sup>

§ 16. There shall be no dower in a *wrongful* estate. Thus, where a man has a title to land, and a *right of action* to assert it, but no *right of entry*, and he enters and dies; although his heir is *remitted* to the rightful estate, the widow shall not have dower.<sup>3</sup> But the wife of a disseisor shall have dower, till the disseisin be defeated.<sup>4</sup> So the widow of a man, against whom judgments existed at the time of marriage, is entitled to dower in the land of which he was seised during coverture, subject to the judgments.<sup>5(a)</sup>

<sup>1</sup> 2 Bing. 452; 4 Kent, 48.

<sup>2</sup> Gillis v. Brown, 5 Cow. 388.

<sup>3</sup> 1 Cruise, 128.

<sup>4</sup> 4 Dane, 668.

<sup>5</sup> Robbins v. Robbins, 8 Blackf. 174.

(a) An ancient English statute (Westminster 2, c. 4) provides, that, where the husband gave up his land to an adverse claimant collusively, by default, the wife may claim dower and compel the tenant

to prove his title. Similar acts have been passed in New York, Missouri, Ohio and Kentucky. 1 N. Y. Rev. Sts. 742; Misso. Sts. 228; Walk. Intro. 825; 1 Ky. Rev. L. 581.

## CHAPTER X.

## DOWER. HOW BARRED.

- |  |   |
|--|---|
| 1. Inchoate right.   | 18. Wife's release can operate only as such.  |
| 2. Crime of husband.   | 19. Devise or legacy, when a bar.   |
| 3. <i>Devise of charters.</i>  | 20. When an implied bar, in law or equity.  |
| 5. Transfer by the husband.  | 22 and notes. Legacy to widow, how regarded; apportionment of legacy; disposal of legacy, when renounced; American law as to devises in bar of dower. |
| 5 a. <i>Exchange of lands.</i>   |   |
| 6. Equitable and implied bars of dower.  | 23. Election between a devise and dower; time of election; mode of election.  |
| 7. Partition.  |   |
| 8. Deed of wife, in England; Fine, &c.; deed of husband alone, and sale of land for debts. |   |
| 9. Deed of husband and wife.   |   |

§ 1. THE *inchoate* right of a wife to dower attaches at the instant of the marriage. Such right, however, may be barred or defeated by several circumstances, some of which have already been incidentally noticed, (a) but which will now be considered more at length.

§ 2. Anciently, in England, an *attainder of treason or felony* against the husband was a bar of dower. The principle was variously modified by the successive statutes of 1 Edw. 6, c. 12, 5 and 6 Edw. 6, c. 11. In the United States, forfeiture of estates for crime is, for the most part, abolished. And where lands have been confiscated by express legislation, for adherence to the public enemy, dower has still been allowed. (b)

(a) See *Adultery, Divorce, Elopement.*

(b) In New Jersey, it is expressly provided by statute, that the right of dower shall not be affected by the crime of the husband. See *Palmer v. Horton*, 1 John. Cas. 27; *Sewall v. Lee*, 9 Mass. 363; *Wells v. Martin*, 2 Bay, 20; 1 N. J. Rev. C. 263.

Though, at common law, a woman loses dower by being attainted of treason or felony, yet, if pardoned; her right revives, though the husband have aliened in the mean time. Co. Lit. 88 a; 18 Rep. 23.

§ 3. Another circumstance, which by the English law bars or defeats dower, is *detinue of charters*; by which is meant, a detention or keeping back, by the widow, of the charters or title deeds of the estate from the heir; the effect of which was, that the heir was unable to set off her dower. This circumstance is of rare occurrence in the United States, the reason of the rule not being applicable, inasmuch as the heir may always inform himself in reference to the real estate of the deceased husband, by means of the registry of deeds; and it is not known that any case upon the subject is to be found in the American Reports.<sup>1</sup>

§ 4. The charters must relate to the lands in which dower is claimed, and the tenant by his plea must show the certainty of the charters, so that an issue may be joined. A stranger cannot set up this defence, even though the charters were conveyed to him by the husband. He who pleads *detinue of charters*, ought to plead that he has been always ready, and yet is, to render dower, if the demandant would deliver them.<sup>2</sup>

§ 5. Inasmuch as a widow is dowable of all lands, &c., of which the husband was *seised during coverture*, it follows of course, that no transfer, by the husband, of land once acquired and owned after the marriage, will bar or defeat the wife's dower:(a) Nor will even the release and extinguishment of a

<sup>1</sup> Stearns, 310; See 2 Bl. Com.136.

Brickhead v. The Archbishop, &c., Hob.

<sup>2</sup> Ann Bedingfield's case, 9 Rep. 17 b;

199; 4 Dane, 666.

(a) Dower depends on the law in force at the time of the husband's transfer, not of his death. *Young v. Wolcott*, 1 Clarke, 174; *O'Farrell v. Simplot*, 4 Iowa, 881.

In New Hampshire, (Comp. Sts. 419.) the husband of an insane woman may obtain authority from the court to release her dower in land conveyed by him. So in Virginia, (Virg. Code, 537.)

The owner of land before his marriage made a fraudulent conveyance thereof. The grantee conveyed to a third person, for the consideration of love and affection, after which the grantor married. A creditor of the grantor subsequently levied his execution on the land so conveyed, and the appraisers made a deduction from the value on account of the possible right of dower therein of the wife of

the judgment debtor. In a writ of entry by the creditor against the second grantee to recover the land levied on; held, the wife had no right of dower therein; and that the tenant might avoid the levy, on the ground that, by reason of such deduction, too great an amount of land had been taken on the execution. *Whitehead v. Mallory*, 2 Cush. 138. But if a husband convey land without consideration, or to one as heir, in order to defeat dower, equity will compel an account with the widow, for one-third of the property. *Jenny v. Jenny*, 24 Verm. 324.

The rule in the text, although undoubtedly in force in this country as a rule of the common law, has been recognized and affirmed in many of the States by express statute. In Indiana, it is provided that the wife shall not be barred

rent, in which she is dowable, bar her right to dower therein. So a second husband cannot convey his wife's dower in the first husband's estate. So dower is allowed, notwithstanding an agreement to convey by the husband, executed under a decree of court after his death.<sup>1</sup> Where a man conveys away his land on the very day of his marriage, the law, favoring dower, will intend the marriage to have preceded the conveyance, and the widow shall have dower.<sup>2</sup> So a widow is not barred of dower by a deed executed by the husband, without consideration to his sons, just before marriage, and kept secret until after the marriage.<sup>3</sup> But where a man before marriage makes a conveyance of lands, which is never acknowledged or legally recorded, his widow shall not have dower.<sup>4</sup> A widow is not entitled to dower in lands conveyed away by her husband before marriage, although such conveyance was fraudulent and void as against his creditors.<sup>5</sup> So, where a statute provided, that a deed in trust should not be valid against *creditors* and *purchasers*, unless proved and registered: held, such deed barred dower, though not proved, &c., till after the husband's death—the widow being neither a creditor nor purchaser.<sup>6</sup> So A conveys to B, who enters upon the land, and re-conveys to A, neither deed being recorded. A then conveys to C, who has no knowledge of B's having ever owned the land. Held, the widow of B could not claim dower as against C.<sup>7</sup> And, in general, if the husband makes a voidable

<sup>1</sup> 4 Kent, 50; Abergavenney's case, 6 Co. 79; Haydon v. Ewing, 1 B. Monr. 114; Manse v. Buchanan, 1 Md Ch. 202; Riddlesberger v. Mentner, 7 Watts, 141; Covert v. Hertzogg, 4 Barr, 145.

<sup>2</sup> Stewart v. Stewart, 8 J. J. Mar. 48.

<sup>3</sup> Cranson v. Cranson, 4 Mich. 230.

<sup>4</sup> Blood v. Blood, 23 Pick. 80; Richardson v. Skolfield, 45 Me. 386.

<sup>5</sup> Whithed v. Mallory, 4 Cush. 188. See Richards v. Richards, 11 Humph. 429; Cook v. Cook, 7 Eng. 881.

<sup>6</sup> Norwood v. Marrow, 4 Dev. & B. 442.

<sup>7</sup> Emerson v. Harris, 6 Met. 475.

of her dower by any *decree, execution or mortgage*, to which she is not a party. Acc. Nance v. Hooper, 11 Ala. 554.

Since dower is allowed in that State in all lands of which the husband was seised during coverture, the enumeration of these three modes of charge or transfer of course does not enable the husband to bar dower in any other way—as, for instance, by an absolute deed.

In Missouri, the laches, default, covin and crime of the husband are also guarded against. Similar provisions are made in

New York, Ohio and Arkansas. In Tennessee, it has been decided, that the title of a widow is paramount to the rights of creditors, claiming after the husband's death. Ind Rev. St. 288-9; Misso. St. 228; Combs v. Young, 4 Yerg, 218; Ark. Rev. St. 358; 1 N. Y. Rev. St. 742; 2 Chase, 1315. See Reed v. Campbell, 1 Meigs, 888; London v. London, 1 Humph. 1; Frost v. Etheridge, 1 Badg. & Dev. 30; Norwood v. Marrow, 8 Bat. 442. See *Infra*, 8.

deed, but never avoids it, dower is barred; otherwise, if the deed is void. Thus, if made for usurious consideration, the widow is entitled to dower, without waiting for the heirs to avoid the deed.<sup>1</sup>

§ 5 a. There is one instance in the English law, where a transfer by the husband alone will operate as a bar of dower. This is the case of an *exchange* of lands. (See *Exchange*.) In such case, the widow must elect to be endowed either of those given or those taken in exchange—she cannot have dower in both.<sup>2(a)</sup>

§ 6. In equity, a mere agreement by the husband to convey the land, or a verbal sale or gift of it, if made before marriage and enforced or executed after, bars the widow of her dower. The husband is regarded as never having been seised during coverture. So, although he was an infant at the time of the contract, but conveys after coming of age, and after marriage.<sup>3(b)</sup> So where the guardian of minors, with the concurrence of the widow, who had a right to dower, obtained an order for the

<sup>1</sup> 4 Dev. & B. 442.

<sup>2</sup> Co. Lit. 31 b.

<sup>3</sup> *Greene v. Greene*, 1 Ham. 538; *Old-*

*ham v. Sale*, 1 B. Mon. 77; *Gaines v. Gaines*, 9, 295.

(a) The form of conveyance known to the English law, technically, as an *exchange*, is but little if at all practised in the United States. But Mr. Dane lays down the principle above stated as a rule of American law. It has been recognized in Kentucky and New York. But in the latter State it is held, that the word *exchange*, as used in the Revised Statutes, in exclusion of the wife from dower in lands exchanged, requires a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other. The transfer of an estate, under a lease in perpetuity, in 75 acres, for 11 acres and \$700 in other property, will not constitute a legal exchange; and, where two defective conveyances are proved, two valid conveyances will not be presumed, to perfect a legal exchange. So, in New Hampshire, where an exchange consists in merely giving land for land, by deeds in common form, without the use of the word *exchange*; the English rule does not apply. In Arkansas and Wisconsin, where one exchanges lands, his widow must take dower in those received by him, unless, in one year from his death, she brings a suit

for dower in the lands parted with. 4 Dane, 668; *Stevens v. Smith*, 4 J. J. Mar. 64; 1 N. Y. Rev. Sts. 740; *Wilcox v. Randall*, 7 Barb. 633; *Cass v. Thompson*, 1 N. H. 65; *Wisc. Rev. Sts.* 323.

(b) And it is said to have been held in Ohio, (probably in equity, upon the principle of an equitable estoppel,) that, where a widow was present at a sale of the land by the administrator, having previously agreed to it, and not dissenting at the time; and the land was sold free from dower, and brought a larger price in consequence: she was barred of her dower, though the purchaser knew of her claim. *Walk. Intro.* 326; *Smiley v. Wright*, 2 Ohio, 509. See *Lawrence v. Brown*, 1 Seld. 894.

In Virginia, both of the principles above stated have been suggested, as doubtful and unsettled points; although, in a case relating to the former, the husband had received the price of the land or a part of it, and the wife had notice of the contract before marriage; and, in the case relating to the latter, the sale of the land was made to an innocent purchaser. *Braxton v. Lee*, 4 Hen. & M. 376; *Heth v. Cocks*, 1 Rand. 844.

sale of their land, and she was present at the sale, acquiescing therein, and received a part of the purchase-money in commutation of dower; held, she could not afterwards claim dower.<sup>1</sup> So where a widow administers on the estate of her deceased husband, sells real estate under order of court, and conveys it with covenants of warranty; she will be thereby estopped to claim dower.<sup>2</sup> So two infants intermarried, and before their majority a decree for alimony was rendered, giving the wife certain property, which she took and enjoyed. After their majority, they were divorced *a vinculo*, and the wife afterward married twice, and she and her second husband brought an action for dower against a purchaser of land sold under execution against her first husband, in which she had not released her dower. Held, as she received and enjoyed the property during her infancy, and since her majority, she was not entitled to any dower.<sup>3</sup> So where a *feme covert*, after a sale of land by her husband, accepted from the purchaser two slaves, in lieu of dower, and retained them, without claim of dower, seven or eight years after the death of her husband: held, although the agreement made by her while covert was voidable, yet her long acquiescence might be construed into a renewal of it; and where, after having recovered her dower in proceedings at law, she brought a bill for arrears of dower, the court refused her application.<sup>4</sup> So a widow entitled to dower married again, and the real estate in which she was dowable was sold by the administrator of her first husband, for the payment of his debts, she not joining in the deed. The purchaser conveyed the same to the second husband, who subsequently mortgaged, and then sold it, with covenants of general warranty, the wife not joining in either of the deeds. Held, by the covenants of the husband, he and his wife were estopped from claiming dower in the estate of the first husband, during the existence of their intermarriage.<sup>5</sup> So upon a petition for dower, to which a plea was put in, and an order made for sale by the guardian; the widow was in court, assenting to the pro-

<sup>1</sup> *Ellis v. Diddy*, 1 Smith, 364.

<sup>2</sup> *Magee v. Mellon*, 23 Miss. 585.

<sup>3</sup> *Bourne v. Simpson*, 9 B. Mon. 454.

<sup>4</sup> *Bullock v. Griffin*, 1 Strobb. Eq. 10.

<sup>5</sup> *Potter v. Potter*, 1 Ang. 48.

ceedings, received part of the price for her dower, and attended the sale, the commissioner giving notice that a clear title would be conveyed, she claiming no dower. Held, a bar.<sup>1</sup> So if an administrator, selling real estate of his intestate, under license, represents that the purchaser will have a complete title, and the widow, upon his statement that "it shall be as well for her," signs, but does not seal, a release of dower, at the end of his deed, and he thereupon receives the full price from the purchaser; she cannot maintain an action against the administrator for the value of her dower.<sup>2</sup> But where a widow applied for dower in an estate, which the husband had given bond to convey, and the administrator conveyed, under direction of the Probate Court, paying to the widow her distributive share of the proceeds; held, the court could not notice the fact of such payment.<sup>3</sup> So where an execution was levied upon land, and, after the right of redemption had expired, the land was sold for more than the amount of the debt, and the balance paid over by the creditor to the debtor's wife and children; held, she was still entitled to dower therein.<sup>4</sup> Nor is a widow barred of dower, in land aliened by the husband, by accepting a share of his estate under the statute of distributions.<sup>5</sup> Nor is it a bar of dower, that the widow has disposed of personal property of the husband, of greater value than the dower.<sup>6</sup> Nor will the mere acceptance of a conveyance of the land in which a widow is entitled to dower, which impliedly disclaims such title, operate as a bar of dower. Thus, where A the widow and B the daughter of the deceased held the land undivided, and, upon B's marriage, she and her husband conveyed the land in settlement to trustees, of whom A was one, describing the land as B's property; held, no bar of A's right of dower.<sup>7</sup> Nor will a widow be barred of her dower, by attempting to claim under a deed of the husband, which is avoided as fraudulent. Thus, where a husband conveyed fraudulently to the use of himself and his children, and contingently to the use

<sup>1</sup> *Ellis v. Diddy*, 1 Cart. 561.

<sup>2</sup> *Giles v. Moore*, 4 Gray, 600.

<sup>3</sup> *Wyatt v. Brown* 8 S. & M. 365.

<sup>4</sup> *O'Brien v. Elliot*, 8 Shepl. 125.

<sup>5</sup> *Liahaweaver v. Stoeve*, 1 M. & S. 160.

<sup>6</sup> *Caruthers v. Wilson*, 1 Sm. & M. 527.

<sup>7</sup> *Wilcox v. Hubbard*, 4 Mun. 346.



of his wife, who did not sign the deed, and after the husband's death a creditor successfully sought to avoid the deed, the wife claiming under it; held, she should still have dower. So though a widow attempts to buy the fee, or claims the property under the will, yet, if the title she acquires turns out to be worthless, she is not thereby estopped to claim her dower.<sup>1</sup>

§ 7. It will be seen hereafter, that, where the husband is a tenant in *common*, the right of dower is subject to the incident of *partition*.(a) (See ch. 12; ch. 54.) So the right has been held subject to the paramount public right of eminent domain. Thus a municipal corporation was authorized by statute to take lands for the public use, making compensation in the manner prescribed to the respective owners and persons entitled to or interested in the same, whereupon the corporation was to become seised in fee-simple. Compensation for a portion of the lands, whereof A was seised in fee, was awarded and paid to him, without notice of the inchoate right of dower of his wife, or award made to her therefor. Held, her interest, for the purpose of compensation under the act, was not to be considered as distinct from that of her husband, so as to require a separate estimation, and that he was, for that purpose, to be deemed the entire owner of the estate; and hence she was not entitled to dower. The right of dower, being an incident to the marriage relation, was merely inchoate during the lifetime of the husband, constituting no vested or certain interest, and before his death any regulation of it might be made by the legislature, though operating to divest dower. The general doc-

<sup>1</sup> *Blow v. Maynard*, 2 Leigh. 80; *Corriell v. Ham*, 2 Clarke, 552.

(a) So where partition is effected by sale. *Weaver v. Gregg*, 6 Ohio Stat. 547. In Maryland, under the act of 1839, c. 23, a sale under a decree in equity for partition, where the wife of a joint owner was made a party complainant, will bar the inchoate right of dower in such wife, out of the lands so sold. *Warren v. Twilley*, 10 Md. 39.

By St. 8 & 4, Wm. 4, ch. 105, dower may be barred by any transfer of the land made by the husband, whether in the way of conveyance or devise; and is sub-

ject to all debts and incumbrances. So, also, it may be defeated by a simple declaration to that effect, contained in the conveyance to him, or the instrument of transfer by him. And a devise of any part of the land, which is subject to dower, for the wife's benefit, bars the right, unless the contrary is expressly declared. Otherwise with a devise of other land, or of personalty. This act does not apply to women who were married previous to January 1, 1834.

trine was laid down, that the power of the State to take private property for public uses results from its right of eminent domain, which is only restricted by the constitutional provision, that just compensation shall be made to the owner. In cases of this character, the husband is justly considered the entire owner, and the award is properly made to him. And, on payment to him of the full value of the property, the title vests in the public, discharged from any claim of dower.<sup>1</sup>

§ 8. At common law, the *deed* of a married woman is *ipso facto* void.<sup>2</sup> In England, however, a widow may bar herself of dower by joining with her husband in a *fine* or *recovery*, though not by joining him in a mere deed. But various devices have been there resorted to, chiefly by way of complicated limitations, to effect this object. These are not practised, because, as will be seen, not necessary, in the United States.<sup>3(a)</sup>

<sup>1</sup> Moore v. City, &c., 4 Sandf. 456.

<sup>2</sup> 1 Cruise, 139; 4 Kent, 50.

<sup>3</sup> 8 Mas. 351.

(a) In the States of Vermont, New Hampshire, Connecticut, Ohio. (see ch. 24,) Tennessee, (but not where the purchaser knows that the husband's intent in giving the deed is to bar dower. Brewer v. Connell, 11 Humph. 500,) North Carolina, Texas, Florida, Mississippi and Georgia, (nothing short of an actual conveyance by the husband, no laches in vindicating his title, will bar the wife's dower. under St. 1826, Hart v. McCollum, 28 Geo. 478); a widow shall be endowed of those lands only of which the husband died seised. Reeve, 40-1; 4 Kent, 41-2; 1 N. C. Rev. St. 613; Prince's Dig. 249; Verm. Rev. St. 289; Thomp. Flori. Div. 2, Pt. 1, Ch. 2, s. 1; Miss. Code, ch. 50. s. 2, art. 162; N. H. Comp. Sts. ch. 175, s. 8. Hence, if a man purchase lands, own them during coverture, but afterwards part with them; he thereby debar the widow's dower in those lands by his own separate act, and without any consent on her part. In Virginia, the husband of an insane woman may obtain license to convey free of dower; reserving a portion of the price to her. Vir. Code, 587.

In Ohio, it is provided that the husband of an *insane* woman may convey his land, free from the incumbrance of dower. Ohio Stat. 1836, 7 Mar. 29.

So dower is barred by a sale for taxes. Jones v. Denore, 8 Ohio, N. S. 480.

In Pennsylvania, Missouri and Tennes-

see, dower is barred by a sale of the lands under a mortgage or judicial process. But, in Tennessee, a widow is dowerable of lands of her husband which are levied on before his death, but not sold. In Pennsylvania, the rule above stated seems to be founded upon no express provision, but upon a mere construction of the statutes on this subject. In the same State, where the husband, being insolvent, conveys to trustees for payment of debts, his widow shall have dower, and also one-third of the rents and profits, till creditors compel a sale of the land for debts, though by such sale her dower will be lessened. It has been more recently held, that a sale for payment of debts does not debar the widow of a deceased alienor of her dower. Keller v. Michael, 2 Yea. 300; Kneider v. Kneider, 1 Miles, 220; Liehaweaver v. Stoeve, 1 W. & S. 160; Helfrich v. Obermeyer, 15 Penn. 118; Rutherford v. Reed, 6 Humph. 423.

Nor an assignment in insolvency under a compulsory process, and a conveyance by the husband's trustee. Eberle v. Fisher, 13 Penn. 526.

But a sale of land under a testamentary power, for the payment of debts, discharges the land from dower. Mitchell v. Mitchell, 8 Barr, 126.

Where a vendee agreed to apply part of the purchase-money in satisfaction of all judgments and liens against the ven-

§ 9. But, in all the States, the most usual mode of barring dower, is by a deed of the husband in which the wife joins, and which contains at the close an express relinquishment of dower. An unsealed release is bad. In many of the States, this method

dor, and he became the purchaser at a sheriff's sale under one of these judgments after the vendor's death; held, this did not divest the widow's dower, for he was bound to extinguish the debts for which the land was sold. *Shurtz v. Thomas*, 8 Barr, 359.

A widow's thirds, as appraised under proceedings in the orphans' court, and left a charge on the land, are not divested by a sale of the land, under a decree of the orphans' court, as the property of the party who took it at the appraised value. *Vandever v. Baker*, 18 Penn. 121.

In North Carolina, a statute provides, that any fraudulent conveyance by the husband shall not bar dower. In the same State, the widow has dower in lands sold after the husband's death, under a *f. fa.* tested and levied before. *N. Car. Rev. Sts. 613; Frost v. Etheridge*, 1 Dev. 80.

In Virginia, dower is barred by a *bona fide* sale to satisfy a prior incumbrance, in creating which the wife joined. In Kentucky, dower is subordinate to a creditor's lien. *McClure v. Harris*, 12 B. Mon. 261.

In Georgia, a conveyance by an officer bars dower, as if made by the husband. *Georgia Sts. 1842*, p. 75.

In Indiana, dower cannot be affected by an execution sale. If a mechanic's lien accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien. So, in Illinois, dower cannot be affected by a mechanic's lien, and the widow should not be made a party to the proceedings to enforce it, if she has no other interest in the premises. *McMahan v. Kimball*, 3 Blackf. 6; *Pifer v. Ward*, 8 Ib. 252; *Shaeffer v. Weed*, 3 Gilm. 511.

In Alabama and Arkansas, dower is allowed from an insolvent estate. *Allen v. Allen*, 4 Ala. (N. S.) 556; *Crittenden v. Woodruff*, 6 Eng. 82; — *v. Johnson*, Ib. 94. See *Outlaw v. Yell*, 3 Eng. —. *Nance v. Hooper*, 11 Ala. 552.

In Maryland, upon a creditor's suit, the real estate of the debtor may be sold, subject to dower. *Mildred v. Neill*, 2 Bland, 355; *Ewings v. Ennalls*, Ib. 356.

Where the land of which a husband

died seised is sold by a court of equity, free from the claim of dower, for the payment of debts, by reason of the insufficiency of the personal estate to pay them, and his widow is a party to such proceeding; she will be barred of her right of dower so long as the decree remains unreversed. *Gardiner v. Miles*, 5 Gill, 94.

A sale after marriage, under an execution upon a judgment prior to the marriage, will defeat dower, even at law. *Trustees, &c., v. Pratt*, 10 Md. 5.

So, notwithstanding an arrest under a *ca. sa.* issued prior to the marriage; which neither waives nor suspends the lien of the judgment, so as to allow the dower to attach upon the lands. *Ib.*

The objection to a sheriff's sale, that two tracts not contiguous were sold in mass, cannot be made by the widow of the defendant in the judgment, in an action at law against the alienee of the purchaser at such sale, for her dower out of one of such tracts. *Ib.*

In New York, a widow cannot claim dower in the surplus arising from a sale in foreclosure, where the husband was living at the time of making the decree, or when the sale took place. *Frost v. Peacock*, 4 Edw. 678.

In it held, that the statutes of New York, relating to the sale of the real estate of deceased persons, under a surrogate's order, for the payment of debts, do not authorize the sale of a widow's estate in dower, where dower has been actually assigned to her. *Lawrence v. Miller*, 2 Comst. 245.

In Maine, the right of dower may be defeated by an attachment. Thus, where one whose land was attached on mesne process married; and, a judgment being obtained, the execution was seasonably levied on the land; and after the levy he died: held, the widow had no right to dower. *Brown v. Williams*, 81 Maine, 408.

In Delaware, (Dela. St. 1829, 167,) a statute of 1816 provides, that a widow shall have dower in all lands owned by the husband during coverture, free from all conveyances, debts, liens, &c., excepting any lien or incumbrance existing before the passage of the act. And it is said that, previously, dower was subject to debts.

is prescribed by express statutes, and added as an exception or qualification of the common law definition of dower.<sup>1(a)</sup> In Massachusetts, the practice was referred by one distinguished jurist to early colonial and provincial acts, and by another to New England common law.<sup>2</sup> A statute of Georgia recites, that the conveyance of the lands of a *feme covert*, by fine and recovery, was never practised in any of the American colonies.<sup>3</sup> The statutory mode is a substitute for fine and recovery, and must be substantially complied with.<sup>4</sup> In many States, a *private examination* of the wife is required to render her release of dower valid, and seems to have been practised before any statutory provision requiring it. Substantially the same provisions are made, with regard to a release of dower, and a conveyance by the wife of her own lands, which has been already treated of, and to the remarks concerning which the reader is referred.<sup>5(b)</sup>

<sup>1</sup> 4 Kent, 58; 3 Mas. 351; Lufkin v. Curtis, 18 Mass. 223; Manning v. Laboree, 33 Maine, 343.

<sup>2</sup> Fowler v. Shearer, 7 Mass. 20-1; 3 Mas. 351-2.

<sup>3</sup> Anth. Shep. 592.

<sup>4</sup> O'Farrall v. Simplot, 4 Iowa, 381.

<sup>5</sup> *Supra*, ch. 7; Anth. Shep. 593.

(a) That is, "a widow shall be endowed," &c., *unless she have parted with her right*, in the method prescribed. In Massachusetts, the early colonial and provincial statutes are said to imply and recognize, though not create, the power of a *feme covert* thus to bar her dower. Col. St. 1644; Prov. St. 9 Wm. ch. 7; 3 Mas. 351-2.

It has been held, that statutes providing for this mode of releasing dower supersede all other methods. French v. Peters, 33 Maine, 396. In Indiana, a widow marrying again cannot alienate her dower. Rev. Sts. *Descent*, sec. 18.

(b) It has been held, that the certificate of acknowledgment need only be in the usual form, and *substantially* conformable to the statute. Brown v. Farran, 3 Ohio, 15. See Dundas v. Hitchcock, 12 How. 256; Ravarty v. Fridee, 8 McLean, 230.

A statute requiring, in any release of dower, or other conveyance of real estate by a married woman, a certificate of a magistrate on the deed, that the wife, on a private examination, apart from her husband, acknowledged that she signed and delivered the same "as her voluntary act and deed, freely, without any

fear, threats or compulsion of her husband," is sufficiently complied with, if the words "freely and of her own accord," are substituted for the words, "as her voluntary act and deed, freely." Dundas v. Hitchcock, 12 How. U. S. 256.

In Massachusetts, it was remarked by Parsons, Ch. J., (7 Mass. 20; acc. Frost v. Deering, 8 Shepl. 156,) that a release of dower has been sometimes effected by a separate deed of the wife, subsequent to that of the husband, and reciting the sale by him as the consideration. But the Revised Statutes provide, that the husband shall join in the subsequent deed; and such deed by the wife alone is void. Mass. Rev. St. 410; Page v. Page, 6 Cush. 196. So in Michigan.—Rev. St. 264; see Sts 1849, 60; and Maine.—Rev. St. 392; and Wisconsin.—Wisc. Ib. 334. And Judge Story supposes, (8 Mas. 353,) that Judge Parsons' remark was by him applied, and is applicable only to the case, where the wife's deed, though subsequent, is made on the same day, and as part of the same transaction with the husband's, and that this course was *sometimes* adopted, but not so generally as to give it the validity of a usage. If the wife's deed be seven months subse-

§ 10. It is sometimes held that the wife need not sign the deed *in person*; that a signing by any third person, or by the husband, if done in her presence and under her direction, will be sufficient. And in case the witnesses to her signature fail to prove it, her own admissions are competent evidence. But a more recent case decides that the deed of a married woman, executed by power of attorney, as to which she was privately examined, does not bar her dower. And where husband and wife gave a power to convey to A, and afterwards, by deed of warranty, the husband conveyed to A, and A mortgaged and conveyed in his own name; held, the deed of A was not made under the power, and the dower was not released.<sup>1</sup>

<sup>1</sup> *Frost v. Deering*, 8 Shepl. 156; *Lewis v. Coxe*, 5 Harring, 401; *Corriell v.*

*Ham*, 2 Clarke, 552.

quent to the husband's, given after two mesne conveyances, for a new consideration, and not reciting the husband's sale as the consideration, it is void. This is not joining in the deed of the husband, according to the words of the statutes. Nor does the husband's mere assent make any difference. So a release indorsed upon the husband's deed, in consideration of the sum mentioned in the deed, is insufficient. *Powell v. Monson, &c.*, 3 Mas. 347; *Shaw v. Russ*, 1 Shepl. 82; *French v. Peters*, 33 Maine, 396.

In Kentucky, the wife may release by a subsequent deed. But not by parol, though privately examined. *Worthington v. Middleton* 6 Dana, 300. But, in general, in Kentucky, the sole deed of a wife is void. In Ohio, she must join with the husband's attorney. 1 Ky. Rev. L. 436; *Thompson v. Peebles*, 6 Dana, 391; *Glenn v. Bank, &c.*, 8 Ohio, 872; *French v. Peters*, 33 Maine, 396.

A release of dower before marriage is void. *Hastings v. Dickenson*, 7 Mass. 155.

In New Hampshire, the wife may release alone. So, although an infant. The wife cannot release to the husband. *Ela v. Card*, 2 N. H. 176; *Rowe v. Hamilton*, 3 Greenl. 63; N. H. Rev. St. 297. In Kentucky, release of dower by an infant *feme* is voidable. *Oldham v. Sale*, 1 B. Monr. 77.

In Massachusetts, merely joining in the husband's deed is insufficient, without words of release. *Ub. sup.* So, in Indiana, there must be a release, though there is a certificate of the wife's acknowledgment.

Her joining in the deed or covenant is insufficient. *Davis v. Bartholomew*, 8 Ind. 485. So in Maine, a wife does not release her dower, unless she uses apt words to express such intention. The words "in token of her free consent," inserted in the conclusion of the deed, are not sufficient. *Stevens v. Owen*, 25 Maine, 94. In Ohio, an acknowledgement is valid, though not on the same day with the execution. *Williams v. Robson*, 6 Ohio St. 510.

In Iowa, a wife joined in the deed with her husband, but did not expressly relinquish her dower nor properly acknowledge the deed. The court, in view of the ordinary practice, held that she was not bound by the body of the deed, as the transaction appeared to be one of the husband alone, and she only intended to release her dower, and that the dower was not released for want of appropriate terms and an acknowledgment. *Westfall v. Lee*, 7 Clarke, 12. But, in Maryland, the deed may bar dower, though the wife be not named in it. 3 Mas. 347; *Catlin v. Ware*, 9 Mass. 218; *Learned v. Cutler*, 18 Pick. 9; 1 Md. L. 128; *Stevens v. Owen*, 25 Maine, 94. So in Ohio, the wife need not join in the covenants, nor expressly release her dower. *Smith v. Hardy*, 16 Ohio, 191.

In New Jersey, the separate deed of the wife will not pass her dower; her husband must join. *Dodge v. Aycrigg*, 1 Beasl. 82. In Illinois, the assent of a husband is necessary to the wife's release of dower in the estate of a former husband. *Osborn v. Horin*, 19 Ill. 124.

§ 11. The demandant in a writ of dower is not barred by a release of dower made by her to a third person, under whom the tenant does not claim.<sup>1</sup>

§ 12. Where a wife releases her dower, and afterwards the purchaser from the husband recovers damages of him for a breach of the covenant that he had a right to convey, there being attachments on the land at the time of conveyance; the release of dower becomes void, because the recovery of the action debars the purchaser from afterwards claiming anything by his deed. So, where a wife joins in the deed of her husband and releases her dower, and an execution against him is afterwards levied upon the land, and the creditor recovers it from the purchaser, on the ground that the conveyance was fraudulent; the right of dower revives, and the widow may recover it from such creditor or his assigns<sup>2</sup>. So where the husband's conveyance is set aside as fraudulent against creditors, and the land sold and conveyed under a decree for their benefit after his death; the widow shall have dower, though she joined in the conveyance.<sup>3</sup> So where land was mortgaged to secure a debt, in which mortgage the wife joined, and was subsequently sold under a judgment against the husband, at the suit of a stranger to the mortgage; held, the wife was not divested of her dower, though the court had ordered the purchase-money in part to be applied to the mortgage debt.<sup>4</sup>

§ 13. The wife may validly join in a *lease* as well as an absolute deed. In such case she shall be endowed of the rent.<sup>5</sup>(a)

<sup>1</sup> Robinson v. Bates, 3 Met. 40.

<sup>2</sup> Stinson v. Sumner, 9 Mass. 148; Robinson v. Bates, 3 Met. 40.

<sup>3</sup> Summers v. Babb, 18 Ill. 483. See Woodworth v. Paige, 5 Ohio St. 70.

<sup>4</sup> Avery, J., dissenting. Taylor v. Fowlet, 18 Ohio, 567.

<sup>5</sup> Herbert v. Wren, 7 Cranch. 370. See Hall v. Hall, 2 McCord, Cha. 280.

(a) In Maine, the wife of one under guardianship may release her dower alone. Me. St. 1853, 29.

In Alabama, by statute, an *infant* may release dower. In the same State, a deed, to bar dower, must be signed in presence of two or more creditable witnesses, or acknowledged. Clay, 174. If made out of the State, it may be acknowledged before a notary, or a judge of a court of record. Ib.

In Wisconsin, the guardian of an infant. So, in Maryland. Chancery may affirm the release of dower by an infant.

But it has been held in New York and Ohio, that a release of dower, though a substitute for the old process of recovery, does not so far partake of the nature of the latter, as to render valid the release of an infant. Nor does a private examination give validity to such release. Nor is a release of dower, like a *fine*, made valid by mere *consent* of the husband. St. of Ala. 1886, No. 22; Md. L. 1095; Priest v. Cummings, 16 Wend. 617; 20, 331; Jones v. Todd, 8 Mas. 361. 356; Hughes v. Watson, 10 Ohio, 137; Wisc. Rev. St. 334.



§ 14. It has been seen, that, in equity, which regards a conveyance agreed to be made, as actually made, dower may sometimes be barred even without any release. On the other hand, equity will sometimes allow dower even after a release, where the deed was merely preparatory to another deed which has never been made. Thus, where several tenants in common, with their wives, conveyed lands, previously lotted out, to a trustee, to be sold in lots; held, the widow of a deceased tenant should have equitable dower in those lots which the trustee had neither conveyed nor contracted to convey.<sup>1</sup>

§ 15. Where a widow, having a right of dower in land of her deceased husband, sells the land, while acting as administratrix upon his estate, to a person whom she afterward marries, by whom it is again sold by a warranty deed, in which she joins "in token of relinquishing her right of dower in the premises;" her release divests her of all the right of dower which she has in the land, either by reason of her first or second marriage.<sup>2</sup>

§ 16. A wife, who joins in a deed with her husband, is no party thereto, except for releasing her dower, and is not thereby estopped from setting up a subsequent title.<sup>3</sup> So a wife uniting with her husband in conveyance of his land, in which she has no interest but her right of dower, incurs no obligation by reason of any collateral and merely personal covenant inserted in the deed, nor by the representations it may contain. Such covenants are the acts of the husband alone.<sup>4</sup>

§ 17. A release of dower may be either gratuitous, or for a consideration paid to the wife. And, though this much exceed the value of the right relinquished, the transaction will not be adjudged void, unless there be a want of good faith in her.<sup>5</sup>

§ 18. A release from dower can operate only *as a release*, accompanying the conveyance of another, and ceasing to operate with the latter; not as the transfer of an independent estate. Thus, where a husband, whose land is bound by the lien of a judgment, conveys the land with a release of dower, and it is

<sup>1</sup> Hawley v. James, 5 Paige. 318.

<sup>2</sup> Usher v. Richardson, 29 Maine, 415.

<sup>3</sup> Blair v. Harrison, 11 Ill. 384.

<sup>4</sup> Shelton v. Deering, 10 B. Mon. 406.

<sup>5</sup> Hoot v. Sorrell, 11 Ala. 386.



afterwards sold under the judgment, the purchaser from the husband cannot claim as an assignee of the wife, or as deriving a distinct estate from her, against the execution purchaser. So, upon a sale of mortgaged lands, the vendee takes them clear of dower, if released. But if the mortgage is paid, never takes effect, or ceases to operate, the right of dower revives. Where the husband only owned a right of redemption, this alone was passed or unincumbered by the mortgage, and his wife's dower could not have been released to any greater extent. And where that right expired by lapse of time, the mortgage became inoperative, and ceased to be a conveyance of the husband's estate, and therefore could no longer operate as a bar to dower. So a widow is not barred of her claim for dower against a mortgagee who has foreclosed, if she did not join in the mortgage, by her release of dower to the purchaser of the equity of redemption.<sup>1</sup>

§ 19. A very common method of barring dower, is by devise or bequest from the husband to the wife. Upon this subject, the English law has been thus stated: Every devise or bequest in a will imports a *bounty*, therefore cannot, in general, be averred to be given as a satisfaction for that to which the devisee is by law entitled; hence a devise, and more especially a legacy, is no bar of dower, unless so expressed in the will, either at law or in equity. The court will go as far as it can not to exclude the claim to dower. Dower is a legal right, which is favored both in law and equity. To debar a widow of this right, and put her to an election between her dower and a bequest in the will, there must be some express declarations of the testator excluding her from her right, or it must be clear by implication, that such was his intention.<sup>2</sup>(a) More especially does this rule apply, where

<sup>1</sup> Douglas v. M'Coy, 5 Ohio, 527; Pride v. Boyce, Rice, 275; Holdich v. Holdich, 2 Y. & Coll. Cha. 18; Ellis v. Lewis, 3 Hare, 310; Blain v. Harrison, 11 Illin. 384; Littlefield v. Crocker, 30 Maine, 192. See Woodworth v. Paige, 5 Ohio State, R. 70.

<sup>2</sup> 1 Cruise, 139; Walk. Intro. 325;

Mills v. Mills, 28 Barb. 454; Dickson v. Robinson, Jac. 503; Hilliard v. Binford, 10 Ala. 977; Church v. Bull, 2 Denio, 430. See Roberts v. Roberts, 34 Miss. 322; Norris v. Clark, 2 Stockt. 51; Van Arsdale v. Van Arsdale, 2 Dutch, 404; Clark v. Griffith, 4 Iowa, 405.

(a) A person, being indebted, devised part of his lands, which were subject to a satisfied mortgage, to his wife, but not

in bar of dower, and the residue to his executors till his debts were paid. The wife having recovered dower at law, the

the devise is made for the term of widowhood of the wife, or is in any other respect less beneficial than dower.<sup>1(a)</sup> But where a devise or bequest is expressly given as a satisfaction, substitute, or recompense for dower, or upon condition that the wife shall not claim dower, she is bound to elect between the two, and an election of one is a perpetual waiver of the other. Nor is it material whether the property given by will consists of real estate or personal, except, perhaps, that to make personal property a bar of dower, stronger proof of an intent to that effect is required, than in case of a devise of lands. But if, after the widow has elected and enjoyed the provision by will, it from some cause fails, as, for instance, if personal property, from which an annuity is to be raised, becomes exhausted, it seems she may claim her dower.<sup>2(b)</sup>

<sup>1</sup> *Lasher v. Lasher*, 13 Barb. 106; *Lawrence v. Lawrence*, 1 Ld. Raym. 448; 2 Vt. 365; 3 Brown's Parl'ty Cases, 488.

<sup>2</sup> *Leake v. Randall*, 4 Rep. 4 a; *Raines*

*v. Corbin*, 24 Geo. 185; *Bush's Case*, Dyer, 220; *Gosling v. Warburton*, Cro. Elix. 128. See *Ayres v. Willis*, 1 Ves. sen. 230.

heir brings a bill in equity for relief. Held, the devise was no bar to dower. *Hitchin v. Hitchin*, Prec. in Cha. 188.

A devised lands to his wife for life, and other lands to his brother in fee. The former lands were of greater value than the wife's dower. Held, both in law and equity, the devise was no bar of dower. *Lemon v. Lemon*, 8 Vin. Abr. 866.

(a) A devises to his wife lands for her widowhood, afterwards, with all his other lands, to trustees for a term of years, for payment of debts and legacies; and directs, that, after the expiration of two years of the term, the trustee shall permit her to receive the rents and profits of another farm, for the rest of the term during her widowhood. The widow having recovered her dower at law, and an application in Chancery for an injunction having been granted; upon a rehearing in the latter court, it was held, that even at law the devise was no bar of dower, and, if it were so at law, it would not be in equity; and the decree was reversed, because, as is said, the matter had been previously settled at law. 1 Ld. Ray. 438, n. This judgment was afterwards affirmed by the House of Lords. *Lawrence v. Lawrence*. 1 Lord Ray, 488; 2 Vern. 365; 3 Bro. Parl. Ca. 488.

So where a husband left all his property to his wife so long as she should live

unmarried; held, at common law she might take under the will, and also have dower in land sold on execution before the making of the will. *Corriell v. Ham*, 2 Clark, 552. So upon a devise of land, in trust to sell, and pay part of the proceeds to the widow; held, she need not elect between the devise and her dower. *Ellis v. Lewis*, 3 Hare, 310.

In a late case in Virginia, a husband conveyed land with warranty, the wife not joining in the deed, and devised all his estate to her, remainder to her children. Held, she should take the devise, and also dower in the land sold. *Higginbotham v. Cromwell*, 8 Gratt. 88.

(b) In Massachusetts, Maryland and Virginia. express statutes so provide. Mass. Rev. St. 411; (See Gen. Sts.) Anth. Shep. 451; 1 Vir. Rev. C. 171. "In Maryland. if nothing shall pass by such devise." In the same State, if the will gives her both personal and real property, she must renounce the whole in order to claim her legal rights. Md. L. 407. Where a testator, devised to his wife his whole estate during widowhood, and she makes no renunciation of the devise, but afterwards forfeits it by marriage, she shall not have dower. *Vance v. Campbell*, 1 Dana, 229.

In New York, where a testator, in lieu of dower, devised certain property to his

§ 20. And a provision by will, though not *expressed* to be a bar of dower, shall still operate as such, if its fulfillment is manifestly inconsistent therewith; or if there appear upon the face of

wife, and directed that his sons should annually deliver to her a certain quantity of wood; and, after the widow had accepted the devise, and for many years enjoyed the property, the sons failed to deliver the wood as directed: held, the widow could not claim dower, but her remedy was under the will, against those chargeable with its execution; that, although the wife would not be bound by a post-nuptial *agreement* merely, yet she would be bound by an *election* to avail herself of such agreement; and, in this respect, a devise stood on the same footing with a settlement made upon the wife after marriage. *Kennedy v. Mills*, 13 Wend. 553; *Id.* 556.

But, in the same State, where the testator devised his whole property to his wife for life or widowhood, remainder to his children, and she occupied some years under the will, and then married again; held, she should have dower. *Bull v. Church*, 4 Hill, 206. See *Fuller v. Yates*, 8 Paige, 325; *Lewis v. Smith*, 11 Barb. 152; *Flagler v. Flagler*, 11 Paige, 457.

A testator devised all his real and personal estate to his wife, "during her life, or so long as she should remain his widow," and, after her decease or re-marriage, to his children. The wife survived him, entered and occupied under the will for several years, and then married a second husband. Held, she was entitled to dower. *Church v. Bull*, 2 Denio, 430.

Where a testator owned the entire estate in certain premises, subject to dower, and devised a part of the premises to the person having the right of dower, and the residue to A, but without declaring his intention, in his will, to dispose of the whole estate, including the right of dower, or that the dowress should relinquish either such dower or her devise, and no such intention was deducible by clear and manifest implication from the will; held, the presumption was, that the testator intended only to devise to A his own estate in the premises, subject to the right of dower therein, and that the dowress, was not put to her election. *Leonard v. Steele*, 4 Barb. 20.

The principal trusts of a will, some years after the testator's death, were declared void by a vice-chancellor; but

the payments made previously were sanctioned by the decree, and the widow was required to elect between her dower and certain valid provisions of the will. Appeals were taken, and the suit protracted, pending which the executors continued to make payments, and the widow, having made no election, died before the decision, which affirmed the decree. In a suit by the executor against the assignee of one of the next of kin; held, the latter could not object to the payments made prior to the decree; that the payments made subsequently were invalid, and must be disallowed; and that the widow's administrator might now make the election granted to her by the decree. *Howland v. Heckscher*, 8 Sandf. Ch 519.

Where a husband gave to his wife by will, in lieu of dower, a decent and comfortable support out of his estate, in sickness and in health, during her lifetime, leaving the residue of his estate to his two children; held, such allowance was not to be measured by the sum necessary to support her in a boarding-house, but that she should have sufficient to maintain her in house-keeping at the place of her residence, and in the manner to which she had been accustomed while living with her husband. such sum being less than the interest on one-third of the testator's estate. *Tolley v. Greene*, 2 Sandf. Ch. 91.

In New Jersey, in a late case, the words were, "I give, devise, and bequeath to my beloved wife, Elizabeth M. Clark, six hundred dollars, at the end of six months after my decease, and my gold watch, which she carries, and the silver tea-spoons, the two sets of window blinds in the back room, and the hall lamp, which she brought me at or after our marriage; and her acceptance of the above gift shall forever exclude her from any further demand on my estate." It was insisted, that the acceptance of the gift excluded the widow from any further demand, only against the personal estate; that the legacy was to be paid her by the executor; and that against that estate out of which the legacy was to be paid, she was excluded from any further demands. It was held, that, if the other parts of the will gave no further indica-

the will an intention which would be frustrated by the claim of dower. It is said, that no person shall dispute a will who claims under it, and this rule is as applicable to a dowress as to any other person. Hence, where the dowable estate is so divided, that the claim of dower makes a material change in the will itself, the widow is barred. There is no difference between declaring that she shall not hold both, and devising so that she cannot hold both without disturbing the will.<sup>1</sup>

§ 21. This doctrine seems to have been first settled in courts of equity, and a *devise* has therefore been called *an equitable bar*. But the language of the modern cases, and the better opinions seem to be, that if the widow has fairly and understandingly, with full knowledge of the facts, made her election between her dower and the testamentary provision, and in favor of the latter, she will be held to her election at law as well as in equity. It is said there is no difference in principle between the courts of law and equity on the subject, but the difficulty of reaching the justice of the case has frequently thrown these questions into equity.<sup>2</sup> But equity will not interpose to compel an election, unless—1, the devise is expressed or strongly and necessarily implied to be a substitute; 2, clearly inconsistent with dower; or 3, where the whole will would be overturned by an allowance of dower.<sup>3</sup> And it is said, a devise to others of all the testator's real estate is not necessarily inconsistent with the right of dower, as such a devise is to be understood as subject to all lawful

<sup>1</sup> 4 Kent, 56; Parker v. Lowerby, 27 Eng. L. & Eq. 154; Villa, &c., v. Galway, 1 Bro. Rep. 293 n; Gretton v. Howard 1 Swaust, 418; Hamblett v. Hamblett, 6 N. H. 333; Weeks v. Patten, 18 Maine, 42; Stark v. Hunton, Saxt. (N. J.) 216; Church v. Bull. 2 Denio, 480; Lasher v. Lasher, 13 Barb. 106; Dodge v. Dodge, 31 Barb. 418; Reaves v. Garrett, 34 Ala.

558; Pemberton v. Pemberton, 29 Mis. 408; Hale v. Hill, 1 Dru. & War. 94.

<sup>2</sup> Kennedy v. Mills, 18 Wendell, 555; 4 Kent, 56; French v. Davies, 2 Ves. jun. 578; (but see Pickett v. Peavey, 2 Con. S. C. 748;) Edwards v. Morgan, 13 Price, 782; Taylor v. Taylor, 1 Y. & Coll. Cha. 727.

<sup>3</sup> Kennedy v. Kennedy, 1 Dall. 418.

tion of the testator's intention, this construction might prevail. But as the testator had put both real and personal estate in the hands of the executor for disposition, and disposed of his whole estate, real and personal, through the executor, the personal to pay the widow the legacy, and the disposition was inconsis-

tent with the widow's enjoyment of her legal right; it was the clear and manifest implication from the whole will, that the testator did intend the gift to be in lieu of dower, and did not, by the use of the word "estate," mean personal estate only. Norris v. Clark, 2 Stockt. 51.

claims upon the land, including dower.<sup>1</sup>(a) Where a testator, not noticing his wife's title to dower, devises to her the residue of his personal estate, this is no bar of dower, because the claim

<sup>1</sup> Per Waldworth, *Ch. Church v. Bull*, 2 Denio, 480.

(a) Instances of inconsistency, are where the interest of one-third of the amount of sales of the whole land is given to the widow for life; or where the rents of lands are charged with the maintenance and education of children, and provision is made for selling lands to pay debts. *Duncan v. Duncan*, 2 Yeates, 302; *Herbert v. Wren*, 7 Cranch, 370.

So where a testator devised one-third of his estate to his wife, the other two thirds to his two children; or gave his personal estate, and an annuity to his wife, and devised his real estate to trustees, or gave to trustees a leasing power over his estate with power to "let" and cut timber; held, the widow could not claim both the devise and her dower. 4 Dane, 680; *ub. Sup.*

A devised to his wife an annuity of 200*l.*, to be issuing out of his lands, with power of distress and entry; subject thereto, he devised his real estate to his daughter in strict settlement; and directed all his personal estate to be invested in land and settled to the same uses. It was held in equity, that the claim of dower was inconsistent with the will: 1. Because it would deprive the trustees of their possession of a part of the land, whereas by the will they were to hold the whole, subject to the annuity and distress, and the widow was to enter, only upon non-payment. 2. Because it would diminish the annuity itself, inasmuch as, by entering upon a third of the land in right of her dower, the widow would sink so much of her annuity as that third ought to bear in proportion. The annuity, being charged upon the whole land, could not, by an equitable marshalment, be thrown upon the remaining two-thirds. *Villa Real v. Galway*, 1 Bro. Rep. 292. See *Reynard v. Spence*, 4 Beav. 108.

But, in some later cases, the charging of an annuity upon lands has been held not to be a bar of dower; and where a widow is to elect between her dower and an annuity, receiving the latter for five years has been held not conclusive evidence of an election. *Reynard v. Spence*, 4 Beav. 108.

A, a testator, gave land to his wife for her

support during widowhood, and, in the event of her death or marriage, to any child or children of his born of her, and, if none, to his nephew, C, in fee. Before the death of A, his wife bore him a daughter, who died shortly after her father, A, and the widow conveyed the land, and afterwards married again. Held, 1. The widow having forfeited her estate by a voluntary breach of condition, it went to the remainder-man designated in the will. 2. The widow having taken under the will the portion therein given to her, it was in lieu of dower, and her right to dower could not be restored by a voluntary breach of her tenure. *Taylor v. Birmingham*, 5 Cas. 306. Where the will vested the whole title to the testator's estate in trustees, and his widow renounced the provisions the will made for her, and dower was assigned to her in slaves, which were included in the estate devised to the trustees; held, the assignment only divested the title of the trustees, to the extent of the interest, which the law conferred upon the widow in the property assigned as dower; and, as she had, by operation of law, a life estate in the slaves, the trustees were only divested of the title to them to that extent, and the reversion remained in them by virtue of the will, and a creditor might sell the title to the reversion under an execution. *Myers v. Davis*, 10 B. Mon. 394.

In Indiana, previously to the Revised Statutes of 1843, if a devise to the wife did not state that it was in lieu of dower, and her claim of dower was not inconsistent with the will, she had a right to take both. *Kelly v. Stinson*, 8 Blackf. 887.

Previously to the Revised Statutes, a testator devised certain goods to his wife, and the residue of his property, real and personal, to his children. The devise to the wife was not said to be in lieu of dower, nor would her taking dower overturn the will. After the testator's death, the widow released her claim by dower (as it was called) on the personal estate, except the provisions made for her in the will. Held, she was entitled to dower in the real estate. *Ostrander v. Spickard*, 8 Blackf. 227. See *Smith v. Baldwin*, 2 Cart. 404.

of the latter does not break in upon the will.<sup>1</sup> And if only a part of the lands subject to dower are devised to the widow, she may claim her dower in the residue, unless the intent is clearly otherwise. So, the devise of a contingent remainder in the whole lands to the widow is no bar of her immediate title to dower, by implication, because the two estates are not incompatible. Nor will the widow be barred of her dower, although there is a probability that the husband was ignorant of her right to claim it. So, where the husband devised his lands, or all his estate, to trustees, charged with an annuity to the widow; dower being a paramount claim, equity will not presume, from his having disposed of all his own property, that he meant also to dispose of what was not his own, unless peculiar circumstances justify such construction.<sup>2</sup> If the lands subject to dower would be insufficient to meet the charges made upon them, dower would probably be barred; and, it seems, a reference may be granted to ascertain the fact.<sup>3</sup>

§ 22. A widow, receiving a devise for her release of dower, is deemed a purchaser, and shall be fully paid before other legatees; even though the legacy be not the only consideration of such release. Her claim is even paramount to that of *creditors*. By relinquishing her dower, she discharges a highly favored debt due from the testator; and relieves his real estate from a lien in her favor, which would have preference to any that he himself could have created. Hence, where the widow filed a creditor's bill in Chancery, praying a sale of the real estate, for payment of debts; and subsequently presented a petition, alleging that she accepted a devise from the husband improvidently, that the estate was greatly charged with debts, and that she should receive no compensation for her dower, and praying to be let into the latter: it was held, that, although she could not waive her election of the devise, affirmed by her bringing this suit,

<sup>1</sup> *Ayres v. Willis*, 1 Ves. 230. In this case, the claim of a widow, as devisee, is compared with that of a child. (See further, *Chalmers v. Stovil*, 2 Ves. & Beam. 222; *Dickson v. Robinson*, Jac. 503.)

<sup>2</sup> *Lord Dorchester v. Effingham*, Coop.

824; *Hitchins v. Hitchins*, Freem. 241; *Inclendon v. Northcote*, 3 Atk. 485; *French v. Davies*, 2 Ves. jr. 577, 581; *Foster v. Cook*, 8 Br. 351; *Wood v. Wood*, 5 Paige, 596.

<sup>3</sup> *Pearson v. Pearson*, 1 Br. 292.



in the absence of any fraud or mistake; yet, according to the language of the Statute (of Maryland), (a) she was "a purchaser with fair consideration," both at law and in equity, and that the creditors, having joined with her in an application for sale, could

(a) In the same State, it is held, that a devise in lieu of dower is to be treated *as dower*; and, if not claimed by the widow in a creditor's suit, the land shall be sold clear, and she may claim her share of the proceeds. *McCormick v. Gibson*, 3 Bland, 501. The rule of priority stated in the text does not apply, unless the bounty to the widow consists of real estate. *Acey v. Simpson*, 5 Beav. 35.

The principles above stated belong to the English law, and, independently of statutory provisions, are generally adopted in this country. But in the States of Massachusetts, Maine, Indiana, Iowa, Vermont, Pennsylvania, Maryland, (with slight modification) Virginia, Wisconsin, Illinois, New Hampshire and Alabama, the widow cannot claim both the provision made by will and dower also, unless such plainly appears to have been the testator's intention. In Pennsylvania, Maryland and Illinois, this intention must be shown by an express declaration in the will. *Herbert v. Wren*, 7 Cranch, 870; *Keller v. Michael*, 2 Yeates, 302; *Webb v. Evans*, 1 Binn. 565; Mass. Rev. St. 410. (See St. 1854, 73); *Purd. Dig.* 220-1; *Park & J.* 468; *Mich. Rev. St.* 264; *Wisc. Rev. St.* 335; *Anth. Shep.* 50, 450; *Maine Rev. Sts. c.* 95; *Illin. Rev. L.* 624; *N. H. L.* 199; *Ala. L.* 884; *Reld v. Campbell*, 8 Port. 878; *Green v. Green*, *Id.* 19; *Hastings v. Clifford*, 82 *Maine*, 182. In Alabama, where the devise is "not satisfactory" to her, the widow may waive it and claim dower. *Ala. L.* 258.

In Missouri and Delaware, the statutory provision applies only to a devise of *real estate*, and, in Missouri, bars dower only in land of which the husband died seised. *Misso. St.* 228; *Dela. St.* 1829, 168; *Hamilton v. O'Neil*, 9 *Mis.* 11; *Dela. Rev. Sts.* 291; *Iowa Code*, ch. 88, sec. 1407. In Kansas, where a husband leaves no descendants capable of inheritance, the widow may elect either to take dower, or all the real estate, subject to debts. In the absence of an election within six months, she has power. *Kan. Comp. L.* c. 88, ss. 4, 6, 7. See *Infra*, for a late statutory alteration in England. The English rule is still adopted in Georgia. *Tooke v. Hardeman*, 7 *Geo.* 20.

Under section 10 of the intestate law of Pennsylvania of 1797, the widow's acceptance of a devise to her does not bar her of dower in land which her husband conveyed in his lifetime, though with general warranty, and in the conveyance of which she did not join. *Borland v. Nichols*, 12 *Penn.* 38.

In Maryland, a partial failure of a devise to a widow, who abides by the will, will not entitle her to compensation out of the residue of the estate, unless the failure is to such an extent as to make what she receives under the will less in value than her legal share of her husband's estate. *Thomas v. Wood*, 1 *Maryland Ch.* 296.

It has been recently held, in Virginia, that, to exclude dower, there must be an express declaration, or an implication equivalent to it. *Higginbotham v. Cornwell*, 8 *Gratt.* 83.

The repeated declarations of a widow, that she accepts and holds property bequeathed to her by her husband in full satisfaction of her interest in his estate, made with full knowledge of such property, and a refusal to claim more, where such property was given by the testator as a jointure, are a sufficient election to accept the same in lieu of dower. *Craig v. Walthall*, 14 *Gratt.* 518.

(See the case for a provision held to be intended in lieu of dower. *Id.*)

A widow must make an election, whenever her taking dower would clearly interfere with provisions in her favor, contained in the will. *Dixon v. McCue*, 14 *Gratt.* 540.

But, if she take a legacy provided by the will, to enable her to carry out certain of its provisions, and has meanwhile been under a misapprehension of her rights; even after the lapse of five years, she will not be deemed to have made her election, but may still have dower. *Id.*

In Alabama, where lands mortgaged are devised with other lands, and she does not dissent, she has no dower against the mortgagee. *Inge v. Boardman*, 2 *Ala. (N. S.)* 331. See *Reaves v. Garrett*, 34 *Ala.* 558.

Where any provision, either by bequest or devise, is made for the wife by her husband's will, and such provision does not



not now claim to be paid in preference to her, but, in order to have equity, must do equity, and allow her legacy in full.<sup>1</sup>

§ 23. With regard to the time and mode in which an election shall be made, it is held in England, in those cases where the widow is bound to elect, that, if she enters upon the estate devised and enjoys it, an election of such estate may be presumed. So, if she partially accede to a settlement, she will be bound for the whole. It is otherwise, where any act is done under an ignorance of her rights, or of the testator's circumstances.<sup>2</sup> So, if an *insane* woman waives the devise to her in due form, does not retract the waiver in any lucid interval, nor her guardian for her, but claims dower and petitions for an allowance; the waiver will bind her.<sup>3</sup> So, where real estate was charged by a testator with an annuity, for the benefit of the widow, and it was provided, that at her death the estate should be disposed of by the executors in accordance with the directions of the testator; held, the dissent of the widow from the will discharged the incumbrance, and the estate thereupon passed to the devisees.<sup>4</sup> And though a devise be not made expressly

<sup>1</sup> Anth. Shep. 451; *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. sen. 242; *Heath v. Dendy*, 1 Russ. 545; *Margaret. &c.* 1 Bland, 203.

<sup>2</sup> *Milner v. Harewood*, 17 Vez. 150; *Pusey v. Desbouvrie*, 3 P. Wms. 321; *Chalmers v. Storil*, 2 Ves. & B. 225;

*Duncan v. Duncan*, 2 Yea. 305; *Tooke v. Harden*, 7 Geo. 20; *U. S. v. Duncan*, 4 McL. 99. Some of these cases sustain the principles stated in the text rather by analogy than directly.

<sup>3</sup> *Brown v. Hodgdon*, 81 Maine, 65.

<sup>4</sup> *Armstrong v. Park*, 9 Humph. 195.

plainly appear from the will to have been intended in addition to her dower, her right of dower is barred by failure to dissent from the will within twelve months after its probate; and this rule applies where the will, purporting to dispose of both realty and personalty, and directing the entire state to be kept together, and the whole proceeds to be applied to the support of the testator's wife and children, is valid only as to the personalty. *Vaughan v. Vaughan*, 30 Ala. 329. In Missouri, a bequest of personal property by a husband to his wife would be no bar, under the dower act of 1845, § 10, to her right of dower in his real estate. *Pemberton v. Pemberton*, 29 Mis. 408.

Whether such a bequest would, if accepted, be a bar to the widow's right of dower in the residue of the personal estate, must depend upon the intent and meaning of the will of the husband. *Ib.*

A widow's right of election is a *personal right*, and not transmissible by descent. *Welch v. Anderson*, 28 Mis. 293.

Under the dower act of 1845, (R. C. 1845, p. 480,) a widow is dowable under § 1, and not under § 3, of the act, unless she makes an election to take under § 3, as prescribed in a following section of the act. *Ib.* And see *Watson v. Watson*, *Ib.* 800.

By the dower act of 1855, (R. C. 1855, p. 668,) no election is necessary in order to enable the widow to take under § 1; and an election so to take would not prevent her taking afterwards under § 11. Nothing but a binding contract or an estoppel *in pais* could restrain her from making her claim. *Watson v. Watson*, 28 Mis. 800.

In Delaware, no *advancement* made in the husband's lifetime shall affect dower. *Dela. Rev. Sts.* 279.

in lieu of dower, and therefore not a bar, yet the widow, by her own acts, may make it such. Dower, before assignment, being a *right of action* merely, may be released, without formal conveyance, by acts and agreements.<sup>1</sup> Thus, if she contracts with the heir, reciting in the agreement that she receives certain things in satisfaction of the devise and in lieu of dower; she shall be barred of the latter. So a widow, to whom property was bequeathed, not expressly but constructively in lieu of dower, having occupied the house devised to her, and received other property given her by the will, and disposed of a part of it, fourteen years after her husband's death claimed her dower. Held, a reasonable time for her election had elapsed, and she could not now waive the devise.<sup>2(a)</sup>

<sup>1</sup> Shotwell v. Sedam, 8 Ohio, 12.

<sup>2</sup> Reed v. Dickerman, 12 Pick. 146.

In South Carolina, it has been held, that, although a Court of Chancery might *imply* a provision by will to be a bar of dower, a Court of Law could not do it. Pickett v. Peay, 8 Con. S. C. 746.

A devised one-half of his estate to his daughter, and the other half to his wife. The latter married again, having first made a marriage settlement, by which the moiety of A's estate was conveyed to her second husband. He died and devised the same half to his widow, in lieu of dower; but she elected to take her dower, and so the devise lapsed. She then applied to have her dower in A's estate assigned to her. Held, as she had accepted the devise, her right of dower was barred. [DARGAN, Ch., dissenting.] Bailey v. Boyce, 4 Strogh. Eq. 84. Where a widow occupied a plantation for eleven years, under the will of her husband, she was held to have elected to take under the will, and could not claim dower, although the will contained no express provision that she should elect. Caston v. Caston, 2 Rich. Eq. 1.

In Arkansas, a widow is entitled to dower in the property of which her husband died seised, including slaves emancipated by will; and, if property be given her by the will in lieu of dower, she has until eighteen months after the probate of the will to elect whether she will take under the will, or renounce the bequests and claim dower in the estate. Crow v. Powers, 19 Ark. 424.

(a) In the absence of any election, whether the widow shall take her dower or the provision made for her by will, seems to be a point somewhat differently settled in different States. In Ohio, if she fails to elect, the law gives her dower. Walk. Intro. 325; Swan. 998-9. See Hamilton v. O'Niel, 9 Mis. 11. Though a late case decides that there shall be an im-election of the devise by possession. Thompson v. Hoop, 6 Ohio, N. S. 480.

But in Massachusetts, if the provision by will is more beneficial than dower, an acceptance of the former will be presumed. Merrill v. Emery, 10 Pick. 507. See Clay v. Hart, 7 Dana, 6; Malone v. Majors, 8 Humph. 577. The latter doctrine is, that such acceptance will be presumed in all cases, in the absence of any election. Pratt v. Felton, 4 Cush. 174. If the widow demand dower, and afterwards, being in possession of the land devised to her, lease it, and the lessee enter and occupy; this is not a sufficient election under the statute. *Ib.*

And the general rule undoubtedly is, that the widow will be understood to accept the devise or legacy, unless she expressly declare a contrary determination. As to the precise time and mode of making an election in the several States, see Mass. Rev. Sts. 410; Maine *Ib.* c 95; Walk. 325; Illin. Sts. 1842-3, 319; Anth. Shep. 50, 451; 1 N. C. Rev. Sts. 618; Swan, 998; Conn. Sts. 189; Verm. Rev. Sts. 289-90; Cummings v. Daniel, 9 Dana

361. *Bell v. Wilson*, 6 Ired. Equ. 1; *Armstrong v. Baker*, 9 Ired. 109; *U. S. v. Duncan*, 4 McL. 99; *Harvy v. Green*, 9 Humph. 182; Ala. L. 258; Mich. Rev. Sts. 254; *Hilliard v. Binford*, 10 Ala. 977; Ind. Rev. Sts. *Descent*. s. 41; Anth. Shep. 483, 648; 1 N. Y. Rev. Sts. 742; *Malone v. Majors*, 8 Humph. 577; Wisc. Rev. Sts. 835; Verm. Rev. Sts.; *Smith v. Smith*, 20 Vt. 270; *Huniershits*, 1 Met. Ky. Hawley, Palmer; *Huniershits v. Bernhard*, 1 Harr. 518; *Lewis v. Lewis*, 7 Ired. 72; *Hinton v. Hinton*, 6 Ib. 274; Dela. Rev. Sts. 29; N. C. St. 1848-9, 90; *M'Callister v. Brand*, 11 B. Mon. 370; *Barnett v. Barnett*, 1 Met. Ky. 254.

But in New York, it has been held, in Chancery, that, where a widow by deed relinquishes the testamentary provision, records the deed, and notifies the executors and trustees or the tenant of the land of her election, who thereupon recognise her right of dower and make payments on account of it; this is equivalent to the formalities prescribed by the statute, and an entry upon or suit for any part of the lands is sufficient. *Hawley v. James*, 5 Paige, 318. See *Palmer v. Voorhis*, 35 Barb. 479.

In Massachusetts, although provision is made for a widow in the husband's will, and though she fails to make her election within six months, she may still claim her dower, if it appear that the estate is insolvent, and the provision in the will wholly fail. By the Revised Statutes, (ch. 60, sec. 13,) if the widow is lawfully evicted of lands assigned as dower, or is deprived of the provision made for her by will or otherwise in lieu of dower; she may be endowed anew. Upon this ground the case was decided. *Thompson v. M'Gaw*, 1 Met. 66.

So, in Maine, if deprived of the provision in the will, she has dower. Or of any substantial part of it. *Hastings v. Clifford*, 32 Maine, 32.

And the same provision is held applicable, in Massachusetts, in case of a devise of all the testator's property to the widow, on condition that she pay all his debts, legacies, &c., as well as where there is a bequest of a certain sum of money or specified property. 1 Met. 66.

So, where the widow applied for her dower, and it appeared that a previous application had been made and refused, before there was sufficient evidence that she would lose her devise, and that she did not appeal from such decree; held, these facts were no bar to the present petition. *Thompson v. McGaw*, 1 Met. 66. So the provision of the Revised Statutes,

as to a widow's electing between her dower and the provision made for her by will, does not apply, where a widow claims her third of unbequeathed personal property in addition to the provision of the will. *Kempton*, 28 Pick. 168.

Devise, that the testator's widow "shall have her dower out of my estate, in the same manner she would be entitled to, if this will had not been made." Held, as she was hereby limited to dower, and excluded from her share of the personal property, the devise constituted a *provision* for her, within the meaning of St. 1838, c. 40; and, upon waiving it, she might claim an allowance from the personal property. *Crane v. Crane*, 17 Pick. 422.

A testator devised to his wife, during her widowhood, all his property, subject to debts and legacies, and appointed her his executrix. He also authorized her, during widowhood, to sell and convey so much of his real estate as she might judge necessary, &c., for payment of his debts, for support of herself and her children, and for their education. She accepted the trust and administered the estate. Within two years, she sold a part of the real estate, under the authority in the will, and soon afterwards married again. Subsequently, she sold the rest of the real estate for payment of debts, under a license of court, and with her husband conveyed the same, not reserving her dower, and having full knowledge of the situation of the estate. Thirteen years after the death of her second husband, she first claimed dower in the land sold under the license. Held, she had accepted the provision made for her by the will, and thus waived her claim for dower. *Delay v. Vinal*, 1 Met. 67. See *Holm v. Low*, 4 Met. 190.

Devise of parts of the real estate to the wife in fee, and of all the personal estate; the other parts of the real estate to be disposed of according to law. The wife having accepted the devise; held, a bar of dower. *Adams v. Adams*, 5 Met. 277.

Though the probate of a will made in vacation is invalid, yet, if acted upon by the executor in administering the estate, and by the widow of the testator, and other parties in interest, for the period of seven years, without objection; the widow will be deemed to have elected to take the provision made for her by the will, and cannot afterwards renounce such provision. *Saunders v. Saunders*, 14 S. & M. 81.

Where a widow has formally waived the provision in the will, a subsequent contract with the heirs and legatees to

accept it, and make no other claim on the estate, can have no effect on the action of the Probate Court. *Gowen, &c.*, 32 Maine, 516.

Where a widow, "under and by virtue of the last will" of her husband, released certain land mortgaged by him to the mortgagee, in consideration of a large sum, and of his relinquishing all claim upon certain other property of the testator, with the usual terms of a quit-claim deed; held, she could not afterwards elect to claim her dower, though within the statutory period. *Dundas v. Hitchcock*, 12 How. 256.

Where a widow remains in the mansion house, uses the property given her by her husband's will, and makes a will disposing of said property, which will is itself annulled by a subsequent event; she may renounce the testamentary provisions, and her motives in making such renunciation are not to be inquired into. *McCallister v. Brand*, 11 B. Mon. 870.

Where a limited power of disposition of certain property is given to a widow,

she may renounce on the ground of such limitation. *Ib.*

If a widow make a conditional renunciation within one year, and the contingency happen within that year, the renunciation is valid, though it be not recorded before the happening of the contingency. *Ib.*

Whether the renunciation must be recorded within the year or not, *Quære*. *Ib.*

The renunciation by a widow does not create a new right, but merely confirms a pre-existing right which the law creates in the right to elect. *Ib.*

A renunciation amounts to a transfer by the widow of her testamentary provision to the heirs and devisees, and entitles her to what the law gives her from them. *Ib.* Where the widow fails to assent within the time fixed by law, she cannot afterwards claim relief in equity, on the ground of mistake as to sufficiency of the estate to meet the charges upon it. Otherwise, where her acceptance of the devise is obtained by fraud. *McDaniel v. Douglas*, 6 Humph. 220.

## CHAPTER XI.

## ASSIGNMENT OF DOWER.

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| 1. Necessity of assignment.  | 20. Demand; costs.  |
| 2. Nature of estate before assignment; tenancy in common with the heirs, in Massachusetts, &c. | 22. Bill in equity for dower.   |
| 6. Assignment not required in equity.  | 27, and notes. Assignment by Probate Court; forms of proceeding; how far evidence of title; when adverse and compulsory, or otherwise; application for assignment—by whom; wrong assignment—how remedied; assignment—when it may be demanded. |
| 7. <i>Quarantine</i> .   | 28. Limitation of suit for dower.   |
| 11. Assignment by the heir or other tenant.  | 32. Death of widow.   |
| 15. Action at law for dower.   |   |
| 17. When the only remedy   |   |
| 18. <i>View</i> .  |   |
| 19. Damages.   |   |

§ 1. ALTHOUGH by the death of the husband the right of the widow to dower becomes *consummate*, yet, in general, she has no title to any specific lands, and no right of entry upon them, until her dower is *assigned* or *admeasured* by the heir or other tenant of the freehold, or in a course of legal proceedings. She has only a *potential* interest, or *right in action*.<sup>1(a)</sup>

§ 2. Upon this principle, a mere judgment for dower, in a suit brought by the widow, gives her no right of entry, like a judgment in other real actions; even though the dower is to be

<sup>1</sup> 8 Clarke, 463; Gilb. Ten. 26; 9 Mass. 13; Cox v. Jagger, 2 Cow. 638; 10 Wend. 528; 3 Ohio, 12; 13 Pick. 35; Robinson v. Miller, 1 B. Monr. 91; Johnson v. Shields, 32 Maine, 424; Pennington v. Yell, 6 Eng. 215.

(a) The rule applies to the alienee of her husband. Sharpley v. Jones; Sharpley v. Loper, 5 Harring, 378. Where, before assignment of dower, the widow married again; held, the second husband's interest in the land did not pass by an assignment of all that he held in right of his wife. Brown v. Meredith, 2 Keen, 527. It has been held in Vermont, that the wife, previously to her dower being as-

signed, has the same right of entry upon the land, whether as against a stranger or her co-tenant, which the husband had during his life. Gorham v. Daniels, 28 Verm. 600. In Delaware, dower is a right at common law; but the right to have it assigned by the Orphans' Court is derived from statute. Layton v. Butler, 4 Harring. 507.

assigned in common, and will, therefore, be rendered no more certain by the assignment.<sup>1</sup> So it is held, that the widow of a tenant in common cannot, before assignment, maintain a writ of partition.<sup>2</sup> So, before assignment, the claimant need not be party to an action for partition, although her writ of dower be pending in the same court. But, in New York, it is intimated, that, although the widow is not properly made a party to a partition among heirs, devisees, &c., and cannot recover her dower by process of partition, where the husband was sole seised; she is a proper party to such partition where he was a tenant in common.<sup>3</sup> So, in general, it is no defence to an ejectment against the widow, brought by the heir for lands descended to him, or by a devisee, that he has failed to assign dower therein. (a) That part of the land, which the widow is specially authorized to occupy without assignment, (as will be seen hereafter,) is, of course, excepted from the above remarks.<sup>4</sup>

§ 2 a. A quiet possession of the land and actual receipt of the rents and profits, for six years, are held not equivalent to a legal assignment, so as to give the wife a freehold estate, but constitute either a disseisin or tenancy at will. But where a mother

<sup>1</sup> *Hildreth v. Thompson*, 16 Mass. 191; Co. Lit. 84 b.

<sup>2</sup> *Brown v. Adams*, 2 Whart. 188.

<sup>3</sup> *Hoxsie v. Ellis*, 4 R. I. 123, *Coles v. Coles*, 15 John. 819.

<sup>4</sup> 8 Clarke, 360; *Evans v. Webb*, 1 Yea. 424; *Moore v. Gilliam*, 5 Mun. 846; *Branson v. Yancy*, 1 B. & Dev. Equ. 77.

(a) But, in Kentucky, neither the heir nor a purchaser from him can maintain an action against the widow for land inherited, till dower is assigned. *Robinson v. Miller*, 1 B. Mon. 93. In Alabama, the heir may recover the land from one to whom the widow conveyed before assignment of dower. *Wallace v. Hall*, 19 Ala. 867. Where a widow remains in possession of the land, the remedy of the heirs is at law, not in equity, unless there be some special reason to the contrary. *Egbert v. Thomas*, 1 Cart. 893. Where land was conveyed, with a covenant that the grantor was lawful owner, had good right to convey, and would warrant and defend, there being a claim for dower at the time, but no assignment; and afterwards the grantee was compelled to pay an annuity in lieu thereof: this was no breach of the covenant. *Tuite v. Miller*, 10 Ohio, 382.

In Iowa, in an action of right against the heirs, a widow, whose dower is unassigned, is not a proper party defendant; and, if made a party, the judgment recovered by the plaintiff cannot affect her dower.

The provision that a widow may petition for an assignment, at any time after twenty days from the death of her husband, does not affect the right of possession.

Where such right comes under the law of dower only, and not of homestead, she cannot claim possession by virtue of the latter. *Cavender v. Smith*, 8 Clarke, 360.

A widow should not be made a party to a bill in equity, to enforce a trust in favor of the heirs. *Stewart v. Chadwick* 8 Clarke, 463.



had the right of dower, and the land descended to her daughter, of whom she was guardian, and there was no assignment, but the daughter remained in the family of the mother; held, all the income that was practicable should be obtained from the estate, and the mother charged with two-thirds, but allowed to retain the rest in lieu of dower.<sup>1</sup>

§ 3. But, after dower has been set off, the widow may enter *before return of the writ*. So, after an assignment by commissioners, made with the assent of the widow and heir, and the report of which is subsequently accepted by the Probate Court; the widow, before such acceptance, may enter and take the crops sown by the heir before the assignment.<sup>2(a)</sup>

§ 4. It has been held,<sup>3</sup> that, before assignment, the widow may release to a party in privity or possession, but cannot transfer her right, as it rests only *in action*.<sup>4(b)</sup> So, it is held, that such right cannot be taken in execution. But a widow may assign her interest in her husband's estate, in equity.<sup>5</sup> And a conveyance by the widow of her dower, before admeasurement, is not so far void as to be set aside on application of a purchaser who has entered and enjoyed. He can only claim to have his title perfected. Though no transfer can be made, which will justify

<sup>1</sup> Windham v. Portland, 4 Mass. 384; Mathes v. Bennett, 1 Fost. (N. H.) 204.

<sup>2</sup> Co. Lit. 37 b. n. 2; Parker v. Parker, 17 Pick. 236.

<sup>3</sup> Saltmarsh v. Smith, 32 Ala. 404; Cox v. Jagger, 2 Cow. 638; Siglar v. Van Riper, 10 Wend. 414; Ritchie v. Putnam, 13, 524; Green v. Putnam, 1 Barb. 500;

Blain v. Harrison, 11 Illin. 884; Summers v. Babb, 13 Ill. 483; 32 Maine, 424.

<sup>4</sup> Mason v. Allen, 5 Greenl. 479; Shields v. Batts, 5 J. J. Marsh. 15; Summers v. Babb, 13 Ill. 483; Pennington v. Yell, 6 Eng. 215. Contra, Strong v. Olem, 12 Ind. 87.

<sup>5</sup> Powell v. Powell, 10 Ala. 900.

(a) Upon the equity of the statute giving dower, the widow will be allowed her portion of mesne profits from the death of her husband up to the period at which the dower shall be set off; and the court, upon proper application, will refer it to a master, to state the account and ascertain the widow's share. But this cannot be done by commissioners in dower, acting under the statute which directs the method of laying out dower. May v. May, 7 Flori. 207.

(b) Such right is not embraced by the Maine Rev. Stat. c. 91 sec. 1, abrogating the common law rule, by which disseisees are prevented from conveying. Johnson

v. Shields, 32 Maine, 424. The right is a *chose in action*, which may be reached by a creditor's bill. Stewart v. M'Martin, 5 Barb. 488.

In case of a release for an order, drawn by the heirs, though not accepted, the heirs may sue for possession. Matlock v. Lee, 9 Ind. 298.

Where a widow released her dower, and afterwards procured an assignment of dower, under which she entered and made a lease; held, the assignment gave her no new right, but merely defined what she had sold. Matlock v. Lee, 9 Ind. 298.



a suit for dower in the purchaser's own name.<sup>1</sup> So, although the widow before assignment is not seised, and cannot convey a legal title; she may make a *contract* concerning the land, which equity will enforce.<sup>2</sup> So a receipt for money received as a substitute for dower, given by a widow to the purchaser of the lands of her deceased husband from her sons, in ratification of an arrangement between her sons, and after consultation with them and her attorney, and due deliberation, she having received a payment under it, estops her from contesting its validity or claiming her dower.<sup>3</sup>

§ 5. The widow cannot *mortgage* her dower, before assignment.<sup>4</sup> And the interest of the widow, before assignment, is not a proper subject of *lease*. Hence a covenant, in an instrument purporting to be a lease of such interest, to pay her a certain sum annually as rent, in consideration of her forbearing to exercise her right of dower, is merely *personal*, and does not run with the land, or bind an assignee of the supposed lessee. Neither can such transaction have the effect of a *release*, which must operate presently and absolutely.<sup>5</sup> So, the widow having before assignment a mere *right of action*, this may be lost to her without the formality of a conveyance, as, for instance, by an award.<sup>6(a)</sup>

<sup>1</sup> Todd v. Beatly, Wright, 461; Douglass v. M'Coy, 5 Ohio, 527.

<sup>2</sup> Potter v. Everett, 7 Ired. Equ. 152.

<sup>3</sup> Simpson, 8 Barr, 199.

<sup>4</sup> Strong v. Bragg, 7 Blackf. 62. But

see Strong v. Clem, 12 Ind. 87.

<sup>5</sup> Croade v. Ingraham, 18 Pick. 35; Matlock v. Lee, 9 Ind. 298.

<sup>6</sup> Cox v. Jagger, 2 Cow. 688; 8 Ohio, 12.

(a) In Connecticut, upon a construction of the statute concerning dower, it has been held, that, immediately upon the husband's death, the widow becomes a tenant in common with the heirs, and may enter without an assignment. She is not regarded as a tenant under the heirs. Stedman v. Fortune, 5 Conn. 462. But in New York, the statute, substituting *ejectment* for the former remedy of the *writ of dower*, has not the effect to make the widow a tenant in common with the heirs. Her title is still a mere right of action. Yates v. Paddock, 10 Wend. 528. So in North Carolina. 1 Bad. & Dev. Equ. 77.

In Massachusetts, Vermont, Wisconsin and Michigan, the widow may occupy the land with the heirs, or receive one-

third of the profits, until they object. This was also allowed in England, by the ancient law, as "*rationabile estoverium in communi*." In Virginia, she may receive one-third of the profits, till assignment. Mass. Rev. St. 410; Mich. Rev. St. 268; Verm. Ib. 290; Wisc. Ib. 884; Vir. Code, 474; (Co. Lit. 84 b; Foster v. Gorton, 5 Pick. 185; 1 Smith's St. 170; Bolster v. Cushman, 84 Maine. 428.) In Maine, she shall have one-third of the rents and profits till assignment, if the husband died seised.

These provisions were probably intended to give the widow a remedy only against the heirs; enabling her to recover the rents and profits from her husband's death without demand, and making the amount of them the measure of her dam-

§ 6. In equity, a formal assignment of dower is deemed unnecessary. Thus, the widow's right may be reached by creditors, before assignment, by a process in Chancery.<sup>1</sup> So where an infant heir brought a bill in equity against the widow of the deceased, for an account of rents which the latter had received as guardian; and the widow was entitled to dower, but it had never been assigned; held, she should be allowed, in accounting, one-third of the rents.<sup>2</sup> And the widow of a mortgagor may have a bill in equity to redeem before any assignment of dower, because such assignment does not affect her right of redemption, and because she has no right to demand such assignment as against the mortgagee, before she redeems. Nor is an assignment by the heirs necessary, because she could not redeem a part of the land without the whole.<sup>3</sup>

§ 7. To the ancient rule at law, that an assignment of dower was necessary to perfect the title of the widow, there was one exception. *Magna Charta* provided, that the widow might remain in her husband's capital mansion-house, with the privilege of reasonable *estovers* or maintenance, for *forty days* after his death, during which time her dower should be assigned. These forty days are called the widow's *quarantine*. Some have said, that, by the ancient law, this time was an entire year.<sup>4(a)</sup>

<sup>1</sup> 4 Kent. 61

<sup>2</sup> Hamilton v. Mohun, 1 P. Wms. 118.

<sup>3</sup> Gibson v. Crehore, 5 Pick. 149.

<sup>4</sup> Co. Lit. 82, b. Seider v. Seider, 5 Whart. 208.

ages. It seems, they do not authorize *assumpsit* against any other tenant of the freehold than the heirs, thereby allowing the title to land to be tried in this form of action. Gibson v. Crehore, 3 Pick. 475.

(a) In most of the States, a similar provision has been expressly made by statute. In Massachusetts, New Hampshire and New York, the widow is entitled to possession of the mansion-house for forty days; in Arkansas, two months; in Maine, ninety days; in Ohio, Wisconsin, Minnesota and Michigan, and substantially in Rhode Island, one year. In Indiana, Florida, Virginia, Kentucky, Rhode Island, New Jersey, Alabama, Florida, Mississippi, Texas, Illinois and Missouri,

she may occupy till dower is assigned. In Illinois, Kentucky, Indiana, Missouri, New Jersey, Virginia and Alabama, she may also occupy the plantation or mesuage. In Arkansas, the mansion and farm. In Georgia, the mansion and tenements. Mass. Rev. Sts. 411; 4 Kent, 62; Walk. Intro. 231, 324; 1 N. C. Rev. Sts. 617; Me. Rev. Sts. 898; Ark. Rev. Sts. 388-9; Mich. Rev. Sts. 265; Wisc. Rev. Sts. 385; Ind. Rev. L. 209; 1 Vir. Rev. C. 170; Ala. L. 260; Misso. Sts. 229; Illin. Rev. L. 237; N. J. Rev. C. 897; 1 Ky. Rev. L. 578; Pharis v. Lachmere, 20 Ala. 662; Springle v. Shields, 17, 295; Shelton v. Carroll, 16, 148; Singleton v. Singleton, 5 Dana, 89; Rambo v. Bell, 8 Kelly, 207; Thomp. Dig. Flori-

§ 8. Quarantine is a *personal* right, not assignable, and said to be forfeited, by implication of law, by a second marriage; though it has been held that the statutory privilege, of occupying the dwelling-house till assignment, is not lost by this cause, and in Missouri that the right is assignable. So the heirs may recover the mansion-house from one claiming by a transfer from the widow before assignment of dower.<sup>1</sup> But, in ejectment by a grantee of the husband, even though the premises are held by a tenant of the widow, yet, if she has not given a lease or actual transfer of her privilege of possession, and she be let in to defend in the action, she may rely on her right of possession under the statute.<sup>2</sup>

§ 9. It is said, notwithstanding the widow's right of occupancy, the legal title is still in the heir. But it has been held, that the heir cannot maintain an action for trespass to the mansion-house land.<sup>3</sup>

§ 10. The widow's right to occupy the mansion usually ceases upon expiration of the *quarantine*, though dower have not been

<sup>1</sup> Co. Lit. 92, b; Wallis v. Doe, 2 Sm. & M. 220; Stokes v. McAllister, 2 Misso. 168.

<sup>2</sup> Doe v. Bernard, 7 S. & M. 819; Miss. Sts. H. & H. 597, s. 47.

<sup>3</sup> Branson v. Yancy, 1 Bad. & Dev. 77; Latham v. Latham, 3 Call. 181.

da Stat. tit. 1, c. 2, s. 2; Miss. Rev. C. ch. 50, art. 174; R. I. Rev. Sts. ch. 202, s. 6; Hart. Dig. (Texas) 287; Minn. Comp. Sts. c. 36, s. 23; N. H. L. 1862, c. 2599.

By late acts in Connecticut, the widow is tenant in common, of her dower, with the heirs. Conn. Sts. 1855, c. 56; Stedman v. Fortune, 5 Conn. 462. So in Vermont. Verm. Rev. Sts. 1863, c. 55, s. 10. In Massachusetts, she may occupy with the heirs or receive one-third of the rents till assignment. Mass. Gen. Sts. c. 90, ss. 7, 18. In New Hampshire, she has one-third of the rents, &c., till assignment. N. H. L. 1862, c. 2599. (See p. 193.)

In Virginia and Kentucky, if deforced before assignment, the widow shall have a *vicontiel* writ, in the nature of "*de quarantina habenda*" 1 Vir. Rev. Code. 170.

The statute of New York relates to lands in which she has a right or claim of dower. It does not apply to leasehold

property. Voelckner v. Hudson, 1 Sandf. 215.

In Kentucky, where the widow left the mansion with her family, and it was leased by the administrator to her father; held, the lease was to be regarded as for the benefit of the heirs, and not as continuing the widow's possession. Burk v. Osborn, 9 B. Mon. 579.

In Arkansas, the husband's usual dwelling is assigned for dower, unless serious injury would be thereby occasioned. (See Meniffee v. Meniffee, 8 Eng. 9.) In Indiana, the term *messuage* is held to include a few acres of land adjoining the dwelling-house, and peculiarly appropriated thereto. Guines v. Wilson, 4 Blackf. 334. In Alabama, the widow of one residing in a town cannot retain the rents of a plantation, of which her husband died seised, until it has been assigned to her for dower, on the ground of quarantine. Smith v. Smith, 13 Ala. 329.

assigned; and the heir may enter and bring a suit. Trespass lies against her; for, she being neither a joint tenant nor tenant in common with the owner of the inheritance, the latter would otherwise be without remedy.<sup>1(a)</sup>

§ 11. By the ancient common law, dower was assigned by the heir, subject to the judgment of the "*pares curiæ*," in case of any dispute. But the assignment might be made by any tenant of the freehold; and this seems to be the universal rule in the United States. If the land is in possession of a wrongful occupant, as, for instance, a disseisor or abator, the widow is not bound to wait for her dower until the heir asserts his title, but may compel the *terre-tenant* to make an assignment. This will be valid, unless he is in possession by fraud and covin of the widow, for the purpose of obtaining dower; in which case the heir may avoid the assignment, although "equally made by the sheriff after judgment." None, however, can assign dower, except those who have the freehold, and against whom an action would lie.<sup>2</sup>

§ 12. Lord Coke says,<sup>3</sup> if the husband have conveyed several lands to different persons, and one of them assign to the widow in satisfaction of her whole dower, the others cannot avail themselves of such assignment. But if a part of the lands descend to the heir, and he assign in full satisfaction of her whole dower, a grantee of another portion of the land, being sued, may vouch the heir, who may plead this assignment in bar, there being no privity between the heir and the grantee.(b)

<sup>1</sup> Jackson v. O'Donaghy, 7 John. 247; 669; Norwood v. Marrow, 4 Dev. & B. McCully v. Smith, 2 Bai. 103. 442.

<sup>2</sup> Co. Lit. 35 a; 3 Co. 784; 4 Dane, <sup>3</sup> Co. Lit. 35 a; (See Perk. s. 402.)

(a) The action brought (in South Carolina) was *trespass to try title*. This or some other similar remedy must, of course, be requisite. In Indiana, if the widow enter upon *any other lands*, than "the mansion-house and messuage thereunto belonging," and apply the proceeds to her own use, she is a wrongdoer, and liable to the owner for the rents and profits. 4 Blackf. 331. See Taylor v. McCrackin, 5 Blackf. 261; Stokes v. McAlister. 2 Misso. 163. In Arkansas, the

heir is required to assign dower *as soon as possible*. Rev. Sts. 340.

(b) In Virginia, Kentucky, Missouri, New Jersey and Delaware, (1 Vir. Rev. C. 170; 1 Ky. Rev. L. 574; Misso. St. 231; 1 N. J. Rev. C. 398; Dela. St. 1829. 165; Rev. St. 292,) statutes provide, that it shall be no defence against a suit for dower, that another person has assigned it, unless this assignment be shown to be in satisfaction of dower from the lands in question.

§ 13. In some cases, where the widow brings a suit against the terre-tenant, and the latter vouches the heir, the tenant may "go in peace," and judgment shall be given against the heir alone. Thus, if the heir is vouched as having assets in the same county, which the demandant acknowledges, judgment shall be against the heir; otherwise, against the tenant, and for him *over in value*. If the heir has assets in the county only in part, the judgment is conditional.<sup>1</sup>

§ 14. The right of the heir to assign dower is not impaired by the statutory provisions for such assignment, which exist in all the States, and will be hereafter mentioned.<sup>2</sup>

§ 15. As has been already intimated, the widow may maintain an action for her dower, where it has not been voluntarily assigned her, against the heir, or the tenant or immediate owner of the freehold. If no dower has been assigned, the form of action is a writ of dower, *unde nihil habet*; if it has been assigned in part, a *writ of right of dower*, which lies also in the former case.<sup>3(a)</sup>

§ 16. The writ *unde nihil habet*, lies only against a tenant of the freehold.<sup>4(b)</sup>

<sup>1</sup> Co. Lit. 39 a, n. 6.

<sup>2</sup> Moore v. Waller, 2 Rand. 418.

<sup>3</sup> 4 Dane, 665, 672; Stearns on R. A. 400.

<sup>4</sup> Miller v. Beverly, 1 Hen. & M. 368; Hurd v. Grant, 3 Wend. 340.

(a) The writ *unde nihil habet* is the only one provided in Massachusetts, Maine, Virginia, (it seems) and Kentucky. In New Hampshire, an action of dower lies, in one month after demand, upon the party seised of the freehold, if in the State; otherwise upon the tenant. The proceedings in such suit are similar to those upon a petition for dower in the Probate Court. Mass. Rev. St. 616; 1 Smith's St. 168; 1 Ky. R. L. 578; N. H. Rev. St. 412. See Kidder v. Blaisdell, 45 Maine, 461.

(b) In New York, ejectment to recover dower will lie against a tenant who has an estate or interest less than a freehold, and before dower has been assigned. Ellicott v. Mosier, 11 Barb. 574

Such action must be brought against the actual occupant, if any. *Ib.*

A verdict in a real action, as of dower, in favor of one of several defendants, on

his separate plea, will not avail another defaulted. Lecompt v. Wash, 9 Miss. 551 With regard to the *description* of the property in which dower is claimed, in an action for dower; if the writ claims dower in the *whole*, while the evidence shows title to it in only a *moiety*, the demandant will recover. Hamblin v. Bank, &c., 1 Appl. 66. A vendor, by articles, before making a deed, and while any part of the consideration remains due, is so far tenant of the freehold, as to make him a proper party to the action of dower *unde nihil habet*. Jones v. Patterson, 12 Penn. 149. See Shawe v. Boyd, *Ib.* 216.

It seems. *non-tenure* is a good plea in bar. Casporns v. Jones, 7 Barr, 120. In Maine, it must be pleaded in abatement. Manning v. Laboree, 38 Maine, 343. If the defendant in a suit for dower buy an outstanding title after suit is brought, this is no defence. *Ib.* See Taylor, 8

§ 17. A suit for dower, in most of the States, may always be brought at the election of the widow, and it is the only remedy, where the right is not conceded, but dower is claimed in lands of which the husband was *not seised* at his death; as, for instance, those which he conveyed or mortgaged, without her signature to the deed. And, if he conveyed different parcels to several persons, the widow shall be endowed proportionally from each, and they cannot be joined in suit. So it has been held, that the Probate Court cannot assign dower in an *equitable* estate.<sup>(a)</sup> But, if a mortgagee of the husband assent to an assignment by the Probate Court, although it has no jurisdiction in such case, the assignment will be good. Without such assent, it would be absolutely void.

§ 18. If the widow resorts to an action, the assignment is made upon execution, by the sheriff, and, in general, upon a *view*. Hence a description by metes and bounds in the writ is unnecessary.<sup>(b)</sup>

§ 19. By virtue of the ancient statute of Merton, 20 Hen. 3,

Harr. Dig. (Suppl.) 716. A declaration for dower need not show the deforcement of the demandant, or the possession of the defendant. *Foxworth v. White*, 5 Strobb. 113.

In Rhode Island, non-joinder of one tenant of the freehold, as defendant, is good cause of abatement, in an action of dower, brought against another. *Ellis v. Ellis*, 4 R. I. 110.

Although, at common law, a writ of dower *unde nihil habet* lies in general only against the tenant of the freehold, such writ may be maintained in Rhode Island against a tenant for years in possession, by force of § 5 of the "act relating to dower and the assignment thereof." Dig. 1844, p. 188. *Ib.*

Demand must first be made in pursuance of the statute, and damages are recoverable only from demand. *Ib.*

(a) So the county courts cannot try a contested claim of dower; they can only assign dower where the right is conceded. *Garris v. Garris*, 7 B. Mon. 461; *Murphy v. Murphy*. *Ib.* 232.

So, in Mississippi, the proper remedy for one, who resists a claim of dower on the ground of paramount title in himself, is ejectment; not in the Probate Court,

nor in equity, for an injunction against the probate decree. So, the widow's remedy, if she is out of possession, is ejectment. *Pickens v. Wilson*, 18 S. & M. 691.

In the latter case, the Probate Court has jurisdiction, as between the widow and her husband's representatives, but its judgment cannot affect the rights of the person in possession, even though he appears and answers in the suit. *Bisland v. Hewett*, 11 S. & M. 164.

(b) In Illinois, such description is given in the judgment upon petition, and in Kentucky, in the judgment upon a writ of dower. In Delaware, no view is granted. And in New York, it is not of course allowed, but only upon affidavit, for cause. *Sheafe v. O'Neil*, 9 Mass. 9; *Ind. Rev. L.* 210; *Rintch v. Cunningham*, 4 Bibb, 462; *Fosdick v. Gooding*, 1 Greenl. 80; *Hawkins v. Page*, 4 Mon. 187; *Watkins*, 9 John. 245; *Pinkham v. Gear*, 3 N. H. 168; *Fisk v. Eastman*, 5 243; *Co. Lit.* 84 b.; *Ayer v. Spring*, 10 Mass. 88; *Ill. Rev. L.* 236, 7; *Dela. St.* 1829, 164; *Rev. St.* 292; *Taylor v. Brod-rick*, 1 Dana, 847; *Vischer v. Conant*, 4 Cow. 896; *Ostrander v. Kneeland*, 2 John. 276; *Nance v. Hooper*, 11 Ala. 552; *Wisc. Rev. St.* 384.



in a suit for dower, the widow may have judgment for damages(a) from the husband's death, as well as for the land; but only where the husband died seised. As against an alienee, they are recovered from the time of demand and refusal.(b) But having recovered judgment for her dower, with damages, she cannot maintain a separate action for the use of the premises, from the date of the verdict to the time of assignment.<sup>1</sup>

<sup>1</sup> Purrington v. Pierce, 1 Adams, 529.

(a) A judgment in dower, for an unas-  
certained sum of money, is void. *May v.*  
*May*, 7 Florida, 207.

(b) The husband is held to have died  
*seised*, though he mortgaged the land and  
the debt had become due, if there had  
been no entry or foreclosure. *Hitch-*  
*cock v. Harrington*, 6 John, 290.

The principle in the text has been  
adopted by statute in Wisconsin, Penn-  
sylvania and Kentucky, (where the statu-  
te of Merton seems to be literally copied)  
and was settled by an early decision and  
is now adopted by statute, in New York.  
So in New Jersey. So the statutes of  
Merton and Westminster, respecting  
dower, have always been in force in Del-  
aware. In Maine, New Hampshire and  
Rhode Island, damages are recovered  
only from demand. In Indiana, damages  
are recovered from a demand, unless  
there is a minor heir. In Missouri, dam-  
ages are recovered to the time of trial.  
In Alabama, from commencement of  
suit; but not in the Orphan's Court. 4  
Kent, 64; Co. Lit. 32 b; N. H. Rev. St.  
412; *Embree v. Ellis*, 21 John, 119;  
Purd. Dig. 221; *Sharp v. Pettit*, 3 Yea.  
88; *Marshall v. Anderson*, 1 B. Mon. 198;  
*Layton v. Butler*, 4 Harring, 507; *Mc-*  
*Clanahan v. Porter*, 10 Mis. 746; *Rankin*  
*v. Oliphant*, 9, 239; *Beaners v. Smith*,  
11 Ala. 20; *Smith v. Smith*, 18, 329; 1  
N. J. Sts. 397; 1 N. Y. Rev. St. 742; 1  
*Smith*, (Maine,) 169; N. H. L. 88; R. I.  
L. 189; Ind. Rev. St. 240; 1 Ky. Rev.  
L. 574; 5 Mon. 288. See *Davis v. Lo-*  
*gan*, 9 Dana. 186; *McElroy v. Wathen*,  
3 B. Mon. 137; *Ganton v. Bates*, 4, 367;  
*Seaton v. Jemison*, 7 Watts, 533; Wis. Rev.  
Sts. 335; *Francis v. Garrard*, 18 Ala. 794.

In Iowa, damages are recovered. *O'-*  
*Ferrall v. Simplot*, 4 Iowa, 881.

In South Carolina and Ohio, no dam-  
ages are recovered. Interest, or rents  
and profits are allowed in South Carolina,  
where the husband died not seised. In  
Maine, the widow has one-third of the  
rents till assignment; also, damages after

demand. In Virginia, she has an ac-  
count of profits, as against a purchaser  
from the husband, only from the date of  
the subpoena. In Maryland, from a de-  
mand and refusal, and only in a court of  
chancery. An alienation by the widow  
of her right to dower, pending a suit  
for rents and profits, is a bar to such  
suit. In case of a partnership, there  
is no right of dower till the accounts  
are adjusted and the debts paid. The  
widow cannot, therefore, claim rents and  
profits from the husband's death. In Wis-  
consin, the widow receives one-third of  
the profits from the husband's death, of  
the heir; of others, only from demand.  
If the heir alienate the land, he is liable  
to damages from the husband's death to  
such alienation, not exceeding six years,  
and not recoverable against both the heir  
and purchaser. *Heyward v. Cuthbert*,  
1 McC. 386; *Wright v. Jennings*, 1 Bai.  
277; *McCreary v. Cloud*, 2, 343; *Rickard*  
*v. Talbird*, Rice, 158; *Bank, &c., v. Dun-*  
*seth*, 10 Ohio, 18; Me. Rev. St. 392; *Tod*  
*v. Baylor*, 4 Leigh, 498, *Steiger v. Hil-*  
*len*, 5 G. & J. 121; *Tellman v. Bowen*, 8,  
883; *Kiddall v. Trimble*, 1 Md. Ch. 143;  
*Goodburn v. Stevens*, Ib. 420; Wisc. Rev.  
Sts. 335. It has been held, in New  
Jersey, that *tout temps prist* is a good plea  
for the heir or devisee of the husband, if  
he died seised, and he need not aver in his  
plea that he is heir or devisee. *Hopper*  
*v. Hopper*, 1 N. J. 543. But see 2 Ib.  
715. But it is not a good plea for the  
husband's alienee, who is liable to dam-  
ages from the husband's death. *Wood-*  
*ruff v. Brown*, 4 Harri. 246.

In Delaware, interest may be recovered  
on arrears of an annuity given in lieu of  
dower, though there be a power of dis-  
tress. *Houston v. Jamison* 4 Harr. 330.

In Missouri, execution runs only against  
the land subject to dower. If the widow die  
before judgment, it is rendered for dam-  
damages only. Misso. Sts. 232, 238. Ohio  
Sts. 1842, 6; *Woodward v. Woodward*,  
2 Rich. Equ. 23; Maine Sts. 1852, 255.



§ 20. In England, a widow cannot recover her dower without a previous *demand* for it. It is a good plea by the defendant, that he hath been always ready and yet is to render dower; because the heir holdeth by title, and doth no wrong till a demand be made, which manifestly distinguishes this case from other actions for recovery of land and damages. And it is said the widow shall have no damages, where, before assignment, she has had the use of the land; as where she has an estate for years.<sup>1</sup>(a) A demand for dower may be *by parol*, and need not be in presence of witnesses. An agent or attorney may make it without written power of attorney, and elsewhere than on the land. It should describe the land with reasonable certainty,(b) and be made upon him who is tenant of the freehold at the time of demand, though he were not such tenant at the death of the husband.<sup>2</sup>(c)

<sup>1</sup> Co. Lit. 83 a, and n. 8; acc. *Ford v. Erskine*, 45 Maine, 484.

<sup>2</sup> *Curtis v. Hobart*, 1 Adams, 280; *Jackson v. Churchill*, 7 Cow. 287; *Hitchcock v. Harrington*, 6 John. 290; *Baker*

*v. Baker*, 4 Greenl. 67; *Bear v. Snyder*, 11 Wend. 592; *Leavitt v. Lamprey*, 18 Pick. 382; *Page v. Page*, 6 Cush. 196; *Haynes v. Powers*, 2 Fost. (N. H.) 590; *Watson v. Watson*, 1 Eng. L. & Equ. 871.

(a) In general, a previous demand is necessary to maintain an action for dower in the United States. Otherwise in New York; and even damages may be recovered without demand. But the plea of "*tout temps prist*," is a good defence against the claim for damages. By the statute of New Jersey, the heir of a husband, who dies seised, must assign dower without demand, under penalty of damages. *Hopper v. Hopper*, 2 N. J. 715. See *Pond v. Johnson*, 9 Gray, 193.

(b) If the widow claims the benefit of a demand, signed by attorney, by bringing her action upon it, that is competent proof of the attorney's authority. *Stevens v. Reed*, 37 N. H. 49.

A demand, made by an attorney in fact, in virtue of a power authorizing him, for the constituent, and in her name and behalf, to demand her just dower to be assigned to her, "in any and all of the before-mentioned premises, or any other," no premises whatever being mentioned, is insufficient; although such authority is ratified by a second power of attorney, in which she recites the former, and authorizes the attorney to commute for and settle all her claims of dower in the prem-

ises, no premises being described. *Sloan v. Whitman*, 5 Cush. 532.

In Massachusetts, the demand must be a *personal* one; and, if there are more tenants than one of the freehold, it must be made on each of them. *Burbank v. Day*, 12 Met. 557. A written demand upon all, served by a sheriff, by a copy delivered to one, and copies left at the dwellings of the others, is insufficient. *Ib.*

Reference to an unrecorded deed, made forty years before, is insufficient. *Ford v. Erskine*, 45 Maine, 484.

In New Hampshire, a demand will not be vitiated by its requiring the dower to be set off in thirty days. The statute does not require any time to be specified in the demand. *Stevens v. Reed*, 37 N. H. 4

(c) In Indiana, if the heirs, &c., reside out of the county where the major part of the lands lie, or any of them are minors without a guardian, a demand is unnecessary. A similar provision is made in Illinois. Ind. Rev. L. 209-10; Illin. Rev. L. 238.

In New York, if the tenant of the freehold assign during quarantine, no costs shall be recovered in an ejectment for

§ 22. Dower is an important subject of *equity* jurisdiction; which has become so common a resort for the enforcement of this claim, (in England,) that a distinguished judge remarked, that writs of dower had almost gone out of practice. This jurisdiction was never questioned for all purposes of mere *discovery*. The difficulty of obtaining access to the title deeds in the hands of the heir; of ascertaining the precise lands from which dower is to be assigned, and their relative value; and of procuring a fair assignment of one-third of the estate; presents a strong case for the interposition of Chancery, to remove all impediments in the way of the legal title. And although the further power of *relief* was formerly doubted, it is now fully settled that equity has in all cases concurrent jurisdiction, through commissioners or otherwise, actually to assign dower, unless the title is disputed, and then it sends the case to an issue at law. If the estate is merely equitable, Chancery is said to have *exclusive* jurisdiction; and the Court of Chancery asserts its full concurrent jurisdiction with other courts, to settle even a disputed legal title.<sup>1</sup>(a) It was remarked by Lord Alvanley, then Master of the Rolls, in a case which has been called "the pole-star of the doctrine," that a dowress stands on the same footing as an

<sup>1</sup> Wild v. Wells, Tothill, 145; Goodenough v. Goodenough, Dickens, 795; Phares v. Walters, 6 Clarke, 106; Gano v. Gilruth, 4 Greene, 458; Swain v. Perrine, 5 John. Cha. 482; Herbert v. Wren, 7 Cranch, 870; 1 Story on Equity, 576, 577-8; Powell v. Monson, &c., 3 Mas. 847; Wells v. Beall, 2 Gill & J. 468; Steiger v. Hillen, 5 Gill & J. 127; Grayson v. Moncure, 1 Leigh, 449; Kendall

v. Honey, 5 Monr. 284; Stevens v. Smith, 4 J. J. Mar. 64; Badger v. Bruce, 4 Paige, 98; London v. London, 1 Humph. 1; LeFort v. Delafield, 8 Edw. 82; Scott v. Crawford, 11 Gill & J. 879; Marshall v. Anderson, 1 B. Monr. 198; M'Mahan v. Kimball, 3 Blackf. 12; Blain v. Harrison, 11 Illin. 384; Kiddell v. Trimble, 1 Md. Cha. 143.

dower. But if, after quarantine, he offer to assign, though before suit brought, costs are allowed. Yates v. Paddock, 10 Wend. 528. In South Carolina, the heir or other owner must pay the cost of assignment, whether by his own act or process of law, even though he return to the summons that he was ready and offered to assign before it was issued. Harshaw v. Davis, 1 Strobb. 74.

(a) But where the husband's seisin is disputed, it is usual to send the case to law. Tellman v. Bowen, 8 Gill & J. 338. On the other hand, equity may be called

upon to interfere by injunction with a suit at law for dower. But this it will not do, except in case of some forfeiture or bar of dower, not provable at law, but only in equity. There must have been something received by the widow, which was both paid and accepted as an equivalent for dower. O'Brien v. Elliot, 8 Shepl. 125. Where a bill for dower is filed against a purchaser from the husband, who files a cross bill for indemnity, (on his covenants,) the former will be continued, to abide the result of the latter. Lawson v. Morton, 6 Dana, 471. (p. 201.)

infant, in the view of equity, and that it would be unconscionable to turn her over to law for the recovery of a provision necessary to her immediate subsistence, when she has been compelled to resort to equity for discovery.<sup>1</sup> And, in some respects, Chancery gives a relief more perfect than can be obtained at law. Thus, although at law the widow recovers damages from the time of demand, yet, if either she or the tenant dies before they are assessed, they are thereby lost.(a) While equity, although awarding no damages *as such*,(b) in this case, as in all others, will order an account of rents and profits from the husband's death, if he died seised.(c)

§ 23. But though, in favor of the widow, the interposition of Chancery may sometimes be peculiarly requisite in cases of dower, yet, in general, *equity follows the law*, the parties are to stand on their legal rights, and nothing will be effectual as a bar of dower in equity which would not be such at law, unless there be fraud or imposition, or some counter equity against the widow's claim. Thus equity will not cure any defect in the form of a release of dower. So courts of equity will not permit an equity to be interposed to defeat the dower. But where the widow applies for equitable relief, she cannot resist an equitable defence; as against a purchaser for a valuable consideration, who is ignorant of her claim.<sup>2</sup> (p. 200, n. a.) So there can be no dower in equity, unless the husband was seised during coverture.<sup>3</sup> And whether Chancery will sustain a bill for discovery and relief, in favor of the widow, against a purchaser of the land for valuable consideration and without notice, is a doubtful point.<sup>4</sup>

<sup>1</sup> 1 Story, 579; *Curtis v. Curtis*, 2 Bro. Cha. 620, 630, 634.

<sup>2</sup> *Powell v. Monson. &c.*, 3 Mas. 860; *Mayburry v. Brien*, 15 Pet. 21; *Blain v.*

*Harrison*, 11 Illin. 384. See *Egbert v. Thomas*, 1 Cart. 393; 29 Ill. 442.

<sup>3</sup> *Dennis v. Dennis*, 7 Blackf. 572.

<sup>4</sup> 1 Story, Equ. 585.

(a) It has been seen that this defect in the law has been remedied in some of the States.

(b) Otherwise in Tennessee. *London v. London*, 1 Humph. 1. It is held in Maryland, that equity alone can give damages against an alienee of the husband. *Kiddall v. Trimble*, 1 Md. Ch. 143. A suit in equity does not lie for rents and profits, after an unsuccessful suit at law. *Ib.* In Alabama, damages

are allowed on the ground of title, and interest upon the arrears. *Beavers v. Smith*, 11 Ala. 20.

(c) In England, by a recent act, and also in New York, such account is limited to two years previous to commencement of suit. The rents and profits go to the executor, not to the heir, of the widow. 1 Story, s. 577; *Johnson v. Thomas*, 2 Paige, 377; 4 Kent, 70 and n. 2; *Coons v. Nall*, 4 Lit. (Ky.) 264.

§ 24. To a bill in equity to recover dower in lands aliened by the husband during coverture, without the consent of the wife, or evidence of her private examination and relinquishment, it is not necessary to make the heirs of the husband, or any purchasers except the holders of the land, parties.<sup>1</sup>

§ 25. A bill against several purchasers of separate and distinct tracts, to recover dower in each tract, is not multifarious, though the plaintiff may elect to proceed against each separately.<sup>2</sup>

§ 26. Generally speaking, in America, fewer cases occur in regard to dower, in which the aid of a court of equity is wanted, than in England, from the greater simplicity of our titles, the rareness of family settlements, and the general distribution of property among all the descendants in equal or nearly equal proportions. Such instances, however, sometimes occur. As where the husband was a tenant in common, and a partition, account, or discovery is rendered necessary. So where the lands are held by various purchasers; or the relative values are not easily ascertainable, as in the case when they have become the site of large manufacturing establishments; or where the right is affected with numerous or conflicting equities.<sup>3(a)</sup>

§ 27. In the United States, suits for dower, both at law and in Chancery, are comparatively of rare occurrence. The statute law of all the States provides a summary mode for obtaining an assignment of dower, by application or petition to the Prerogative, Probate or Orphan's Court, having jurisdiction of the estates

<sup>1</sup> *Boyden v. Lancaster*, 2 Patt. & Heath, (Va.) 198.

<sup>2</sup> *Id.*  
<sup>3</sup> *Ub. Sup.*

(a) In New Jersey, although possessing a court with full Chancery powers, dower was formerly considered as exclusively within the cognizance of the common law courts, except for discovery. By a late statute, however, Chancery jurisdiction upon this subject is distinctly recognized. *Harrison v. Eldridge*, 2 Halst. 401-2; N. J. St. 1845, § 2.

The courts of Chancery, in Arkansas, have jurisdiction in matters of dower, especially where the lands lie in different counties; notwithstanding the jurisdiction given to the Probate courts. *Meni-*

*fee v. Meniffee*, 8 Eng. 9. Where the husband was joint tenant, held, the widow, in a bill in equity for dower, against the administrator, might unite the other tenant, or, in case of his death, his heirs, as defendants, so that the lands might be divided, and her dower assigned. *Ib.* When, on a bill in equity for dower and the settlement of accounts, between a widow and the administrator, it appears that she has retained a gold watch belonging to her husband; the court may allow her to keep the watch, and charge her with its value. *Ib.*

of persons deceased.(a) The assignment is made by commissioners or a special jury, after notice to all parties interested.(b) It has already been stated, that this course can, in general, be resorted to, only where the husband died seised of the land from which dower is claimed, and the widow's right to dower is not disputed by the heirs or devisees.<sup>1</sup>(c)

<sup>1</sup> Mass. Rev. St. 409; 4 Kent. 72. See *Stiver v. Cawthorn*, 4 Dev. & B. 501; Me. Rev. St. 451. In Mississippi, the Pro-

bate Court is said to have full jurisdiction of the claim of dower in all cases. *Caruthers v. Wilson*, 1 Sm. & M. 527.

(a) In Massachusetts, this mode of assignment, though immemorially practised, is said to have been authorized merely by an *inference* from certain statutes. *Sheafe v. O'Neil*, 9 Mass. 10-1. A judge of probate has no authority, under Massachusetts Revised Statutes, ch. 60, s. 3, to assign dower in *mortgaged* lands. *Raynham v. Wilmarth*, 18 Met. 414. But such assignment is valid, if made with consent of the heir and mortgagee. *Draper v. Baker*, 12 Cush. 288. By a late statute, (1860, 343,) where a testator provides by his will that his widow shall have the use and improvement of an undivided part of his real estate for her life or widowhood; the Probate Court may set off her interest, as in case of dower.

(b) Notice to the administrator, of proceedings in the Probate Court (under Rev. Sts. of Michigan, 1828, p. 262) for assignment of the widow's dower, is not necessary. *Campbell*, 2 Doug. 141.

(c) In Ohio, it is said, probably no action for dower will lie, but the only two modes of obtaining it, are a voluntary assignment by the heir, &c., and a petition; and the latter is the only method, where the land is incumbered. In Wisconsin, the writ of dower is abolished. *Walk. Intro*, 326; *Wisc. Rev. Sts.* 586. In Vermont and Michigan, (1 Vt. L. 132, 158; Mich. L. 30; see Michigan Revised Statutes. 263.) it is provided, that the widow may recover her dower *as the law directs*. Under this clause, an action for dower may undoubtedly be maintained, although in Vermont subsequent provision is made for an assignment by the Probate Court. In New York, (2 N. Y. Rev. St. 303, 343; Illin. St. 1838-9, 227-8,) the action of dower is abolished; but the remedy of ejectment is provided for the recovery of dower before assignment. In this suit, commis-

sioners are appointed to make an admeasurement, and possession is given accordingly. So in Illinois. In New York, the action is brought against the actual occupant; or, if none, against the party owning or interested in the land. *Sherwood v. Vandenburg*, 2 Hill, 303. A proceeding for dower, under the Code of New York of 1848, may be regarded as a substitute for the former remedy by petition or bill; and will lie, though the defendant, being seised, is not in actual possession, and six months have not elapsed since the death of the husband. *Townsend v. Townsend*, 2 Sandf. 711.

In Delaware, (Dela. St. 1829, 164, 168; Rev. Sts. 292,) provision is made for an assignment by the Orphan's Court; but the action of dower is also recognized and regulated.

In Pennsylvania, (*Brown v. Adams*, 2 Whart. 188; but see *Bratton v. Mitchell*, 7 Watts, 118; also *Rittenhouse v. Levering*, 6 Watts & S. 190,) the question has arisen, how far the common law remedy for recovery of dower has been superseded by the statutory provisions for an assignment in the Probate Court. The action was a writ of dower *unde nihil habet*. The husband had been a tenant in common with the defendant. It was contended by the counsel for the latter, that the common law right of dower was abrogated by the statute law, which had created an estate for the widow *in lieu* of dower; and that no remedy therefore would lie for its recovery, except that expressly provided. On the other hand it was contended for the plaintiff, that such a construction would impair the right of a trial by jury. The court held, that, although the right of the widow was given by statute, yet this was merely declaratory or in affirmance of the common law; that, in this case of tenancy in common, the Probate Court would have

§ 28. With respect to the time within which a suit for dower must be commenced, either in law or equity; such suit is not

no jurisdiction; neither could the widow maintain a writ of partition; and therefore the action brought was her only remedy. Judgment for the plaintiff. (In Maine, before assignment of dower to the widow of a tenant in common, partition must be made. Me. Rev. St. 451.)

In a later case, it is held, a widow may claim her statutory dower by the common law action, when the land is in the adverse possession of one denying her right, or of one not amenable to the Orphan's Court process. *Evans v. Evans*, 5 Cas. 277.

It is error to allow a recovery of dower of one-half of the land, when the claim on record was for one-third only. *Ib.* Such a mistake cannot be amended in the Supreme Court, but, on reversal of the judgment, the allowance of such an amendment will be referred to the discretion of the court below. *Ib.*

A testator ordered that the residue of his estate, except a house devised to his wife in addition to her dower, should descend as if no will had been made. Held, the widow could not maintain an action of dower. If the land descended, the will being void, exclusive jurisdiction vested in the Orphan's Court; if it passed under the will, the widow was a purchaser, and her remedy was by ejectment. *Thomas v. Simpson*, 3 Barr, 60.

It may perhaps be safely said, that the remark, made in New York and South Carolina, is equally applicable in most of the other States; namely, that "the acts (concerning assignment of dower) are made, not to vary the right to dower," (or supersede the old remedy,) "but to institute a more easy and certain mode of obtaining it." *Yates v. Paddock*, 10 Wend. 528; *Scott v. Scott*, 1 Bay. 507. In Massachusetts, and probably elsewhere, the Probate Court has *exclusive* jurisdiction, only where the provisions of the law on the subject can be enforced by no other tribunal. In other cases, it has merely concurrent jurisdiction, which is taken away by the previous commencement of proceedings in another court. *Stearns v. Stearns*, 16 Mass. 171. (See as to assignment of *devised lands*. St. 1839, 124.) In Alabama, it is held that the statutory method of assigning dower is merely *cumulative*; and though such assignment be irregularly made, yet it is binding, if assented to by the wife, es-

pecially if she has had possession, and there is no fraud. *Johnson v. Neil*, 4 Alab. N. S. 166. The common law courts have jurisdiction of a claim for dower by the widow of a tenant in common, dying seised of a fee-simple in one-third of the lands, and a fee-simple determinable by executory devise in one-sixth. *Evans v. Evans*, 9 Barr, 190.

This method of obtaining an assignment of dower partakes of the nature of a suit in different degrees in the several States. The proceeding is usually termed a *petition*, but in Vermont, (1 Verm. L. 158,) a *complaint*. It is, in fact, everywhere, and in North Carolina and Alabama (Alab. L. 259; 1 N. C. Rev. St. 614; Ark. Rev. Sts. 840-1) expressly declared to be, in its nature, *summary*.

In most of the States, the return of the commissioners, appointed by the court to make the assignment, is not made the foundation of a judgment, upon which execution issues; but only gives a *right of entry*, or vests a title in the widow, which authorizes her to enter, and which she may maintain, if necessary, by a subsequent suit for possession. Neither are damages ordinarily allowed in this course of proceeding. Its chief object is to prevent difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower. *Williams v. Morgan*, 1 Lit. 167; *Martha Watkins*, 9 John. 245.

In New York, the proceedings before the surrogate, for admeasurement of dower, are no evidence of *title*, in ejectment, but merely of *the location* of the land; but as to this they are conclusive. But commissioners for assigning dower have the same powers as the sheriff under an execution; and are not confined to a mere assignment by metes and bounds, but may exercise a discretion, and assign dower, for example, in *mines*, and such assignment may be enforced by the surrogate. *Jackson v. Dewitt*, 6 Cow. 316; *Miller v. Hixon*, 17 John. 123; *Coates v. Cheever*, 1 Cow. 460. See *White v. Story*, 2 Hill, 543.

In proceedings before a surrogate for the admeasurement of dower, the title to the land must be taken to be as the widow claims. The admeasurement is conclusive only as to the location and extent of right of dower, and the title to the land may be questioned in any subsequent



within the ordinary statutes of limitations, although lapse of

proceedings. *Parks v. Hardey*, 4 Bradf. 15.

A record of the assignment of dower in the Court of Probate is presumptive evidence, that the assignment was made upon the petition, and with knowledge of the widow, such being the usual course, and the proceedings being for her benefit. *Tilson v. Thompson*, 10 Pick. 859.

But in some parts of this country, particularly the new Western States, a mere petition for dower, which may be called *amicable*, at its inception, assumes in its progress the character of an adverse and compulsory suit. In Missouri, (Misso. St. 229-30-1-2; see *Peake v. Redd*, 14 Mis. 79,) where the widow is deforced of her dower, or cannot have it without a suit, or an assignment is made unfairly, or none is made for twelve months from the husband's death; she may bring a suit, and shall recover damages, from the death of the husband, if he died seized—otherwise, from demand. It lies against any one in possession, or claiming an interest, or who deforces her. The suit is in form of a petition, and the assignment made by commissioners; but a writ of possession issues. A "writ of dower," however, may still be brought. Misso. St. 231-2. In New Jersey, the right of suing is given in the same words. The time is limited to forty days. 1 N. J. Rev. C. 397.

In Vermont, after the return of the commissioners who assign dower, "said dower shall remain fixed and certain," and all parties concerned shall be concluded. 1 Ver. L. 158.

In South Carolina, (*Scott v. Scott*, 1 Bay. 504; 1 Brev. Dig. 270,) the form of application for dower is a *petition* to a common law court, which issues a *writ for admeasurement* to commissioners. They are sworn to "put the widow in full and peaceful possession," and return a plat of land with their doings, which become matter of record, and are "final and conclusive." In New York, (2 N. Y. Rev. St. 803, 843; *Borst v. Griffin*, 9 Wend. 807; *Ward v. Kilts*, 12, 187; see Code, 1851. 12.) where an ejectment is provided for the recovery of dower, commissioners are appointed to admeasure dower, and possession is given by them; but (it seems) no writ of possession issues. After admeasurement, the widow may have ejectment for the specific lands assigned to her. In the same State, it seems, if the land in which dower is

claimed was alienated by the husband, such alienation and the value at that time are not subjects of inquiry upon trial of the ejectment, but are to be brought before the commissioners for admeasurement. So a *settlement* made upon the wife in lieu of dower is not to be inquired into before the surrogate; but set up in defence to any action for the land which may be assigned to her. Nor have the admeasurers a right to consider any post-nuptial conveyance by the husband to the wife. *Hyde v. Hyde*, 1 Wend. 630.

In Delaware. (Dela. St. 1829, 164-5; Rev. Sts. 292; *Doe v. Carrol*, 18 Ala. 148,) in the action of dower, the court appoint commissioners, whose return is conclusive, and the foundation of a writ of possession, and a final judgment for damages and equitable costs.

Ordinarily, the assignment of dower is founded on an application made by the widow herself. But in Indiana, Virginia, Connecticut and New York, it may be done on application of the heirs; in Illinois, Michigan and Vermont, of any party interested; in Missouri, of the heir, legatee, guardian, executor, &c., or a creditor of the widow or her second husband. In this State, the widow and children may join in a petition for assignment of dower and distribution of shares, where lands lie in different counties. Commissioners are appointed, but cannot act, if a division is impracticable. St. 1838, 40. In Maryland, a commission to assign dower may issue, on petition of the widow in a creditor's suit. *Simmons v. Tongue*, 8 Bland, 844. So it may be done in such suit, without her being a party. *Watkins v. Worthington*, 2 Bland, 512. In Mississippi, a decree of dower, without legal notice of the application therefor, is not binding upon the heirs. *Muirhead v. Muirhead*, 28 Miss. 97. In Alabama, upon petition of the widow, and citation to adverse parties, her right may be determined; and upon allotment being made she is put in actual possession. *Barney v. Frowner*, 9 Ala. 101. Dower cannot be claimed from several alienees of the husband by the same petition. *Ib.*

In New Jersey, the guardian of an heir may apply for admeasurement. A purchaser of the widow's right cannot claim an assignment, the sale being void; and though made with the consent of the heir or his guardian, the proceeding is *coram*



time may bar a bill for an account.(a) So a statute of limitation in common form is held inapplicable to dower, upon the ground that such statute contemplates the case of a seisin which once existed, and from the termination of which the statute begins

*non judice* and *void*. In Alabama, a purchaser from the husband may claim an assignment in equity. In the same State, if the widow occupies the husband's dwelling-house, the owner of the fee is bound to move for an assignment of dower. See *Siglar v. VanRiper*, 10 Wend. 419; Ind. Rev. L. 210; Illin. do. 238; Misso. St. 231; *Moore v. Waller*, 2 Rand. 418; 1 N. J. Rev. C. 399; *Shields v. Batts*, 5 J. J. Mar. 15; *Jackson v. Aspell*, 20 John. 411; Mich. Rev. St. 263; Conn. St. 189; Verm. Rev. St. 290. See *Bancroft v. Andrews*, 6 Cush. 493.

In Tennessee and Ohio, where the heirs of one deceased pray for partition, dower shall first be assigned from the whole land. So in Ohio, where land is directed to be sold by administrators. Tenn. St. 1828, 46; Walk. Intro. 327. See *Swan*, 299. In Missouri, one interested in the estate, and not made party to a suit for dower, may, after assignment, have an action against the widow for *admeasurement* of dower; alleging either that she was not entitled, or an undue assignment. If the latter is proved, the court shall assign anew, and award a writ of possession. Misso. St. 232.

Where dower has been assigned to a widow, on her petition to the county or superior courts of North Carolina, the heirs cannot have a re-allotment, on petition. If they have any remedy, it is not by petition. *Bowers v. Bowers*, 8 Ired. 247. In South Carolina, where a wrong summons had been served on a respondent in dower, for which reason he had neglected to appear and plead, all the other proceedings were set aside; for, if the judgment were allowed to stand, it would stand as obtained through misrepresentation. *Williams v. Lanneau*, 4 Strobb. 27.

The time, after which the widow is entitled to have an assignment of dower, is variously established in the different States. In Vermont and Connecticut, sixty days from demand. In Michigan, thirty days. In New Hampshire, Rhode Island, Maine, Massachusetts, Indiana, and Illinois, one month. In Missouri, twelve months from the husband's death. In New York, six months from the time the right accrued. 1 Vt. L. 158; N. H.

L. 187; R. I. L. 189; Smith's St. 168; *Crocker v. Fox*, 1 Root, 227; Ind. Rev. L. 209; Illin. do. 236; Misso. St. 229; Mass. Rev. St. 616; 2 N. Y. R. St. 303; Mich. Rev. St. 263.

In Arkansas, if dower is not assigned in one year from the husband's death, or three months from demand, the widow may file a petition in the Probate Court. Rev. St. 340-1.

(a) But by a recent English statute (8 and 4 Wm. IV. c. 27) the time is limited to twenty years from the husband's death. In New York, a demand for dower is limited to twenty years from the husband's death, or the removal of certain disabilities. In Kentucky, twenty years are held to be the limitation in Chancery. In Massachusetts, the only statutory limitation is not less than one month, nor more than one year, after demand. In South Carolina, Tennessee and New Jersey, the lapse of twenty years is a bar to the claim of dower. So, it seems, in Maine. *Durham v. Jugier*, 20 Maine, 242. In Ohio, the lapse of twenty-one years. 4 Kent, 69; Ala. Code, 1852, s. 1375; *Barnard v. Edwards*, 4 N. H. 107; *Wells v. Beall*, 2 Gill & J. 468; *Wilson v. M'Leuaghan*, 1 M'Mul. 85; *Wakeman v. Roache*, Dudl. 123; *Berrien v. Conover*, 1 Harri. 107; *Tuttle v. Wilson*, 10 Ohio, 24; *Rickard v. Talbird*, Rice, 158; *Ralls v. Hughes*, 1 Dana, 407; 1 N. Y. Rev. St. 742; Mass. Rev. St. 616; *Kiddall v. Trimble*, 1 Md. Ch. 148; *Tooke v. Hardeman*, 7 Geo. 20; *Caston v. Caston*, 2 Rich. Eq. 1; *Grundy v. Grundy*, 12 B. Mon. 269; *Carmichael v. Carmichael*, 5 Humph. 96; *Chapman v. Schroeder*, 10 Geo. 321. In Georgia, seven years. In Alabama, three Ub. sup. In New Hampshire, twenty years from demand. *Rohie v. Flanders*, 33 N. H. 524.

In Connecticut, lapse of time, though connected with other equitable grounds of defence, constitutes no bar to the claim of dower. Thus, fifteen years after the husband's death, his widow claims her dower. In the meantime, a creditor or one of the heirs had taken his share of the land, and the heir was insolvent. Held, she should have her dower without any reference to this incumbrance. *Crocker v. Fox*, 1 Root, 227.

to run. But a widow before assignment is not seised, and has no right of entry; nor would an entry be of any avail to her. Nor is she a tenant in common with the heirs. She may make a demand, and afterwards sue; or, neglecting to sue in the time prescribed, may make a new demand. Neither can the limitation run against her during the life of her husband; for she had then a merely future or contingent interest, and the allowance of such a limitation would render a conveyance by the husband, made twenty years before his death, a complete bar to her claim.<sup>(a)</sup> So, from an adverse possession of twenty years, the law will not presume a release of dower.<sup>1</sup> But it has been suggested in New Hampshire, that the circumstance of a great lapse of time might be left to the jury, as a ground for presuming a release of dower.<sup>2</sup>

§ 29. A statute of limitation in regard to dower is not applicable to a case, where the husband died before the statute went into operation. But, in reference to such a case, it seems the statute runs from the time of its going into operation.<sup>3</sup>

§ 30. A purchaser from the husband, recovering rents after his death, is a *trustee* for the widow, and cannot avail himself of the statute of limitations.<sup>4</sup>

§ 31. While the statute of limitations does not operate *against* the claim of the widow, on the other hand, it is held not to operate *in her favor*, as against the heirs of the husband. Thus, where a widow continued in possession, married anew, and with her second husband occupied over twenty-one years; held, the heirs of the first husband were not barred.<sup>5</sup> So an informal assignment of dower, acquiesced in for twenty-one years, cannot be disturbed.<sup>6</sup>

<sup>1</sup> Barnard v. Edwards, 4 N. H. 107; Moore v. Frost, 3 Ib. 126; Durham v. Angier, 2 Appl. 242; Parker v. Obear, 7 Met. 27-8. See Ramsay v. Dozier, 1 Const. S. C. 112; Wells v. Beal, 2 G. & J. 468; Hogle v. Stuart, 8 John. 104; 1 Swift, 85; Spencer v. Weston, 1 Dev. & B. 213; Guthrie v. Owen, 10 Yerg. 339;

Evans v. Evans, 29 Penn. 277.

<sup>2</sup> 4 N. H. 109.

<sup>3</sup> Sayre v. Wisner, 8 Wend. 661; Tooke v. Hardeman, 7 Geo. 20.

<sup>4</sup> Tellman v. Bowen, 8 Gill & J. 383.

<sup>5</sup> Cook v. Nicholas, 2 W. & S. 27.

<sup>6</sup> Robinson v. Miller, 7 B. Mon. 287. See Johnson v. Neil, 4 Ala. N. 166.

(b) Such is the reasoning of the court in New Hampshire. Whether a purchaser from the husband would in such

case be regarded as holding under, or adversely to him, *qu.*

§ 32. The *death* of a widow before assignment of dower extinguishes her right. Her representatives have no right to recover its fruits.<sup>1</sup> So, where she dies after commencement of suit, the court will not allow entry of judgment as of a prior term.<sup>2</sup> Nor will they award damages even to an assignee of her right,<sup>3</sup> even though she dies after judgment in her favor.<sup>4</sup>(a)

<sup>1</sup> 1 Knapp, 225; 4 Kent. 70, n.

<sup>2</sup> Rowe v. Johnson, 1 Appl. 146.

<sup>3</sup> *Ib.*

<sup>4</sup> Atkins v. Yeomans, 6 Met. 438. See Sandback v. Quigley, 8 Watts, 460.

(a) In Maryland, a statute provides the death of either party. Md. L. 407. that actions for dower shall not abate by

## CHAPTER XII.

### ASSIGNMENT OF DOWER. WHAT SHALL BE ASSIGNED AND BY WHOM; AND THE EFFECT OF ASSIGNMENT.

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| 1. By metes and bounds or otherwise;<br>practice in the United States. | 7. Assignment <i>against common right</i> .                        |
| 2. Value of land assigned.   | 8. Assignment of rent. &c.   |
| 3. Assignment in common.   | 10. Assignment must be <i>absolute</i> .                           |
| 4. Partition by husband.   | 11. Assignment by parol; by guardian.                              |
| 5. Assignment by sheriff, and commis-<br>sioners.                      | 12. Implied warranty.  |
| 6. Improper assignment by sheriff.                                     | 13. Entry not necessary to title.                                  |
|  | 14. Assignment has <i>relation</i> ; rule in the<br>United States. |

§ 1. It is said, that dower must be assigned *by the sheriff* by metes and bounds, or in certain closes by name, and that any other assignment is void. But the *heir* may endow the widow, generally, of the third part of all the lands whereof the husband was seised. And, if the lands were leased, the widow and lessee shall hold in common.<sup>1</sup> And where the nature of the property does not admit of an assignment by metes and bounds, some other is allowed. Thus, if the property consist of a mill, the widow shall not be endowed of a separate third part, nor in common with the heir, but of the third toll-dish, or of the whole mill for a certain time. So in case of mines. Though from these dower shall be assigned by metes and bounds, if possible.<sup>1(a)</sup>

<sup>1</sup> Co. Lit. 32 b, and n. 1.

<sup>2</sup> Coates v. Cheever. 1 Cow. 460. (This case (p. 480) contains a form of assignment in mines.) See Crouch v. Puryear,

1 Rand. 258; Heth v. Cocke, Ib. 844; Dunsett v. Bank, &c., 6 Ohio, 76; Whaler v. Story. 2 Hill, 543; Smith v. Smith, 5 Dana, 179.

(a) This principle of the English law is adopted by the statute law of nearly all the States, and undoubtedly practised upon in all of them. Illin. Rev. L. 238; Ind. do 210; Tenn. St. 1823, 46; Walk.

Intr. 327; Mich. Rev. St. 263; Ark. Ib. 341-2; Wisc. Ib. 334

In Massachusetts, in the case referred to, dower may be assigned in common. In Vermont, Maine, New Hampshire and

§ 2. The assignment of dower shall be such as to give, not one-third of the lands in quantity, but one-third of the *income*, or rents and profits, according to the quantity, quality and pro-

Rhode Island, where no division can be made by metes and bounds. *or the widow cannot be endowed of the premises*, she has one-third of the rents and profits. (In Vermont, if the estate is insolvent, the widow and two-thirds of the creditors may agree on a provision in lieu of dower; which shall be valid, if approved by the court. Verm. Rev. St. 290-1.)

In Kentucky, she may elect to have the property every third year, or one-third of the rents, &c. Mass. Rev. St. 409; N. H. Rev. St. 329; R. I. L. 189; Verm. Rev. St. 290; Hyzer v. Stoker, 3 B. Mour. 117; Ky. L. 1844, 16-17; 1 Verm. L. 153. In Alabama, an allotment of dower can be made, under the statute, only where it can be designated by metes and bounds. Barney v. Frowner, 9 Ala. 901. In Illinois and Missouri, (Illin. Rev. L. 238; Misso. St. 231-3; Riley v. Clamorgan, 15 Mis. 331,) where the commissioners for assigning dower report that a division will be injurious, a jury shall assess the yearly value, which shall be paid in lieu of dower. In Missouri, on failure of payment, execution issues. So, for any arrears due at the death of the widow, in favor of her executors. A similar provision exists in South Carolina. The valuation is either one-third of the annual income, or one-third of the whole value of the land for seven years; and where the commissioners returned one-third of the value of the entire fee, their return was set aside. In Missouri, without a formal election on the part of a widow to accept the provisions in lieu of dower, she may agree with the heirs in writing as to the quantity of the estate she should take as dowress. Welch v. Anderson, 28 Mis. 293.

In Illinois, where the widow remains in possession without assignment, there cannot be a partition or sale of the whole premises. Bonham v. Badley, 2 Gilm. 622. In Georgia, if the property is within a city, village or public place of business, commissioners assign dower according to quantity or valuation, at their discretion. If otherwise, they assign with reference to shape and valuation. See 1 Brev. Dig. 271; 1 Bay. 504; Russell v. Gee, 4 Const. S. C. 254; Hayward v. Cuthbert, 2, 626; Ga. Stat. 1839, 148; Barnes v. Cunningham, 9 Rich. Equ. 475.

In Alabama, where a compensation for

dower is made in money, the decree should be, not for a gross sum, based on the estimated value of the widow's life estate, but for the annual payment of the annual value of the dower interest during the life of the dowress, secured by a lien on the estate. Beavers v. Smith, 11 Ala. 20. Where an assignment cannot be made of a portion of the premises, the interest of one-third part of their value at the time of alienation is a just criterion. Ib. Where the principal value, in such case, consists of buildings, which require an annual outlay to keep them in repair, it is doubted whether the dowress should contribute her portion of the expenses. Ib.

In New York, where the lands of one deceased are sold by order of court, if the widow will not accept a sum in gross in lieu of dower, one-third of the proceeds shall be invested for her benefit. 2 N. Y. Rev. St. 106; 4 Kent, 45; N. Y. St. 1840, ch. 177. See, also, N. J. St. 1845, 100.

On a sale of lands, by order of the surrogate, to pay debts, the portion of the purchase-money to be set apart and invested, pursuant to the statute (2 R. S. 106, sec. 87), in lieu of dower, is the one-third of the gross amount, not deducting expenses of the sale. Higbie v. Westlake, 4 Kern. 281. Also, of interest on the price, accruing after the sale and before the distribution of it. Ib.

The statute on this subject is applicable, though the marriage and seisin were long prior to its enactment; and is not for this reason inconsistent with the constitution of the United States or the State; as dower arises, not by *contract*, but by *operation of law*. Lawrence v. Miller, 1 Sandf. 516. Such sale may be made, though dower has been assigned in equity. Ib. And a sale will pass a title to the lands so assigned, as well as those for which there is merely a right of action. Ib. But it is held, that, where the estate is an entire farm, and dower has been assigned; the sale should be of the whole farm, subject to the widow's life estate in a portion of it. Maples v. Howe, 3 Barb. Ch. 611.

In a suit for partition, the contingent or inchoate right of dower was determined by a master under order of the court, by virtue of the New York Statute,

ductiveness of the lands; and such as is best calculated for the convenience of the widow and the heirs, and will least

passed April 28, 1840, and the same was paid into court. After the death of the wife, the husband petitioned to have the money paid to him. Held, that the sum estimated by the master was the present worth of the wife's dower, and was absolute and personal, and that on her death the husband was entitled to it *jure mariti*. *Bartlett v. Janeway*, 4 Sandf. Ch. 396.

Dower cannot be assigned in a proceeding for partition. *Tanner v. Niles*, 1 Barb. 560. A purchased the shares of some of the tenants in common of a farm, while a suit in equity for a partition was pending. The decree directed a sale. A having deceased, his widow was held entitled to dower in the proceeds. *Church v. Church*, 3 Sandf. Ch. 434.

A purchased the land, and entered, but died before receiving a deed, or paying the whole of the purchase-money. Held, his widow had an inchoate right of dower, subject to the payment of the residue of the purchase-money. *Ib.*

Exceptions having been taken by the creditors, the widow was exonerated from defraying any portion of the costs of the proceedings. *Ib.*

Where the realty is sold under the surrogate's order to pay debts, the widow is entitled to one-third of the gross sum to be invested in securities; one-third of all interest accruing after the sale is hers absolutely. *Higbie v. Westlake*, 4 Kern. 281.

In Maryland, (2 Md. L. 520,) upon such sale by application of the heirs, the dower land shall be reserved, unless the widow consent to a sale of the whole, she receiving a share of the proceeds, not more than one-seventh, nor less than one-tenth. In Pennsylvania; (Purd. Dig. 407-12-15; *Mentzer v. Menor*, 8 Watts, 296; *Shouffler v. Coover*, 1 W. & S. 400; *McCarthy v. Gordon*, 4 Whart. 821. See *Beeson v. McNabb*, 2 Barr, 422,) where partition of an estate cannot advantageously be made, and the whole is therefore assigned to one or more heirs, the widow shall receive for her dower an annual sum, which shall remain charged upon the land as a rent, to be apportioned among such heirs. If, for want of an assignment to one heir, the land is sold, the purchaser shall retain one-third or one-half (according to circumstances) of the purchase-money, which shall be a charge on the land for payment of the interest

to the widow. The right of the widow to her annuity, in lieu of dower, is personal to herself, and does not pass by *subrogation* to one of several heirs, who has paid more than his share, nor can the widow exercise her right of *distress* more than once. In Wisconsin, where the court orders a sale, the executor, &c., may contract with the widow to receive a certain sum in lieu of dower. Wis. St. 1853, 78-9. In case of the sale by an administrator of land in which the widow is dowable, he may contract with the heir to commute her dower, and hold in trust such parts of the price, as she would be entitled to on the principle of *annuities*. Wisc. Sts. 1853, 78.

In Florida, where lands, from which a widow was dowable, are converted into money, the money should not be ordered to be put out at interest, by a master in Chancery, unless there is a well grounded fear of loss, if it remains in her possession. *Osborne v. VanHorn*, 2 Florida, 360. In Delaware, provision is made for securing the rights of tenants in dower and by the curtesy, where a sale is made of land held in common. Dela. St. 1848, 489-91.

In Maryland, the widow may agree with the heir, &c., in lieu of an assignment of dower, that he shall lease the land and pay her one-third of the rent; and she may maintain *assumpsit* against him therefor. *Marshall v. McPherson*, 8 Gill & J. 333. Dower shall be assigned before partition; but, if the widow consents to a sale by a writing filed in court, the land is sold free of dower, and she receives a share of the price. Md. St. 758. A widow having been held entitled to an allowance from the proceeds of sales of partnership lands, in lieu of dower, the husband having died in 1825, and the sale not being made till 1845; held, the age of the widow at the husband's death should be taken in fixing her allowance under the Chancery rule. *Goodburn v. Stevens*, 1 Md. Ch. 420.

In Pennsylvania, where an administrator, under a decree of court, conveys property contracted to be sold by his intestate, the price is personalty, and the widow, who releases her dower, has one-third absolutely. *Drenkle's Estate*, 3 Barr, 377.

If the purchaser agreed to take the land encumbered with her title, she could

disturb the will, the provisions of which in her favor she renounces.<sup>1(a)</sup>

§ 3. If the widow waives an assignment by metes and bounds, it may be made in common.<sup>2</sup> And this is the only practicable mode, where the husband at his death was a tenant in common with another person.<sup>3(b)</sup>

§ 4. Contrary to the general rule, that no act of the husband alone can affect the wife's claim of dower, if partition were made of lands held by him in common during coverture, she shall have dower only in the portion allotted to the husband; upon the grounds, that the husband's co-tenant might have enforced partition by legal process, and that, partition being an incident to the estate, the wife's inchoate right of dower was acquired subject thereto. More especially, where the wife joins in a bill for partition, and the property is sold under a decree, her potential right of dower is barred. When the sale is ratified, any inchoate or possible right of dower is transferred to the proceeds of sale, out of which the court has full power to provide therefor, and if such proceeds are not correctly distributed by the court, the purchaser is not responsible for such error.<sup>4</sup> But fraud on the part of the husband, as, for instance, in taking for his share woodland, not subject to dower, would avoid the

<sup>1</sup> *Hoby v. Hoby*, 1 Ver. 218; *Leonard v. Leonard*, 4 Mass. 538; *Miller v. Miller*, 12, 454; *Conner v. Sheperd*, 15, 167; 1 N. C. Rev. St. 618-4; *Illin. do* 237; 4 Kent, 68, n. c; *Alab. L.* 259; 7 J. J. Mar. 637; *M'Daniel v. M'Daniel*, 8 Ired. 61.

*Smith v. Smith*, 5 Dana, 179.

<sup>2</sup> Co. Lit. 84 b, n. 1.

<sup>3</sup> 4 Dane, 678; *Rowe v. Power*, 5 B. & P. 1; Co. Lit. 82 b.

<sup>4</sup> *Warren v. Twilley*, 10 Md. 89. See *Sts.* 1839, c. 23.

have claimed both her dower and a third of the proceeds. Per Gibson, C. J. *Ib.*

Where the husband was a tenant in common, if no partition is made within a year, the wife's dower is charged upon the whole land. If partition is subsequently made, it may be charged upon his share alone. In case of sale, her interest shall be protected. *Penns. St.* 1843, 360.

(a) In Alabama, Illinois, North Carolina and Kentucky. (*Alab. L.* 259; *White v. Clark*, 7 Mon. 642; *Illin. Rev. L.* 237.) the assignment shall include the husband's dwelling-house, or, in Alabama, a portion of it, if it would do injustice to assign the whole. In Kentucky, it makes

no difference that the widow does not herself occupy the mansion. In North Carolina, the widow is entitled to only *one-third* of the real estate, in the *whole*, including the mansion. And, if this would give her more than her third, she can have only part of it. *Stiver v. Cawthorn*. 4 Dev. & B. 501.

(b) In one case, in Massachusetts, dower was had in 105-19440 of the great sheep pasture in Nantucket. 4 Dane, 674. In Massachusetts, by a late statute, 1842. p. 231, the judge of probate may authorize the commissioners, first to make partition, and then assign dower from the part allotted to the husband's estate.



partition as to the widow.<sup>1</sup> And where a widow concurs in the partition of her husband's land, releasing her right to the other tenants in their share of the property, and the husband's portion is conveyed to trustees of his will; she has dower in the whole, not an undivided part, merely, of such portion.<sup>2</sup> And the rule applies only where a division is made, in equal proportions, by mutual releases. But there is no such limitation to the right of the widow, if, for a valuable consideration, the division was purposely made in unequal proportions.<sup>3</sup>

§ 5. It is said that *the sheriff* must assign for dower a third part of each manor; or a third part of the arable, meadow and pasture; but the heir may, with the widow's assent, assign the whole of one manor.<sup>4</sup>(a) But commissioners appointed to assign dower are bound, in general, like the sheriff in whose place they stand, to assign one-third part of each parcel of land.(b) If they assign one-third of a single tract, creditors of the husband may appear and object; because, if this were allowable, the commissioners might assign wholly from land of which the hus-

<sup>1</sup> Potter v. Wheeler, 18 Mass. 504. See Jackson v. Edwards, 22 Wend. 498; Reynard v. Spence, 4 Beav. 103; Totten v. Stuyvesant, 3 Edw. 299.

<sup>2</sup> Reynard v. Spence, 4 Beav. 103.

<sup>3</sup> Mosher v. Mosher, 32 Maine, 412.

<sup>4</sup> 1 Cruise, 132; 1 Bay, 504. That assent cures a wrong assignment, see Johnson v. Neil, 4 Alab. N. S. 166.

(a) In North Carolina, (1 N. C. Rev. St. 614,) a statute provides that the assignment need not embrace one-third of each tract. In Indiana, if the widow elects one tract, it may be assigned to her.

(In Iowa, courts cannot compel a dowress to take her dower in different parcels of land, out of one or more, for the whole; and, if she does not assent, it cannot be done. O'Ferrall v. Simplot, 4 Iowa, 381.)

In Kentucky, it is held, that, where the husband has conveyed away part of a tract of land, dower shall be assigned, if possible, in the remaining part. Ind. Rev. L. 210; Lawson v. Morton, 6 Dana, 471. See Childs v. Smith, 1 Md. Ch. 483.

(b) Where it was agreed that the commissioners should assign the dower in two lots out of one only; and they assigned the whole of one, without stating the value

of the dower in each, and that the aggregate of both was equal to the value of the lot assigned; held, the assignment was presumptively correct; also that, unless the contrary appeared, the commissioners were to be presumed to have estimated the dower at the time of the alienation by the husband, as was proper. Corriell v. Bronson, 6 Clarke, 471.

Where the plaintiff, in her complaint, describes the lands in the possession of several tenants occupying different portions thereof, the defendant occupying but a small part; claims for her dower one-third of the whole, and obtains a verdict: upon filing the record of judgment, commissioners are to be appointed to make admeasurement of dower out of the lands which the jury have found in the possession of the defendant, and out of which the plaintiff is entitled to dower. Ellicott v. Mosier, 11 Barb. 574.

band died seised, and the creditors would have no claim against that which he had conveyed in his lifetime.<sup>1</sup>

§ 6. Where the sheriff assigns dower improperly, the court will punish him and set aside the assignment. Thus a sheriff returned that he had assigned for dower, in a house, the third part of each chamber, and had chalked it out. Held, an idle and malicious assignment, and the sheriff was committed.<sup>2(a)</sup> So where a sheriff refused to make an equal allotment of dower, and took sixty pounds for serving the writ; he was committed, and an information ordered against him.<sup>3</sup> But, on the other hand, where a third part of lands containing a coal-work was assigned by the sheriff for dower, without reference to the latter; upon a bill in equity by the heir to set aside the assignment as fraudulent, and upon his offering one-third of both the land and coal-work by way of rent charge; held, the widow should accept this offer or be endowed anew.<sup>4</sup>

§ 7. An assignment of one tract, in satisfaction of the widow's claim upon each separate portion of the husband's lands, is termed an assignment *against common right*. The effect of it is to impose upon her the risk of any defect in the title to the land. If the estate assigned turns out to be more valuable than a third, she may still hold it; and, on the contrary, if it proves less valuable, she must bear the loss. The principle is, that she has accepted what could not have been lawfully assigned to her against her will. It is a voluntary release of a legal right, for something supposed to be equivalent, or more.<sup>5</sup> Thus the whole

<sup>1</sup> Scott v. Scott, 1 Bay, 504; Wood v. Lee, 5 Mon. 55. See Graham v. Duni-gan, 2 Bosw. 516.

<sup>2</sup> Abington's case, 1 Cruise, 164. (Cites Howard v. Candish, Palm. 264.)

<sup>3</sup> Longvill's case, 1 Keb. 743.

<sup>4</sup> Hoby v. Hoby, 1 Vern. 218.

<sup>5</sup> 1 Pick. 817-18; Wisc. Rev. St. 836.

(a) In New York, it is held that, by consent of the widow, particular rooms in a house may be assigned for dower, with the right of using stairways, halls, &c., for the purpose of passing; and that the heir cannot object thereto. Whether the widow might object, *q. u.* White v. Story, 2 Hill, 543; Parks v. Harden, 4 Bradf. 15.

In Alabama, an assignment of dower

may designate the lands by the designation of them at the land office. They need not be described by metes and bounds Adams v. Barrow, 13 Ala. 205.

A sheriff returned, that commissioners to assign dower had been duly sworn, and proceeded to assign it, "as shown by the annexed return." Held sufficient, the return being presumed to be that of the commissioners. *Ib.*

of one parcel of land was assigned to the widow for life, to be holden in full satisfaction of her dower, and subject to all the conditions and liabilities, and with all the privileges and incidents, of dower. The land assigned proved to be under mortgage, and at the time of assignment the mortgagee was in possession. Held, the widow should not have dower in other land of the husband, held by an innocent purchaser.<sup>1</sup> But where a widow has recovered judgment for her dower, and agrees with a warrantor of the tenant to receive an annual sum for life in lieu thereof, which is not paid, she may recover her dower. Such a transaction can operate neither as a lease nor release. There is no privity between the parties to it.<sup>2</sup>

§ 8. Lord Coke says, an assignment of lands in which the widow is not dowable, or of a rent issuing out of them, is no bar of dower.(a) Otherwise, with a rent issuing from lands of which she is dowable. Thus, if it is necessary to assign dower in the capital dwelling house, and the widow refuses a single room or chamber in it, she shall have a rent therefrom. The statutory

<sup>1</sup> Jones v. Brewer, 1 Pick. 314; French v. Pratt, 27 Maine, 381.

<sup>2</sup> Sargeant v. Roberts, 34 Maine, 135.

(a) In order to bar the widow of her action for dower, where rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life. Ellicott v. Mosier, 11 Barb. 574.

A plea in an action for dower, alleging that the husband died intestate; that the defendant occupied the premises under a lease from him, and that the plaintiff and heirs had collected and received the rents reserved ever since his death as the same became due, and had divided and enjoyed the rents, in proportion to the interest of each in the premises, the plaintiff receiving one-third in lieu of dower; and insisting that the plaintiff was thereby estopped from maintaining the action; constitutes no defence. Ib.

An arrangement was made by the heir and the widow, that he should have possession of certain lands in the place of dower, until either party saw fit to terminate the arrangement. Held, that notice to her, by the party having the heir's estate, not to cut wood on the land, did not terminate the arrangement. Nor an

informal and therefore unsuccessful application by her to the court of probate for dower. Mathews v. Bennett, 20 N. H. 21.

Certain heirs promised to "cut and haul out" to a certain place, annually, a stipulated quantity of hard wood, for the use of the widow, so long as she should give up to them the exclusive occupancy of the buildings of which she was dowable, and in full satisfaction of her claim as dowress to cut wood. She afterwards leased to one of the heirs the only part of the land assigned to her in dower on which wood grew; and after that made a contract with those who had purchased the buildings of the heirs, that she would not disturb them in their possession. She also, for one year, compounded for a sum of money with one who had agreed with the heirs to cut and haul the wood. Held, these acts did not impair her right under the contract with the heirs; and they were required to furnish the wood, whether it could be obtained on land assigned to her or not. Page v. Page, 20 N. H. 128.

provisions of different States in regard to the assignment of rents and profits, in lieu of the lands themselves, have already been stated.<sup>1</sup>

§ 9. It is said, if the heir assign dower of lands of which the husband was seised, but the widow is not dowable; she is tenant in dower. So, if she be endowed, and afterwards exchange with the heir for other lands, which the husband owned in fee, she shall hold in dower, and *by* the husband.<sup>2</sup>

§ 10. The assignment of dower must be *absolute*. Any condition, exception or reservation annexed to it—as, for instance, a reservation of trees—will be void; or the widow, at her election, may sue for her dower anew.<sup>3</sup>

§ 11. At common law, the heir may assign dower by a mere parol declaration(*a*) that the widow shall have certain lands, or, generally, one-third of all the lands of which the husband died seised; and an entry upon the lands assigned will vest in the widow a perfect title. The statute of frauds does not render necessary an assignment in writing. The widow holds her estate by *law*, and not by *contract*. And after an assignment of dower by the owner of the land, though made by parol, he cannot dispute that the land was subject to dower.<sup>4</sup> And the same principle seems applicable to an assignment by any other tenant of the freehold. Thus, one of two persons, to whom the husband has transferred the land in joint tenancy, may assign a third part of it, and thereby bind his companion.<sup>5</sup> So the guardian of an infant heir may validly assign dower.<sup>6</sup>(*b*)

<sup>1</sup> Co. Lit. 84 b.; Turney v. Sturges, Dyer, 91. See White v. Story, 2 Hill, 548; Perkins, 406; Bickley v. Bickley, And. 287.

<sup>2</sup> Co. Lit. 84 b. n. 9.

<sup>3</sup> Co. Lit. 84 b.; Wentworth v. Wentworth, Cro. Eliz. 451.

<sup>4</sup> Curtis v. Hobart, 1 Adams, 230; Co. Lit. 85 a; Baker v. Baker, 4 Greenl. 67;

Conant v. Little, 1 Pick. 191; Shattuck v. Gragg, 28 Pick. 88; Johnson v. Neil, 4 Alab. N. S. 166; Boyers v. Newbanks, 2 Cart. 888.

<sup>5</sup> Co. Lit. 85 a, n. 1 and 2.

<sup>6</sup> Curtis v. Hobart, 1 Adams, 230; Jones v. Brewer, 1 Pick. 314; Boyers v. Newbanks, 2 Cart. 888; *contra*, Guernsey, 21 Ill. 448.

(*a*) In Ohio, the assignment of dower by the heir or other party interested must be made by deed. Walk. Intr. 326.

In Maine, a parol assignment of dower by a guardian is good. Curtis v. Hobart, 41 Maine, 230.

(*b*) In Maine and Arkansas, statutes

so provide. Ark. Rev. St. 340; Me. Ib.; 468. In England, an infant cannot assign dower, *ad ostium*. Co. Lit. 84 a. In Wisconsin, where dower has been wrongly recovered from an infant, he may recover it back. Rev. St. 386. It is held in Indiana, that dower need not be demanded

§ 12. In the assignment of dower there is an *implied warranty* that the tenant, if impleaded, may *vouch* the heir; and, if evicted by paramount title from the lands assigned, she shall be endowed anew;(a) except in the case above-mentioned (s. 7), of an endowment *against common right*. But it is said, if the assignment of dower were made by an alienee of the husband, the widow shall not vouch him to be newly endowed, for want of privity. A new assignment is the widow's only remedy. She has no claim upon the covenants in her husband's deed, which can be enforced<sup>1</sup> by the heirs alone. Thus, where the widow surrenders her dower, in part satisfaction of a claim against an estate of which she is administratrix, and the settlement is afterwards set aside at the instance of the creditor; she will be entitled to her dower or its value.<sup>1</sup> So a widow being evicted from an estate in which she had a right of dower, by a suit to enforce a lien for the purchase-money, to which she was not a party; held, her right of dower was not divested, and she was entitled to that proportion of the rents and profits, from the time the land was sold under a decree in such suit, which her right of dower bore to the value of the land, less the unpaid purchase money.<sup>2</sup> On the other hand, if after assignment of dower the heirs are deprived of any part of their lands by a claim adverse to the husband's title, there shall be a new assignment, although the dower land has not been taken. And in case of an excessive assignment, the widow shall account for rents, &c., with an allowance for any improvements. So, also, her second and third husbands.<sup>3</sup>

<sup>1</sup> *Puison v. Williams*, 23 Miss. 64.

<sup>2</sup> *Willet v. Beatty*, 12 B. Mon. 172.

<sup>3</sup> *Bustard's case*, 4 Rep. 122 a; Mass. Rev. St. 411; *Scott v. Hancock*, 18 Mass. 168; *Bedingfield's case*, 9 Co. 17 b; St.

*Clair v. Williams*, 7 Ohio, part 2, 110; *Singleton v. Singleton*, 5 Dana, 89; Verm. Rev. St. 290; Wisc. Ib. 335.

<sup>4</sup> *Summers v. Babb*, 18 Illin. 483.

from an infant; that at common law he has no power to assign dower, and, if he does it, and the assignment is excessive, a writ of *admeasurement* lies. *McCormick v. Taylor*, 2 Cart. 886. But he cannot defeat it by entry. And an *admeasurement* lies only for him, not for the widow. Ib.

In Missouri, Kentucky, New Jersey and Virginia (*Misso. St.* 281-2; 1 Ky.

Rev. L. 575; 1 N. J. Rev. C. 398; 1 Vir. Rev. C. 171), where the widow sues such guardian for her dower, and he endows her *by favor*, or "makes default, or by collusion defends the plea faintly;" the heirs, on becoming of age, may avoid the assignment.

(a) In Arkansas, if land assigned for dower is deforced, the widow has double damages.

§ 13. By the assignment of dower, the widow acquires a *freehold estate*, without livery of seisin in England, and probably in this country without entry; because dower is due of common right, and the assignment is an act of equal notoriety.<sup>1</sup>(a) And after assignment, the law regards the widow, *by relation*, as having had possession from the death of her husband. She acquires no *new freehold*, but comes to her dower *in the per, by her husband*, and is *in*, in continuation of his estate; while, on the other hand, the heir is considered never to have been seised of this portion of the land.<sup>2</sup> Upon this principle, where a disseisor dies, although the disseisee cannot enter upon the heir, yet, if dower be assigned in the land, he may enter upon this portion of it; because the widow claims under the husband, and not under the heir.<sup>3</sup> So the widow, after assignment, becomes entitled to the back rents.<sup>4</sup>

§ 14. The principle of the common law above stated, so far as it avoids the seisin of the heir in regard to the lands of which the widow is endowed, can hardly be regarded as in force in the United States.<sup>5</sup> Indeed the English law itself seems to be confused and contradictory upon this subject; for while the assignment of dower is said to defeat the seisin of the heir, it is also laid down that such assignment constitutes a species of *subinfeudation*, and the widow holds as a tenant to the heir.<sup>6</sup> But, whatever may be the rule of law in England, in the United States the ancient doctrine of seisin had been so far modified, either by express legislation or by necessary implication therefrom, sanctioned by usage and adjudication; that, for all practical purposes, it seems, the heirs of a husband hold a vested reversionary interest in the lands from which the wife is endowed, subject to conveyance, devise, distribution and legal

<sup>1</sup> Co. Lit. 35 a; 4 Dane, 670.

<sup>2</sup> Windham v. Portland, 4 Mass. 388; Norwood v. Marrow, 3 Battl. 448. See Ross v. Ross, 12 B. Mon. 437.

<sup>3</sup> Lit. 398.

<sup>4</sup> 3 J. J. Mar. 48. As to interest, O'Ferrall v. Davis, 1 Clarke, 500.

<sup>5</sup> Cook v. Hammond, 4 Mas. 467; Fay v. Hunt, 5 Pick. 400-1-2.

<sup>6</sup> Park, 344.

(a) Lord Coke remarks, in regard to the legal requisites of an assignment of dower, "here be two things that the law doth delight in, viz.: 1, to have this and

the like *openly and solemnly done*; 2, to have *certainie*, which is the mother of quiet and repose." Co. Lit. 84 b.



process. This peculiarity in American law, however, is a subject deserving of careful examination, and will be particularly considered in a subsequent portion of this work.(b)

(b) A distinction seems to have been made in Massachusetts between curtesy and dower, as to their effect in defeating the seisin of the heir, in which respect they are alike at common law. The former has been held not to defeat such seisin; while, as to the latter, the English rule is said to be in force. See 4 Mas. 467; 3 Ib. 368; also, *Robison v. Codman*, 1 Sumner, 130. In North Carolina, both the principles stated in the text are recognized as equally in force; to wit, that the widow holds of the heir or reversioner, and at the same time her estate is a continuation of the husband's, and, in case of an intervening title, relates back to his death. *Norwood v. Marrow*, 4 Dev. & B. 442.

A died seised of lands, and leaving a widow and six children, of whom B and C were two. An application was made by the heirs of A for partition, and an attorney of some of the children, minors, appeared for them, being appointed guardian. The commissioners appointed to make partition also assigned dower to the widow. She entered on the land assigned, and afterwards joined, with C, one of the children, in a conveyance of his part, which came to E by sundry *mesne* conveyances. B brought ejectment against E for the part conveyed to him. Held, the assignment of dower displaced the heirs' seisin, and related back, so as to give the dowress seisin from the death of her husband; that, as the assignment of dower, which in itself was bad, had been followed by her entry and possession, and by the ratifying acts of the heirs, it was good; but that, as the assignment and the judgment for partition were simultaneous, the latter was not defeated, so as to divest the heirs of the momentary seisin which followed the judgment and supported the partition. *Fowler v. Griffin*, 3 Sandf. 385.

It has been recently decided in New York, that, after assignment of dower, the widow's title relates back to the marriage, if the husband was then seised of the land; if not, to the time of his seisin; that the assignment defeats the seisin of the heir *ab initio*; and, as she does not hold under the heir, she has no right to become party to an application for sale of the land to pay debts. *Lawrence v. Brown*, 1 Seld. 394. If the surrogate order a sale of all the husband's

estate, including that assigned for dower, the sale is void as to this partition, though the widow were notified to appear. *Ib.*

The widow is regarded as so far holding under the next owner, that, like other tenants, she is estopped to set up against him a paramount title purchased by her. Nor can a purchaser from her be allowed to do it. *Kirk v. Nichols*, 2 J. J. Mar. 470.

Having now finished the important and somewhat extensive titles of *curtesy* and *dower*, it is worth while briefly to compare these two estates, and designate their several points of similarity and difference. See Co. Lit. secs. 2, 52, 53.

Both are *life estates* created by *act of law*, and arise out of the same relation that of marriage. Both require a present seisin, either in law or in deed, in the owner of the inheritance; that is, a title not subject to any particular freehold estate. In both, marriage alone gives an *incipient* or *initiate* title, which the death of the party owning the inheritance is necessary to *consummate*. Both curtesy and dower are a continuation of the deceased party's estate, having the effect to interrupt the seisin as between ancestor and heir, although in the former case the estate is said to be *in the post*, and in the latter *by the husband*. And lastly, neither of these estates is defeated by the ending of the estate out of which it springs, according to the original *limitation*; while both alike are determined by forfeiture under a *condition*. Co. Lit. 80 b, n. 7.

In regard to the points of *distinction* between curtesy and dower, each seems to be in some particulars the more favorably regarded by the law. Tenant by the curtesy does not forfeit his estate, as a wife forfeits her dower, by elopement and adultery. The former may immediately enter upon the land after the death of his wife, while the latter must wait for an assignment or judgment of law. Curtesy embraces *the whole* estate of the wife; while dower is confined to *one-third* of the husband's estate.

On the other hand, *dower* does not require actual seisin on the part of the husband, as curtesy requires it in the wife. And the wife shall have dower, but the husband shall not have curtesy, without the birth of issue; provided that the issue, which she might by possibility have had, could inherit the estate.



## CHAPTER XIII.

## JOINTURE.

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|--|--|
| 2. Definition.                                     | 16. A <i>provision</i> —not a <i>contract</i> ; infants.                 |
| 3. Origin.   | 17. Waste.   |
| 5. Value.  | 18. Emblements.  |
| 6. When to take effect.                            | 19. Eviction, or breach of covenant; and the jointress' lien upon lands. |
| 7. Quantity of estate.                             | 23. Favored in equity.   |
| 9. Must be a legal interest.                       | 26. Interest.  |
| 10. Must be an entire satisfaction; and so stated. | 27. How barred—by deed.  |
| 11. Ante-nuptial.                                  | 28. By elopement, &c.  |
| 12. Provisions not strictly jointures.             | 29 and notes. By devise, &c.; jointure in the United States.             |
| 14. Equitable jointure.                            |  |
| 15. Who may receive a jointure.                    |  |

§ 1. THE next estate for life, and one immediately connected with that of *dower*, is a *jointure*.

§ 2. A jointure is defined as a competent livelihood of freehold for the wife, of lands or tenements, &c., to take effect presently in possession or profit after the decease of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture.<sup>1</sup>

§ 3. This estate originated with *the statute of uses*. (See *Use*.) By the common law, as has been stated above, (ch. 10, s. 1,) a wife's right to dower attached immediately upon her marriage, and could be defeated only in the few modes which have been mentioned. No conveyance to the wife during coverture would operate as a substitute for her dower; upon the maxim, that no right or title to a freehold estate can be barred by a *collateral satisfaction*; neither was her release, being made during coverture, of any effect.(a) To obviate this inconvenience, it became

<sup>1</sup> Co. Lit. 86 b; Vance v. Vance, 8 Shepl. 364; Me. Rev. St. 892. See Tevis v. McCreary, 3 Met. Ky. 151.

(a) In South Carolina, in case of a husband's property, and subsequent desertion by him, dower is allowed against a

very common to convey lands to *uses*, a widow not being dowable of a use; and when a *cestui que use* married, the friends of the woman, by way of provision for her, procured him to take a conveyance from his feoffees, and limit it to himself and the wife for their lives in joint tenancy, or *jointure*. When the statute of uses transferred the legal estate to the *cestui*, the widow became dowable, even though the above-named provision had been made for her. Hence this statute provided, that no woman thus provided for should claim dower in the lands of her husband; in other words, it made a jointure, if conformable to its provisions, a bar of dower.<sup>1</sup>

§ 4. From the definition of a jointure, given above, it may be seen that several circumstances are requisite to constitute this estate. These are enumerated at length, and the general principles of law upon this subject fully stated, in *Vernon's case*, already referred to.<sup>2</sup>

§ 5. With regard to the amount and value of the property limited, although the statute seems to make no express provision upon this point, it must be *a reasonable and competent livelihood*, taking into view the circumstances of the parties, the amount of the husband's estate, and the portion which he received with the wife.<sup>3</sup>

§ 6. The jointure must take effect, in possession or profit, immediately from the husband's death—otherwise, it would be less beneficial than dower. Thus, if the estate is limited to the

<sup>1</sup> *Vernon's case*, 4 Rep. 1; *Lincoln College case*, 3 Rep. 59 b; Co. Lit. 36 b; *Hastings v. Dickinson*, 7 Mass. 155; *Powder v. Sheil*, 1 Moll. 296.

<sup>2</sup> *Supra*, 8; 4 Rep. 1; Mass. Rev. St. 410.

<sup>3</sup> *M'Cartee v. Teller*, 2 Paige, 511; 4 Dane, 686.

purchaser. *Spira v. Jeter*, 9 Rich. Equ. 434. In Alabama, it is held that an ante-nuptial agreement is no bar to dower, though made expressly in lieu thereof; but that such agreement, if reasonable, may be enforced in equity. *Gould v. Womack*, 2 Alab. (N. S.) 83.

So a conveyance by a husband to his wife of a life estate in certain property, which passes a vested interest, and is not testamentary in its character, will not bar her dower. *Mitchell v. Mitchell*, 8 Ala. 414. Whether a release of any

claim to dower is sufficient consideration for a marriage settlement, see *Lewis v. Caerton*, 8 Gratt. 148; *Blackman v. Blackman*, 16 Ala. 633.

A contract, made by husband and wife and her trustee, during the coverture, by which, in consideration of her receiving separately, and absolutely controlling, her property, she releases her dower in the husband's lands, is invalid, and no bar to dower. *Townsend v. Townsend*, 2 Sandf. 711.

husband for life, remainder to A for life, remainder to the wife; this is no bar of dower, it seems, even though A die during the coverture.<sup>1</sup> So a limitation to the husband in tail, remainder to the wife for life, is not a good jointure, though his issue die before himself, and therefore the widow come into possession immediately upon his death.<sup>2</sup>

§ 7. The estate limited must be at least as great as for the life of the wife. It is insufficient, if only in part freehold, and in part an annuity, not secured by real estate. The estates mentioned in the statute, are to the husband and wife and his heirs; or to them and the heirs of their bodies, or one of their bodies; or to them for their lives or her life.<sup>3</sup> And it is said in an ancient treatise, that an estate to a husband and wife and their heirs is not a good jointure, because not mentioned in the act.<sup>4(a)</sup> But it has been since held, that these estates are mentioned only as examples, and do not exclude others equally beneficial and consistent with the intention of the act. Thus an estate to a man and his wife, and the heirs male of their bodies; or to him for life, remainder to her for life; is a good jointure.<sup>5</sup>

§ 8. It was formerly held, that a jointure *durante viduitate* was good, because it would continue for life, unless terminated by the widow's own act. But it has been since decided, that a jointure *during life or widowhood* is bad, unless accepted.<sup>6</sup>

§ 9. A jointure, to be strictly legal, must be limited to the wife herself, not to another person in trust for her, even though she assent. But equitable jointures are now allowed, and will be noticed hereafter.<sup>7</sup>

§ 10. A jointure, to be a bar of dower, must be made in satisfaction of the *whole dower*.<sup>8</sup> It must also appear by proper evi-

<sup>1</sup> Co. Lit. 36 b; 4 Rep. 2 a; 7 Mass. 156.

<sup>2</sup> Wood v. Shurley, Cro. Jac. 488; Caruthers v. Caruthers, 4 Bro. Rep. 500; Smith v. Smith, 5 Ves. 192.

<sup>3</sup> 4 Rep. 3 b, 2 a; Dyer, 97 a, 248 a; Co. Lit. 36 b; Vance v. Vance, 8 Shepl. 364; Ind. Rev. Sts. *Descent*,, sec. 88.

<sup>4</sup> Bro. Abr. *Dower*.

<sup>5</sup> 4 Rep. 3 b, 2 a.

<sup>6</sup> Mary Vernon's case, 4 Rep. 3; McCartee v. Teller, 2 Paige, 511.

<sup>7</sup> Co. Lit. 36 b.

<sup>8</sup> Co Lit. 36 b.

(a) Another reason mentioned is, that such estate goes to the heirs generally, but the statute was intended to benefit the issue. Dyer, 248 a, n.

dence to have been made to the wife *as a satisfaction of dower*. Before the statute of frauds, this fact might be *averred*, that is, proved by parol. And it has been suggested that the law is still the same, as there is nothing in that statute excluding averments. But the modern doctrine seems to be otherwise.<sup>1</sup> Thus where, to a bill in equity for dower, the heir pleaded, that the husband made a bond, in trust, to secure the wife a certain sum; that it was intended in lieu of dower, and that she acknowledged it to be so: held, parol evidence of such acknowledgment was inadmissible.<sup>2</sup> It is sufficient, however, if the deed show by strong implication that the provision was intended as a bar of dower. But equity requires a very distinct manifestation of such intent.<sup>3</sup>

§ 11. A jointure, to be binding on the wife, must be made before marriage. If made after marriage, she may refuse it and demand dower.<sup>4</sup>

§ 12. A jointure, made conformably with all these requisitions, is in general absolutely binding upon the wife, and prevents the claim of dower from ever arising. But many provisions made by the husband for the wife, though not in the form above prescribed, may also operate as a bar of dower, if *accepted by her*.<sup>5</sup> In this respect, a settlement made during the husband's life stands on the same footing with a devise or bequest; which, it has been seen (ch. 10), if intended as a substitute for dower, the widow can receive only in that way. Indeed, a provision for the wife by will is often in statutes and elsewhere called a jointure, and was originally upheld as a bar of dower, as being within the equity and reason of the statute of uses, which establishes jointures.<sup>6(a)</sup> Thus, if an estate be settled upon the wife after

<sup>1</sup> 1 Cruise, 149; Owen, 33; 4 Rep. 8.

<sup>2</sup> Tinney v. Tinney, 3 Atk. 8; Walker v. Walker, 1 Ves. 54; Couch v. Stratton, 4 Ves. jr. 391; Charles v. Andrews, 9 Mod. 152.

<sup>3</sup> Ambler v. Norton, 4 Har. & McHenry, 23; Vizard v. Longdale, 3 Atk. 8;

Lord Dorchester v. Effingham, Coop. 323.

<sup>4</sup> Co. Lit. 36 b; 4 Rep. 3 a; Vance v. Vance, 8 Shepl. 364.

<sup>5</sup> 1 Cruise, 151; 4 Rep. 2 a; Mass. Rev. St. 410.

<sup>6</sup> Vernon's case, 4 Rep. 4 a. b; 4 Dane, 685.

(a) A jointure is ordinarily settled before marriage; and a devise takes effect after it is ended by death. Hence they

are held to stand on substantially the same ground. 4 Rep. 4 a.

marriage, and if, after the husband's death, she accepts it, she is barred of her dower.<sup>1</sup> So, if the estate limited is less valuable than dower—being burdened with a condition, or made determinable during the life of the wife; still, if she accepts it, she shall not have dower. Thus, where an estate was limited by the husband to the wife for life, upon condition of her performing his will, and after his death she accepted and entered upon the estate; held, inasmuch as the estate was for life, though conditional, and the widow had accepted it, she was barred of her dower.<sup>2</sup>

§ 13. In some cases, however, if the provision made for the wife has not the legal requisites of a jointure, the widow may claim both such provision and dower also. This is of course the case, where there was no intention to bar dower. And it is said, that, where the estate limited is not to commence immediately upon the husband's death, the widow shall have such estate in addition to her dower, although the intermediate party have died before the husband.<sup>3(a)</sup>

§ 14. *In equity*, any provision, which a woman accepts before marriage in satisfaction of dower, may constitute a good jointure; for instance, a trust estate; or a mere personal covenant of the husband; or a sum of money secured by bond; or a bond to the mother of the intended wife, conditioned that the husband, or his heirs, should settle a certain sum *per annum* upon her, in satisfaction of dower; or a covenant by the husband, that his heirs, executors or administrators will pay an annuity for life to the wife, though it be not charged upon lands. For, although the husband might defeat his own covenant by immediately conveying away all his property, this would be an *eviction*, which would let in the wife to her dower. And although the husband was not in terms bound himself, equity would treat him as bound, and, upon a suit of the wife by her next friend, compel

<sup>1</sup> Co. Lit. 86.b; Walk. Intro. 825. See Frank v. Frank, 3 My. & C. 171.

<sup>2</sup> Vernon's case, 4 Rep. 1; Dyer, 817 a.  
<sup>3</sup> 4 Rep. 2 a; Co. Lit. 86 b.

(a) Such is probably the meaning of the language. "although the wife attains to them, and enters and takes the profits; yet she shall have dower of the residue." 4 Rep. 2 a.

him immediately to settle the annuity.<sup>1</sup>(a) So, where a man and infant woman, each of whom owned leasehold estates, assigned them to trustees, in trust to permit the husband to receive the rents for his life, and the wife for her's after his death; held, a good jointure.<sup>2</sup> And a jointure will be good in equity, though the estate limited does not proceed immediately from the husband. Thus it may come through trustees, or the demandant in a common recovery, suffered for the purpose of a jointure, or the father of the intended husband, by a conveyance from him to trustees, in pursuance of previous articles.<sup>3</sup>

§ 15. All persons capable of being endowed are also capable of taking a jointure.<sup>4</sup>

§ 16. It has been held in England, that a jointure is a *provision*, not a *contract*. Although it is undoubtedly necessary that the woman should have notice of it, yet there is no law requiring that she should be a party to the deed by which the jointure is created. Upon the same principle, it was decided by the twelve judges, three dissenting, that an *infant* woman is bound and barred of her dower, by a jointure made to her before marriage.<sup>5</sup>(b) And, inasmuch as a legal jointure bars the dower of an infant at law, an equitable jointure will bar it in equity, more especially if assented to by the father or guardian. But, although in equity, as at law, a jointure not in itself valid may become a bar of dower by the acceptance of the wife, yet in the case of

<sup>1</sup> *Tinney v. Tinney*, 8 Atk. 8; *Estcourt v. Estcourt*. 1 Cox, 20; 1 Cruise, 152; *Bucks v. Drury*, 8 Bro. Parl. Ca. 492; *Lechmere v. Lechmere*. Cas. Tem. Tal. 80; *Seys v. Price*, 9 Mod. 219; *Caruthers v. Caruthers*, 4 Bro. 506 n; *Jordan v. Savage*, 2 Abr. Equ. 101; *Pottow v. Fricker*, 5 Eng. L. & Equ. 443.

<sup>2</sup> *Williams v. Chitty*, 8 Ves. jr. 545.

<sup>3</sup> *Bridge's case*, Moore, 718; *Ashton's case*, Dyer, 228.

<sup>4</sup> 1 Cruise, 152.

<sup>5</sup> *Buckingham v. Drury*, 8 Bro. Parl. Cas. 492; *Levering v. Heighe*, 2 Md. Ch. 81; *Caruthers v. Caruthers*, 4 Bro. Rep. 506 n.; *Jordan v. Savage*, 2 Ab. Equ. 101; *Earl of Buckingham v. Drury*, 2 Eden, 78; 4 Kent, 55 n.

(a) Lease for life to A, remainder to his executors for years. The term vests in him, as if it had been to A and his executors. Co. Lit. 54 b.

(b) In this case, however, the settlement was made by an indenture of three parts, between the husband, the wife and

trustees, executed in the presence of and witnessed by her guardian. Four judges only delivered opinions in the affirmative. In Wisconsin, (Rev. Sts. 384-5,) the woman must be a party to the deed; if she is a minor, her father or guardian shall join.

an infant it is otherwise; for an infant has no capacity in law to accept. Hence, a jointure for life or widowhood is bad.<sup>1</sup>

§ 17. In general, a jointress, like other tenants for life, has no right to commit *waste*. But where there is a covenant that the lands settled shall be of a certain yearly value, and they prove otherwise; she may commit waste to make up the deficiency.<sup>2</sup>

§ 18. A jointure is not, like dower, a continuation of the husband's estate. Therefore a jointress is not entitled to the crops sown at his death.<sup>3</sup>

§ 19. *Eviction* from her jointure restores a woman's right to dower, either entirely, or in proportion to the value of the lands evicted; whether the eviction take place before or after the husband's death, and notwithstanding an acceptance by the widow of the remaining portion of the lands.<sup>4</sup> Thus a jointure was settled before marriage. The husband purchases other lands, alienes them and dies. The widow is evicted from her jointure. Held, she should have dower in these lands, though the husband owned them only while the jointure remained good, and while therefore her dower was barred.<sup>5</sup> Upon the same principle, if a jointure is covenanted, or even merely expressed, by the husband to be of a certain annual value, and proves of inferior value; equity will make up the deficiency from his estate. And although the covenant is contained only in articles, not in the settlement itself, the widow will not be at first turned over to law for damages, but equity will inquire into the amount of the defect, and send it to be tried at law upon a *quantum damnificat*. In such case, the widow, in England, stands as a specialty creditor, and has a claim against the other lands of the husband.<sup>6</sup> The distinction is made, that at law, a mere covenant to settle even certain specific lands gives no lien upon those lands. In equity, a covenant to settle lands generally, or lands of a certain value,

<sup>1</sup> *McCartee v. Teller*, 2 Paige, 511; *Corbit v. Corbit*, 1 Sim. & Stu. 612.

<sup>2</sup> *Bassett v. Bassett*, Finch, 189; 1 Abr. Eq. 221.

<sup>3</sup> *Fisher v. Forbes*, 9 Vin. 373.

<sup>4</sup> *Gervoye's Case*, Moore, 717; *Hastings v. Dickinson*, 7 Mass. 153; *Ambler v. Weston*, 4 Hen. & Mun. 23; 4 Kent,

55, n. See *Johnson v. Johnson*, 30 Mis. 72; *Finch v. Finch*, 10 Ohio, N. S. 501.

<sup>5</sup> *Mansfield's case*, Co. Lit. 33 a, n. 8.

<sup>6</sup> *Glegg v. Glegg*, 2 Ab. Eq. 27; *Probert v. Morgan*, 1 Atk. 440; *Speake v. Speake*, 1 Ver. 218; *Parker v. Harvey*, 2 Abr. Eq. 241; 1 Cruise, 110.



gives no lien upon the husband's real estate; but the widow stands as a specialty creditor for an amount not exceeding her dower. But a covenant to settle particular lands gives a lien upon them, except as against ignorant purchasers for a consideration. So, if the covenant declare the settlement to be in execution of a power, equity will ascertain to what lands such power is applicable, and enforce a lien upon them.<sup>1</sup>

§ 20. No act or neglect on the part of the wife, during coverture, will bind her, in case of eviction from the jointure, or of its proving of inferior value to that agreed upon. It is a maxim in law, that the *laches* of a *feme covert* shall not be imputed to her. Thus a husband, after marriage, gives a voluntary bond to settle a jointure, and afterwards makes such settlement, whereupon the bond is given up. After the husband's death, the widow was evicted. Held, in equity, that the giving up of the bond did not bind her, she being a *feme covert*; and that the bond should be satisfied from the personal estate, unless she recovered her dower.<sup>2</sup> So a husband, having a power to settle a jointure, not exceeding £100 per annum, after marriage, appointed lands to trustees for this purpose, covenanting that they were worth £100; and, if they were not, that, upon demand made during his life, he would make up the deficiency. The husband lived several years, and no complaint was made respecting the jointure. After his death, the widow brings a bill in equity, to have a deficiency made up from the personal estate. Decreed, in favor of the widow.<sup>3</sup>

§ 21. If the wife had a title before marriage to the lands assigned her for a jointure, it seems, upon entering on them, she is remitted to her former title, and shall recover dower as if evicted.<sup>4</sup>

§ 22. A widow shall be endowed for life only, though evicted from a jointure in fee.<sup>5</sup>

§ 23. In equity, a jointress is regarded as a *purchaser*, marriage being held a valuable consideration. Hence a court of

<sup>1</sup> 2 Story on Eq. 496, and n.

<sup>2</sup> Beard v. Nutthall, 1 Vern. 427.

<sup>3</sup> Fothergill v. Fothergill, 1 Abr. Eq.

<sup>4</sup> Wood v. Shurley, Cro. Jac. 490.

<sup>5</sup> 4 Dane, 685.

equity will always interpose for her protection; and, where there is a mere agreement for a jointure, compel an execution of it, which shall *relate* to the time when it ought to have been made.<sup>1</sup> And, if the agreement is to settle a jointure before marriage, a marriage without such settlement is no waiver or release of the contract; but the wife, after her husband's death, may enforce it in equity.<sup>2</sup> But equity will not relieve against a jointure, although it operates very unequally in favor of the wife.(a)

§ 24. A jointress, being regarded as a purchaser, will be relieved in equity against a prior voluntary conveyance.<sup>3</sup>

§ 25. Where an heir or other person seeks in equity to avoid a jointure, for want of title in the husband to make it, and prays a discovery of title-deeds; in order to obtain such discovery, his bill must submit to confirm the jointure, even though made after marriage. And the widow will not be compelled to produce her own deed, unless the party not only offer to confirm, but actually confirm the jointure. Upon such confirmation, the court will order her to deliver up even leases, if expired, or attendant on the inheritance, although she may have claims for back rents, and upon the covenants.<sup>4</sup>

§ 26. *Interest* is not allowed upon the arrears of a jointure, except under special circumstances; as where the widow has

<sup>1</sup> 1 Cruise, 156; Sydney v. Sydney, 3 P. Wms. 276; Buchanan v. Buchanan, 1 Ball & Beat. 206.

<sup>2</sup> Hayner v. Hayner. 1 Cruise, 218.

<sup>3</sup> 1 Cruise, 157.

<sup>4</sup> Towers v. Davys, 1 Vern. 479; Leach v. Trollop, 2 Ves. 662; Lomax v. —, Sel. Cas. in Cha. 4; 1 Story on Equ. 78.

(a) As part of a marriage treaty between A and the father of B, A was to have a marriage portion of £5,000, and settle £500 per annum upon B. The father demanded that the fee of the jointure should be settled upon her, in case A died without issue, which A refused. A afterwards resumed the negotiation, received articles for the £5,000, settled the £500 per annum, and mortgaged the reversion of the jointure, with his other lands, for the payment of £5,000 to his widow, if he should die without issue. In a fortnight afterwards A died, having been feeble and sickly at the time, and having also declared, on his death-bed, and in presence of the

wife, without contradiction, that no such agreement had been made. The wife brings a bill for foreclosure of the mortgage against the heirs of A, and they bring a bill for relief, alleging fraud. Held, that, marriage being a valuable consideration, mere unreasonableness in the provisions of a settlement, without fraud, was insufficient to set it aside; and that the fairness of the transaction was to be determined by the state of facts at the time, not what took place afterwards. The defendants were decreed to pay the £5,000, without interest. Whitfield v. Paylor. Show. Parl. Ca. 20; (Wickerley v. Wickerley, 2 P. Wms. 619).

been compelled to borrow money on interest. And even this ground is doubted. A *contract* is said to be the only proper reason.<sup>1</sup>

§ 27. In general, a jointure, like dower, is not liable to be barred or affected by any act of the husband alone. But it may undoubtedly be barred by a joint deed of husband and wife.<sup>2</sup> It seems, if the jointure were settled before marriage, it being an absolute satisfaction of the right of dower, this right will not be revived by a conveyance of the husband and wife, releasing her jointure. But if made after marriage, inasmuch as the widow might waive it and claim dower, such release will have the effect to restore the wife's right of dower.<sup>3</sup>

§ 28. In England, a wife does not lose her jointure, like dower, by *elopement* and *adultery*. And, in equity, this is no defence to a bill brought by the wife herself, or by trustees, for a specific performance of marriage articles for a jointure; more especially where specific lands are to be settled, and where both the averment and proof are not of positive acts of adultery, but of mere elopement with another man.<sup>4(a)</sup>

§ 29. With regard to the effect of a provision by will, for the benefit of the wife, it has been held in England, that such provision, being no bar of dower, is upon the same principle no bar of a jointure, which is to be considered as coming in the place of, and having the same privileges with dower. And where there is a covenant that the jointure lands shall be of a certain value, and they prove deficient, the devise or bequest shall not be taken as a satisfaction of such deficiency, or performance of a covenant, but as a bounty, and the defect shall be made up as if no devise had been made. It is said, this is not like the case

<sup>1</sup> *Hubert v. Parsons*, 2 Ves. 261; *Tew v. Winterton*, 1 Ves. jun. 451.

<sup>2</sup> 1 Cruise, 160.

<sup>3</sup> Co. Lit. 87 a; *Dyer*, 858 b.

<sup>4</sup> *Blount v. Winter*, 8 P. Wms. 277; *Sydney v. Sydney*, 8 Ib. 269; *Buchanan v. Buchanan*, 1 Ball & B. 206.

(a) In New York, Missouri and New Jersey, a jointure, and in New York and Arkansas, every other pecuniary provision in bar of dower, is barred by elopement and adultery. In Delaware, a jointure is barred by divorce for adul-

tery of the wife, or by adultery and elopement or separation without the husband's fault, unless he be reconciled to her. 1 N. Y. Rev. St. 742; 1 N. J. Rev. C. 400; *Miss. St.* 229; *Dela. St.* 1882, 149; 1829, 165; *Rev. Sts.* 291.

where a husband covenants to settle lands, and permits them to descend; which is held an implied performance. But it is a question of the construction of a will, with the intent of a testator. The husband having contracted to make the jointure of a certain value, that is what the widow has a right to, as a purchaser; it is her own estate, or a debt from her husband to her. Nor does the largeness of the settlement at all vary her rights.<sup>1</sup>(a) And more especially is this construction to be adopted, where the husband by his will expressly ratifies and confirms the marriage articles, although in the same sentence he gives to his wife lands for life.<sup>4</sup> And the same rule prevails, though the specific lands charged with the jointure are expressly devised away, by the will which makes provision for the wife.(b) But,

<sup>1</sup> Probert v. Morgan, 1 Atk. 440; 1 Crui. 169 a; Prime v. Stebbing, 2 Ves. 409.

<sup>4</sup> Prime v. Stebbing, 2 Ves. 409.

(a) By marriage articles between an intended husband and the father of his intended wife, the father covenanted to pay a certain sum of money, and to settle lands to certain uses, if the husband would settle lands upon his wife to the value of £500 per annum, as a jointure in lieu of dower. The father fulfilled his covenants, and the husband settled lands the annual value of which exceeded the amount agreed upon. But afterwards, finding some defect in the title of a part of the lands, and being advised that, upon his dying without issue, the jointure might become void in consequence of an entailment for the benefit of his sisters, he suffered a fine of the jointure lands, and also, in pursuance of a power from his father, appointed other lands to his wife, declaring the same to be in recompense of all deficiencies in her jointure. The husband afterwards made his will, by which he gave the wife a large pecuniary legacy, all his personal estate, several houses and lands, and made her a residuary legatee; all which provisions were more than double the value of the jointure. Neither the wife nor her father or friends had notice, during the marriage, of the title of the sisters. The husband, by the death of his wife's parents, received a considerable amount of property, and was allowed by her to have the benefit of her estates derived from her father. The will devised to the sisters and their issue the reversion of all the husband's inheritance after the wid-

ow's death. After the husband's death, his sisters claimed the lands settled as a jointure, and by legal title evicted the widow therefrom. The widow files a bill in Chancery, to have her jointure confirmed or dower assigned; and the defendants file a cross-bill for discovery. Held, by Lord Harcourt, that the defendants should convey to the widow lands of her husband to the value of £500 per annum for life, which she should hold in addition to all the other provisions above mentioned for her benefit. On appeal to the House of Lords, the decree was affirmed. *Grove v. Hooke*, 4 Bro. Parl. Co. 568; 5 Vin. Abr. 298.

A man, upon his marriage, gave bond to a trustee, to settle upon the wife, within four months, freehold lands worth £100 per annum. After marriage, he devises freehold and copyhold lands, of the value of £88, to *his loving wife* and her heirs; and dies within the four months. Held, this devise was no satisfaction of the jointure, because land cannot be a satisfaction of money, nor the converse; nor copyhold a satisfaction of freehold. That the phrase, *his loving wife*, imported a bounty, and that the wife should take the devise in addition to the £100, if there were assets for payment of bond debts, and those charged by will upon the land. *Eastwood v. Vinke*, 2 P. Wms. 618.

(b) A man, in consideration of marriage and a large marriage portion, covenanted to convey lands in C to trustees, to raise

if a devise is made expressly as a substitute or satisfaction for the jointure of the wife, she cannot hold both, but must make her election between them.(a) And it is suggested, that, in analogy to the law concerning dower, a devise shall be held a satisfaction of the wife's jointure, if the will raises a strong implication that such was the testator's intention.(b)

an annuity for his wife, as a jointure and in lieu of dower. The conveyance was not made; but the husband, having sold large estates of greater value than the lands in C. and contracted for the purchase of others, made his will, devising to his wife a leasehold house in London with all the furniture, and also the estates contracted for, or the purchase-money of those sold, and devising the lands in C to trustees for the benefit of his heir, subject to an annuity. The widow, after entering upon the estates devised to her, brought a bill in equity against the heir for a specific execution of the marriage articles. Held, both in Chancery and the House of Lords, that the devise was no bar of the jointure. *Broughton v. Errington*, 7 Bro. Parl. Ca. 461.

(a) A man agreed to purchase lands to the amount of £10,000, and settle them upon his intended wife for her jointure. After the marriage, his father gave him an estate for life, with a power to grant a rent-charge of £400 per annum to any woman whom he should marry, for her jointure. The husband accordingly granted such rent-charge, in satisfaction of a part of the jointure; afterwards conveyed a leasehold of £200 per annum, in trust for the wife; and then, by will, confirmed the rent-charge, and the conveyance of the leasehold, by way of addition, and in full compensation of the jointure. Held, these provisions were a satisfaction of the jointure, and the widow must elect between them. *Grandison v. Pitt*, 2 Ab. Eq. 892.

(b) The following case is cited to this point. 1 Cruise, 171: The father of a husband settled lands upon the wife, and covenanted that they were worth £1,000 per annum. After the father's death, the husband, his heir, devised to his wife other lands worth £500, a legacy of £1,000, and a part of his household goods. Subsequently, being minded to make some further provision for her, he revoked the uses of a portion of his estates, and limited them to trustees to

raise £10,000 for her. By a codicil, he devised to her an annuity of £500 for life. The widow brings a bill in equity to have a deficiency in her jointure made up. Held, the other provisions must be taken as a satisfaction of such deficiency. *Mountague v. Maxwell*, 4 Bro. Parl. Ca. 598; 2 Ab. Eq. 421.

Upon this case, however, it is remarked, that it was prior to *Prime v. Stebbing*, (*Supra*, sec. 29,) and also that it was finally decided upon the ground, that the husband was a very weak man, and under the influence of his wife, and, at the execution of the codicil, actually insane.

In the United States, no very considerable departures have taken place from the English law of jointure; except in a few of the States. Universally, a jointure accepted will operate as a bar of dower; and, in many of the States, the statutes providing for the right of dower, in the way of qualification or exception, expressly disallow it in cases where the widow has received a jointure. Vermont seems to be the only State where a woman of full age "endowed by way of jointure," before marriage, could ever waive her jointure and claim dower. And now, by the Revised Statutes of that State, a jointure or pecuniary provision, made by the husband or any other person, before marriage, or, with the wife's consent, after marriage, to take effect after the husband's death and in lieu of dower; is a bar thereof. So any devise, &c., which the Probate Court determines to have been so intended. So her half of the estate, where there are no children or their representatives. And the widow cannot elect between an ante-nuptial provision and her dower, where she was not the first wife, and there are no issue, and she receives a comfortable support, if the court order otherwise. In Indiana, where both curtesy and dower are expressly abolished, a jointure will bar the wife's share of her husband's estate; and a similar provision for him will bar his share of her estate. *Anth. Shep.* 21; *Verm. Rev. St.* 289;

Ind. Rev. Sts., *Descent*, secs. 36-7. See *Cauley v. Lawson*, 5 Jones Equ. 132.

Mr. Dane remarks, that the colony law of Massachusetts of 1644 supposed the widow might be barred of her dower by a jointure. 4 Dane, 685.

In the same State, a jointure which would be good in equity has been held insufficient to bar dower.

By marriage settlement, a husband covenanted that the wife should have an annuity from his estate after his death, and, in consideration thereof, she covenanted not to claim dower. The husband died insolvent. Held, the covenant for an annuity could not operate as a jointure; nor the covenant of the wife as a release of her dower, or a valid contract; the claim of dower at the time of the covenant not having accrued, and the consideration failing by the husband's insolvency. *Hastings v. Dickinson*, 7 Mass. 158. Nor could it operate by way of *estoppel*. 15 Mass. 110.

So, where a man and woman, before marriage, entered into mutual covenants through a trustee, in the nature of a jointure; the former covenanting for an annuity, and the latter agreeing to relinquish all title to dower, and also that her covenant might be pleaded in bar to any claim of dower, with a saving of her right to the annuity: held, the covenants were not extinguished by the marriage, as they could not by possibility be enforced or performed during the marriage; but that a failure to pay the annuity would restore the wife's right to dower in full, although she might perhaps be liable upon the covenant for the difference of value between the two. *Gibson v. Gibson*, 15 Mass. 106; \* *Vance v. Vance*, 8 Shepl. 334.

In South Carolina, the English statute of uses on this subject has been almost in terms re-enacted. In Ohio, it is said the provision must be for the life of the wife. *Anth. Shep.* 560; *Walk. Intr.* 325; 2 *Const. S. C.* 747. See *Green v. Green*, 7 Por. 19.

In Massachusetts, Maine, Michigan, Arkansas, Wisconsin and New York, a woman's assent to her jointure, or any pecuniary provision in lieu thereof, must be expressed, if she be of full age, by her becoming a party to the conveyance

\* This case is said to be not distinguishable from *Hastings v. Dickinson* (*supra*, n. 3). But some of the remarks of *Wilde, J.*; would seem to imply that such a covenant, if performed, might bar dower.

by which it is settled, or, if she is an infant, by her joining with her father or guardian in such conveyance. Like provisions are made in Virginia.

(Previous to the marriage of A with B, an indenture of three parts, sealed by the parties, was made by and between A, B and C. A covenanted and agreed with C, that in the event of the marriage taking place, and his wife surviving him, he would, "by his last will or otherwise," make a certain provision for her, by the payment of a gross sum to C, and by payment or giving security for the payment to him of a further sum yearly during the widowhood of the wife, for her use, and to be paid to her by C, instead and in satisfaction of dower in the real, and of any distributive share of the personal estate of A. C covenanted and agreed with A that he would accept the trust, and receive and pay over the money, for the use and benefit of B; and the latter covenanted and agreed with A and C, that, in case the marriage took place, and she should survive A, and the money above mentioned should be provided to be paid, and actually paid, and the annuity well and sufficiently secured and provided to be paid, as stipulated, the same should be in full satisfaction of her dower in the estate of A, and should bar her from claiming the same, if she should survive him, and also bar any claim on her part of any share in his personal estate, unless given her by his will. The marriage took place, and A died, leaving a will, in which no reference was made to the indenture, but which contained a general direction for the payment of the testator's debts and the performance of his obligations. The executor of A, within the time stipulated, made the payments and gave the security therein specified to C, for the benefit of the widow, who refused to receive the same, but made a demand of dower, and brought her action therefor. Held, by the indenture, a pecuniary provision was made for the benefit of the demandant, in lieu of dower, and assented to by her, within the provisions of the Rev. Sts., ch. 60, secs. 8, 9, by which the demandant was barred of her dower. *Vincent v. Spooner*, 2 Cush. 467. In Virginia, a jointure may consist of either real or personal property. *Craig v. Walthall*, 14 Gratt. 518.)

In South Carolina, by an old act, if a jointure be made after marriage, unless by act of Parliament, the wife may refuse it and demand dower. *Mass. Rev.*



St. 410; 1 N. Y. Rev. St. 741; Anth. Shep. 562; Mich. Rev. St. 264; Ark. Rev. St. 387-8; Wisc. Rev. Sts. 384-5; Vir. Code, 474.

In Maine and Massachusetts (Mass. Rev. St. 410; Me. Ib. 892), if a jointure is settled before marriage without the wife's assent, or after marriage with her assent, she is allowed six months after notice of the husband's death, to elect between the jointure and her dower. In Virginia, she is allowed nine months; in Vermont, sixty days; in New York, Indiana, Arkansas and Michigan, one year. (So, in Wisconsin, she may elect. Wisc. Rev. Sts. 385.)

In Missouri, if a jointure be settled upon an infant, or after marriage, the wife may elect. 1 N. Y. Rev. St. 742; Misso. St. 229; Mich. Rev. St. 265; Ind. Ib. *Descent*, sec. 40.

In Missouri (Misso. St. 229), a jointure may be created on an agreement with the husband, or a third person, prior to and in contemplation of marriage, for real or personal estate, to take effect after the husband's death by way of jointure, and expressed to be in bar of dower; or by a conveyance to the husband and wife, or a third person, and their heirs, to the use of them both or of her alone, as a jointure. So, in New York, a jointure may be limited *in trust*. 1 N. Y. Rev. St. 741.

In Delaware, dower will be barred by any estate in or charge on lands, prior to and in contemplation of marriage, for life, to take effect at or before the husband's death, in lieu of dower; provided the wife be of age. In Rhode Island, by a jointure *by deed or will*, for life or in fee, in lieu of dower, to take effect in possession on the husband's death, and forfeitable only like dower. If made after marriage, or to an infant, she may waive it. Del. St. 1829, 165; Del. Rev. Sts. 290; R. I. L. 191.

(A husband, by will, made certain provisions for his wife, declaring them to be in "lieu of her dower or other interest in my estate," and, after making the will, acquired other real estate. The widow having elected to accept the provisions of the will; held, she was barred of her dower in the after-acquired estates, and that a letter of the testator, enclosed with his will, was inadmissible to show a contrary intent. *Chapin v. Hill*. 1 Rhode Island, 446.)

In Virginia and Kentucky (1 Vir. Rev. C. 171; 1 Ky. Rev. L. 575-6), the law is substantially the same; except that the jointure may be either *expressly or*

*by averment* in lieu of dower. In Ohio, an infant jointress may waive her jointure. (Walk. Intr. 825.) In Tennessee, a post-nuptial settlement, made in lieu of maintenance, dower and distribution, is voidable at the election of the wife; yet, if she claims dower and distribution after the death of her husband, she must renounce the benefits of the deed. *Parham v. Parham*, 6 Humph. 287.

In Missouri, Michigan, Wisconsin, Indiana, Virginia, South Carolina, Delaware, Massachusetts, Maine, Connecticut and Ohio (1 Brev. Dig. 268; Walk. Intr. 825; Misso. Sts. 229; 1 Vir. R. C. 171; 4 Kent, 55, n.; Dela. St. 1829, 165; Mass. Rev. St. 411; 4 Hen. & M. 28; Maine Rev. St. 398; Connecticut St. 190; Dela. Rev. Sts. 290; Wisc. Ib. 385; Vir. Code, 474; Ind. Rev. Sts., *Descent*, sec. 42), eviction from a jointure, or any part thereof, restores the right to dower, wholly or *pro tanto*. It is remarked, that this provision is omitted in the Revised Statutes of New York. But, in the absence of any statutory provision, the English rule undoubtedly prevails. (See *supra*. sec. 19.)

In Missouri, Rhode Island, Virginia, and Kentucky (Misso. St. 229; 1 Vir. R. C. 171; 1 Ky. Rev. L. 576; R. I. Laws, 191), if, through any informality in the settlement, a jointure fails to bar dower, and the latter is claimed, the widow loses her jointure.

In Pennsylvania, where a marriage contract was set up in bar of dower and proved, and it also appeared that the contract had been given up by the trustee under it to the husband to be cancelled, and he did destroy it, but no evidence of its contents as to the terms or amount of the settlement was brought, and it appeared that the contract was made to quiet the children of the husband, who promised, when he had shown it to them, to destroy it; held, as the proof of the contents of the contract was not clear, and as it had been cancelled by the husband according to his original intention, though it was kept some time before it was actually destroyed, the widow's dower was not barred; that the destruction of the contract was binding on the husband, and, if ratified by the wife by her acts after his death, was binding on her. *Gangwere*, 2 Harris, 417.

In Connecticut (Dut. Dig. 53), the rules of the English law relating to jointures have probably been farther relaxed than in any other State. There a jointure may consist of personal estate;



and any provision accepted before marriage in lieu of dower will be a good equitable jointure. By statute, a jointure made before marriage must be expressed as made in lieu of dower. Conn. St. 189.

It was agreed between husband and wife, that his executors should pay her \$100 in lieu of dower from his estate, which was worth \$6,000. After his death, the widow gave a receipt acknowledging satisfaction. Held, in chancery, a good bar of dower. *Selleck v. Selleck*, 8 Conn. 79, n.

A man and woman, of advanced years, being about to marry each other, entered into a written agreement, by which he promised not to interfere with her pro-

perty, to support and clothe her, and allow her a part of the avails of her labor. The husband executed his part of the agreement. After his death, his executor delivered to the widow the articles which she had brought to the house. In consideration of the premises, the widow, by an unsealed instrument, released *the estate* from her claim of dower, but afterwards brought a suit at law to recover it. The heirs file a bill in chancery, for an extinguishment and release. Held, the contract was one highly beneficial, and the release founded on a valid consideration; and the bill was sustained. *Andrews v. Andrews*, 8 Conn. 79.

## CHAPTER XIV.

## ESTATE FOR YEARS.

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|---|---|
| 1. Estates less than freehold—estate for years—lease.   | 22, 29. Limitation of.  |
| 3. Definition—"term," what is a.  | 28. Husband and wife.   |
| 4. How created, and for what time.  | 24, 28. Liable for debts.   |
| 5. Must be <i>certain</i> ; estate of executors and trustees.   | 25. Freehold cannot arise from.                                       |
| 6. An inferior estate.  | 26. Incidents.  |
| 7. Tenant not <i>seised</i> .   | 27. <i>Estovers</i> .   |
| 8. When it commences—entry— <i>inter-esse termini</i> ; liability of tenant as depending on possession. | 30. <i>Merger</i> .   |
| 19. <i>In futuro</i> .  | 38. <i>Surrender</i> , actual or constructive; assignment, whether a. |
| 21. How terminated.   | 36. Assignment and under-lease.                                       |
| 22. Is a chattel.   | 46 a. Assignment by reversioner.                                      |
|   | 49. Conveyance of.  |
|   | 50. Forfeiture.   |

§ 1. Having treated of *Freehold Estates*, we proceed to consider *Estates less than Freehold*.

§ 2. Of these, the first in order is an *estate for years*. This, next to a fee-simple, is the most common estate known to the law. It is that to which the term *lease* is chiefly, though not exclusively, applied.

§ 3. An estate for years, is a right to or a contract for the possession of land, for a certain specified time.<sup>1</sup> Both the time and the estate itself are called in law a *term*. Hence the *term* may expire before the time—as, for instance, by a *surrender*.<sup>2</sup> Thus, if a conveyance be made to A for three years, and, after the expiration of the said *term*, to B for six, and A surrender or forfeit his term after one year; B's estate takes effect immediately. Otherwise, if the language had been, "after the expiration of *the said time*, or *the said three years*." (*Infra*, ch. 15.) So in case of a lease for years, if the lessee live so long, remain-

<sup>1</sup> 4 Kent, 85; 1 Cruise, 174; 2 Black. Co. Lit. 45 b. Comm. 112. See Hitchman v. Walton, 4 Mees. & W. 409.

der to A for the residue of *the term*; A shall hold for the whole term after the lessee's death.<sup>1</sup>

§ 4. This estate is never created, like a life estate, by *act of law*, but always by *act of parties*. The title is applicable, though the time limited be less than a year.<sup>2(a)</sup>

§ 5. Every estate for years must have a certain beginning and ending, to be ascertained, at its creation, either by express words, or by reference to some certain collateral act.<sup>3</sup> According to the maxim, "*id certum est quod certum reddi potest*," a lease for so many years as A shall name is a good estate for years; but a lease for so many years as A shall live, or by a parson for so long a time as he shall continue in that office, is bad, as an estate for years. In England, it would be void for want of livery; but in this country would probably create a life estate.<sup>4(b)</sup>

§ 5 a. A conveyance for twenty-one years, if A shall live so long, creates a tenancy for years; because the estate, though it may end sooner, cannot last longer, than the time fixed. So a devise to executors, for payment of debts and till the debts are paid, gives them an estate for so many years as will be necessary to raise the required sum. A devise, till such time as a

<sup>1</sup> Wright v. Cartwright, 1 Burr. 282.

<sup>2</sup> Lit. 67; Co. Litt. 54 b.

<sup>3</sup> 1 Cruise, 174.

<sup>4</sup> 2 Bl. Com. 115; Co. Litt. 45 b. n. 2; Goodright v. Richardson, 8 T. R. 468.

(a) The meaning of the term *year* depends upon the subject matter, the context, and the intent of the party using it. Thornton v. Boyd, 25 Miss. 598. A year, in law, consists of three hundred and sixty-five days, the additional day of leap year not being reckoned; and a half year, of one hundred and eighty-two days. A month, in England, means ordinarily a lunar month, except in mercantile contracts, or where the intention is otherwise. But in this country, a calendar month will be usually intended. In New York and New Hampshire, express statutes so provide. So in Massachusetts, in the construction of statutes. Co. Litt. 185 b; Ind. Rev. L. 409; 4 Kent, 95 n. b; 1 N. Y. Rev. St. 606, Mass. Ib. 60; N. H. Ib. 44. As to the meaning of the word *day*, see Pulling v.

The People, 8 Barb. 312; Judd v. Fulton, 10 Ib. 117.

A term for years continues through the anniversary of the day on which it commenced. Ackland v. Tulley, 9 Ad. & Ell. 879. See Brewer v. Harris, 5 Gratt. 285; Bartol v. Calvert, 21 Alab. 42; Mitchell v. Woodson, 37 Miss. 567; Marys v. Anderson, 2 Grant, 446,

(b) A lease, to hold till a child, then unborn, shall come of age, has been held to constitute a *tenancy at will*, on account of the uncertainty whether the child will ever reach that age. Bishop, &c., 6 Co. R. 85.

Where one has a lease for forty years, a grant, for so many years as shall remain at his death, is void. Otherwise, with a demise for so many years, to commence after his death. The Rector, &c. 1 Co. 153 a.

certain sum shall be raised from the rents and profits, has the same effect. Lord Coke speaks of the former of these estates as an uncertain interest; being neither for life, for years, nor at will. The uncertainty would make it a life estate; but this would defeat the object, as the party might die before the debts were paid. So where there is a devise to trustees, of all the testator's lands in A; in trust to permit the wife to enjoy them for life, afterwards, out of the rents and profits, to pay B an annuity for five years, if he live so long; and the will also gives legacies, to be paid when the legatees come of age, and constitutes the wife executrix: the trustees take a chattel interest in the lands in A, either until the legacies are paid, or all the legatees come of age.<sup>1</sup> So a feoffment to the use of A, his executors and assigns, till ten pounds should be levied out of the profits, was held to pass a chattel interest.<sup>2</sup>

§ 5 b. Lease of land for the purpose of being explored for minerals, the rent payable quarterly, and a forfeiture created by non-user for a year, but with a right in the lessees to discontinue their operations at any time. Held, an estate from year to year, with a right in the lessee to six months' notice to quit.<sup>3</sup>

§ 5 c. A written agreement, on one part, to lease premises at a rent payable quarterly, to continue one year, and on the other to pay the rent, and signed by both parties, is a lease for one year.<sup>4</sup>

§ 6. Tenancy for years is an inferior title to a life estate, however long it may last; being in its nature a chattel interest, according to Lord Coke, "never without suspicion of fraud,"<sup>5</sup> and not real estate. This inferiority may be traced to the original nature of such tenancy, which grew out of the mere *possession* of land by the *villeins*, in the early period of the English law.(a)

<sup>1</sup> Co. Litt. 42 a; Matthew Manning's case. 8 Rep. 96 a; Sir Andrew, &c. 4 Rep. 81 b; Carter v. Barnadiston. 1 P. Wms. 509; Doe v. Needs, 2 Mees. & Wels. 129.

<sup>2</sup> Co. Litt. 42 a, n. 7.

<sup>3</sup> Patton v. Axley, 5 Jones, 440.

<sup>4</sup> Hurlburt v. Post, 1 Bosw. 28.

<sup>5</sup> Co. Litt. 46 a.

(a) In the time of Littleton, the letting of lands to a *villein*, for years, operated as an enfranchisement. Litt. 205. By the ancient law, a term could not exceed

forty years. Co. Litt. 45, b. By the Constitution of New York, (1846,) agricultural leases are limited to twelve years.

This naked possession was gradually enlarged into a tenancy at will, yielding rent in kind, and at length into a letting of the land for a certain specified time; but never rose to the dignity of a freehold. Before the statute of Gloucester, passed in the reign of Edward I., the law, regarding tenants for years as rather bailiffs or servants, than as having any estate in the land, allowed their title to be defeated by recovery against the landlord in a real action. This act, and the Statute 21 Henry VIII, allow such tenant to *falsify* or avoid a collusive recovery.<sup>1</sup>(a)

§ 7. Such being the nature of his estate, a tenant for years is not said to be *seised of the land*, but only *possessed of the term*. The subject of seisin has already been considered, (chap. 2.) (b)

<sup>1</sup> 1 Cruise, 172; Gilb. Ten. 84; Wisc. Rev. Sts. 314.

(a) These provisions have been re-enacted in New York and North Carolina, and extended to a tenant holding by an execution title. 1 N. C. Rev. Sts. 261; 2 N. Y. Rev. Sts. 340.

(b) Improvements by a tenant for years cannot convert his tenancy into a freehold estate. *VanBlarcom v. Kip*, 2 Dutch. 351. The tenant, however, has a possessory title to the land. Thus the occupant of a house, damaged by blasting, may maintain an action for the injury to his possession, whether he is the owner or merely a tenant. *Hardrop v. Gallagher*, 2 Smith, 523. As in case of throwing stones upon an adjoining lot, splitting out the rock in such lot, and undermining his house; whether done negligently or otherwise. The tenant, in such case, recovers for the injury to his possession, not to the freehold. *Gourdiere v. Cormack*, 2 Smith, 200.

Questions sometimes arise from clauses in a lease, restrictive of the lessee's general title, in reference to the purpose of his occupation. See *Croft v. Lumley*, 1 Ell. B. & E. 1069.

The use, for the manufacture of caps, of premises leased "to be occupied for the same purposes they now are," and which were occupied at the time of the lease for the manufacture of carpet-bags, is not such an alteration in the occupation as will avoid the lease. *Shumway v. Collins*, 6 Gray, 227. A tract of land was demised for a term of years, "together with the quarry or quarries thereon, and the privilege of getting out stone in the same; also the privilege of getting

out stone in any part of said tract, and to use and occupy said land in any manner that the lessees may choose, and for all purposes necessary and convenient for carrying on the quarrying business."

The lease also provided that the lessees should have the use of a certain wharf for the purpose of hewing stones thereon, and of shipping them, and that the rent should be seven per cent. of the value of the stone quarried and sold. Held, the lessees were not restricted in the use of the demised premises to the quarrying of stone. Also, that there was no such ambiguity in the language of the lease as to render admissible evidence *aliunde* of an intent of the parties that the use should be so restricted. *Burr v. Spencer*, 26 Conn. 159. In a similar case, held, the lessees were not at liberty to work the quarry or not, as they pleased, but were bound to improve it in a reasonable manner during the term of the lease. *Brainerd v. Arnold*, 27 Conn. 617.

If a lessee (a druggist), knowing that the landlord will not let for a bar-room, agree to sub-let for that purpose, and thereupon obtain a renewal in his own name, equity will restrain him and his sub-lessee from using the premises as a bar-room. *Parkman v. Aicardi*, 84 Ala. 398.

A recital in a lease, that the premises "are now occupied and to be occupied as a lumber yard," is a covenant running with the land, and the erection of buildings by an assignee of the lease is a breach. *DeForest v. Byrne*, 1 Hilt. 43.

§ 8. At common law, the mere *delivery* of a lease does not make the lessee a tenant for years, till he enters. But he has an *interesse termini*, which passes to his executors, if he die without taking possession, and may be assigned over. So, when one buys land at a sheriff's sale, upon which there is a lease from the defendant in execution older than the judgment, and at the time of the sale the lessee has not entered into possession, the purchaser buys, subject to the lessee's right of entry and user. Before entry, a lessee cannot maintain trespass. But, more especially as against a wrong-doer, his possession of a part is that of the whole. And, under the statute of uses, an estate for years may be created without entry.<sup>1</sup> And it is remarked, that there are subtleties upon the subject of an *interesse termini*, that betray excessive refinement, and lead to useless abstruseness;<sup>2</sup> and the rule of American law is stated to be, that the execution and delivery of the lease perfects the title of the lessee to all intents and purposes.<sup>3(a)</sup>

§ 9. Till he takes possession, a lessee is liable upon the covenants only as an executory contract. And, to recover on them, the lessor must show performance on his part.<sup>4</sup>

§ 10. Where a term is created, to commence from the time when the premises shall be "finished and ready for the occupation of the lessees;" in covenant for rent, the defendants may prove that they never were so finished, and so the term never commenced; and this, although they occupied for a time, and, upon taking possession, expressed themselves satisfied.<sup>5</sup>

<sup>1</sup> Litt. 58, 66, 324, 459; Co. Lit. 200 b, 46 b, 51 b. 270 a; 1 Cruise, 175-6; Williams v. Bosanquet, 1 Brod. & B. 238; Copeland v. Stephens, 1 B. & A. 593; Raine v. Alderson, 6 Scott. 691; Field v. Howell, 6 Geo. 423; 2 Phil. Evi. 182; Taylor v. Perry, 1 Scott, N. 576.

<sup>2</sup> 4 Kent. 97. n. a.

<sup>3</sup> Walk. Intr. 278.

<sup>4</sup> La Farge v. Mansfield, 81 Barb. 845. See Andriot v. Lawrence, 88 Barb. 142.

<sup>5</sup> Clarke v. Spaulding, 20 N. H. 818.

(a) If a person receive a lease by *metes and bounds*, his possession is co-extensive therewith, and is not available to establish the possession of his landlord any further. Massengill v. Boyles, 11 Humph. 112.

A lease cannot give the lessee such a constructive possession of the whole tract, of which the defendant occupied a part at the time of the demise, as will

enable him to maintain trespass against the defendant, however good the title of the lessor may be. Wilson v. Douglas, 2 Strobb. 97.

Littleton says, "when the lessee entereth by force of the lease, then is he tenant for term of years," and the lessor may distrain or have an action of debt for rent. Ub. sup.

§ 11. If the landlord refuses to deliver possession to an under-tenant, and occupies himself, the contract is repudiated, and it is a good defence to an action for the rent against the lessee.<sup>1</sup>

§ 12. Delivery of possession is necessary to the obligation to pay rent, whether the lessor refuses or is unable to give possession. Where the premises are destroyed after execution of the lease, but before commencement of the term, and before the lessee has entered, he is not liable for rent.<sup>2</sup> And the lessee is under no obligation to accept a part, but is justified in abandoning the land.<sup>3</sup> The distinction is made, however, that in the equitable action for use and occupation the tenant is not answerable, unless he has had the beneficial use of the property. But the action of covenant for rent upon a sealed lease does not depend upon occupation and enjoyment.<sup>4</sup>

§ 13. In an action by the lessee for refusing to deliver the premises, the plaintiff cannot offer evidence of a contract to assign the lease, or a proposal to purchase it.<sup>5</sup> But he may show the amount of money paid to workmen whom he was obliged to discharge for this cause. So he may recover expenses incurred in preparing to remove to and occupy the premises, together with the difference between the real value of the rent and the sum agreed to be paid; but not the profits which he might have made in his business, had he occupied the premises.<sup>6</sup>

§ 14. Where, at the time of taking a lease, the lessee knew that A was in possession, and tried to eject him, and, failing in this, finally assigned his lease to A; held, the tenant was liable for the rent reserved.<sup>7</sup>

§ 15. A lessee does not show eviction by proving that he never could obtain possession in part;<sup>8</sup> but if he enters upon the rest, and pays in full for two quarters without objection, it is no bar to a suit for the third quarter's rent that he never had full possession; but the lessor may recover on a *quantum meruit*.<sup>9</sup>

§ 16. After an agreement to lease, if the owner notifies the

<sup>1</sup> Garner v. Byard, 28 Geo. 289.

<sup>2</sup> Wood v. Hubbell, 5 Barb. 601.

<sup>3</sup> Hay v. Cumberland, 25 Barb. 594.

<sup>4</sup> Gilhooley v. Washington, 4 Comst. 217.

<sup>5</sup> Lawrence v. Wardwell, 6 Barb. 428.

<sup>6</sup> Giles v. O'Toole, 4 Barb. 261. See Noyes v. Anderson, 1 Duer, 342.

<sup>7</sup> Bailey v. Wells, 8 Wis. 141.

<sup>8</sup> Hurlbut v. Post, 11 Bosw. 28.



applicant for a lease, that he cannot take possession until a lease is made and security given for the rent; and the applicant subsequently takes possession, and cultivates a part of the premises at the same time with the owner: he cannot recover of the owner in trespass, although the owner harvested and retained the entire crops; such notice being sufficient to prevent any dispossession of the lessor.<sup>1</sup>

§ 17. Where a lessor made a fraudulent representation to his lessee as to the territorial extent of his right, and the lease was made for a term commencing *in futuro*, and the lessee took possession at the commencement of the term, and after having discovered the fraud: held, the lease passed a present interest in the term to the lessee; and, by taking possession, he waived only his right to rescind the contract, but not his right to recover the damages occasioned by the fraud.<sup>2</sup>

§ 18. It seems, if a lessee enter upon the land before the time agreed on, his entry is a disseisin, not a possession under the lease; and, although he remain in possession after the time, he is still a disseisor as before, by *relation*.<sup>3</sup> But if a lease is limited from a time past, and the lessee was in possession before that time, this shall be intended to have been by permission, and not a disseisin.<sup>4</sup>

§ 19. An estate for years may be created to commence *in futuro*, and the lessee acquires an immediate interest; because such conveyance does not, like a conveyance of the freehold *in futuro*, place the latter *in abeyance*, which is contrary to the policy of the law.<sup>5</sup>

§ 20. Where a lease is to commence *in futuro*, if, before entry of the lessee, a stranger enter by wrong, the former may still make a valid assignment of his term; because, before entry, the estate, not being vested, cannot be divested or turned to a mere right by any wrongful act; but, when the lawful time of entry arrives, the lessee, or his assignee, enters by a title paramount to all intermediate claims.<sup>6</sup> So if, after commencement of the

<sup>1</sup> Crotts v. Collins, 18 Ill. 867.

<sup>2</sup> Whitney v. Allaire, 1 Comst. 805.

<sup>3</sup> Hennings v. Brabason, 1 Lev. 45.

<sup>4</sup> Waller v. Campian, Cro. Eliz. 906.

<sup>5</sup> See ch. 2. Allaire v. Whitney, 1 Hill, 484; Field v. Howell, 6 Geo. 428; Ind. Rev. Sts. 232.

<sup>6</sup> 1 Cruise, 176.

term, the lessor continue in possession, the lessee may still make a valid assignment.<sup>1</sup> But where a lessee *in futuro*, having entered, is turned out of possession, he can no longer make a valid assignment, having merely a right of entry left him, which is not assignable.<sup>2(a)</sup>

§ 21. A freehold estate, in the language of Lord Coke, cannot begin nor end *without ceremony*. Hence such estate can in general be terminated, before its natural expiration, only by some similar act to that with which it commenced, such as entry. But a lease for years may begin, and so may end, without ceremony. Hence it may be made to cease by a proviso in the instrument itself. Thus a trust terms will cease, upon fulfilment of the trusts for which it was created, if the instrument creating it so provide.<sup>3</sup>

§ 22. An estate for years is denominated a *chattel real*. Being an interest in land, it has the quality of *immobility*, which constitutes it real; but, having no *indeterminate duration*, it is not ranked with inheritances and other freeholds, but is a mere chattel; though for 999 years, and in consideration of *a sum in gross*.<sup>4</sup> Hence an estate for years, upon the owner's death, passes with personal property to the executor, &c., and not with the real estate to the heir.<sup>5(b)</sup> And the legal succession to a

<sup>1</sup> Wheeler v. Thorogood, Cro. Eliz. 127; 1 Leon. 118.

<sup>2</sup> Bruerton v. Rainsford, Cro. Eliz. 15; Saffyn's case, 5 Rep. 124 a.

<sup>3</sup> Co. Lit. 214 b; Ark. Rev. Sts. 268. See Nicoll v. Walworth, 4 Denio, 885.

<sup>4</sup> Osborne v. Humphrey, 7 Conn. 335. Acc. Spanger v. Stanler, 1 Md. Ch. 81.

<sup>5</sup> 1 Cruise, 177; Wiscon. Rev. Sts. ch. 56, 65; Ellison, 2 Y. & Coll. 528; Ackland v. Pring, 8 Man. & G. 987; Dillingham v. Jenkins. 7 S. & M. 479.

(a) A leases to B, for two years from a future day, a house, stated in the lease to be then in possession of C. C holds over wrongfully after the day fixed. B cannot sue A, as on an implied promise to deliver possession. Cozens v. Stevenson, 5 S. & R. 42. If a lessee assign his lease before the time of taking possession arrives, a judgment docketed against him before he became lessee is not a lien upon the land, as he never had possession. Crane v. O'Connor, 4 Edw. Ch. 409.

(b) Upon this principle, the levy of an execution upon a term, in the form of a levy on real estate, in Massachusetts is

held void. But in New Hampshire a different rule has been settled. Chapman v. Gray, 15 Mass. 439; Adams v. French, 2 N. H. 387.

In Massachusetts it is now provided, that a term originally created for a hundred years or more, and of which fifty remain unexpired, shall have all the incidents of a fee-simple. So, in Vermont, the owners of long terms are invested with some of the privileges of freeholders. And, in Ohio, lands held by permanent leases are treated as real estate, in regard to judgments and executions, and descent. But a term for ninety-nine years is to be sold on execution, as a

term cannot be controlled by any limitation in the conveyance. Hence, if a lease be made to a minister, or other sole corporation, *and his successors*, the estate will still pass, upon his death, to his executor or administrator, who shall hold it, not in *autre droit*, but in his own right. The reason of the above rule is, that a chattel can never be *in abeyance*. Therefore such estate may pass to the successor of a sole, who is merely the head of an aggregate corporation.<sup>1</sup>

§ 23. In reference to the title to an estate for years as affected by *marriage*; where a woman, owning a chattel real, marries, it does not, like personal chattels, vest in the husband absolutely, but *sub modo*. He has the power to dispose of it; but, if he does not, either legally or equitably, it reverts on his death to her.<sup>2</sup> Where the husband, holding a term in right of the wife, leases the land for a shorter period and dies, the wife has the reversion, but the rent goes to his executors. (a) If the husband grant the whole term on condition, and the executors re-enter for a breach, they hold absolutely.<sup>3</sup> If the husband and wife are ejected from the land, and the former recovers it in a suit brought by himself alone, this vests the term absolutely in him.<sup>4</sup> In England, by the statute of frauds, if a wife die before her husband, he is entitled to administer upon her estate, and takes her chattels real to his own use. They vest absolutely in him, and upon his death pass to his administrator.<sup>5</sup> A similar rule generally prevails in the United States.

§ 24. The purchaser of a term from an executor is in no case bound to see to the application of the purchase-money. Because, being personal estate, such term is primarily liable for debts.<sup>6</sup> See chap. 25.

<sup>1</sup> Co. Litt. 9 a, 90 a; 1 Co. Litt. (Thomas' ed.) 224, n. k; 2 Bl. Com. 431. See *Daniels v. Richardson*, 22 Pick. 565.

<sup>2</sup> *Steed v. Cragh*, 9 Mod. 43; Co. Lit. 46 b; *Ellison*, 2 Y. & Coll. 528; *Wynne v. Wynne*, 4 Maur. & G. 253.

<sup>3</sup> Co. Lit. 46 b.

<sup>4</sup> *Ib.*

<sup>5</sup> Co. Lit. 851 a, n. 1; Harg. L. Tracts, 47b; *Squibb v. Wynne*, 1 P. Wms. 878; *Cart v. Reeve*, *Ib.* 882; *Whitaker v. Whitaker*, 6 John. 112.

<sup>6</sup> *Ewer v. Corbet*, 2 P. Wms. 148.

chattel. Mass. Rev. St. 411; 2 Chase's St. of Ohio, 1185; *Bisbee v. Hall*, 8 Ohio, 405; Ohio Sts. 1853; 1 Verm. L. 199.

(a) Demise to A, and B, his wife, for twenty-one years. A leases to C, for nine years. Held, for an injury to his

§ 25. A freehold cannot be derived out of a term. Thus a rent-charge for life, proceeding from an estate for years, is itself a chattel.<sup>1(a)</sup>

§ 26. The *incidents* of an estate for years are in some respects the same with, and in other respects different from, those of a life-estate.

§ 27. Tenant for years is entitled to *estovers*. (See ch. 4.)

§ 28. An estate for years, with other chattels, is primarily subject to the payment of debts, in the hands of an executor or administrator. So, also, it is liable to be attached and sold on execution. But a judgment is no lien upon it. This point will be further considered hereafter.<sup>2(b)</sup>

§ 29. By the old law, the gift of a term, like that of any other chattel, for a day or an hour, passed the entire interest. But this rule has been changed, and a term for years may now be limited for any number of lives in being.<sup>3</sup> But a term for years is not *entailable*. The disposition of such term to one and the heirs of his body passes the entire interest; so that the estate continues, though the grantee die without issue.<sup>4</sup>

§ 30. In general, where a tenant for years becomes seised of the freehold,(c) the term *merges* in the freehold and becomes

<sup>1</sup> 1 Cruise, 179.

<sup>2</sup> 1 Cruise, 183; *Vredenbergh v. Morris*, 1 John. Cas. 223; *Shelton v. Codman*, 8 Cush. 818. See Mass. Sts. 1847, 410-1.

<sup>3</sup> Dyer, 74, pl. 18 (7 b, n. a.).

<sup>4</sup> Dyer, 7 a, pl. 8, and n. a.; 1 Cruise, 184; *Hayter v. Rod*, 1 P. Wms. 860; *Kinch v. Ward*, 2 Sim. & St. 409.

reversion, A might maintain an action, alleging the estate to be his. *Wallis v. Harrison*, 5 Mees. & W. 142.

(a) In England, an exception to this rule is the case of *tithes*, which may be freehold, though the estates on which they are charged are not. 8 Bl. Com. 104, n.

(b) See *Judgment, Execution*. The sale of leasehold property by a sheriff need not be on the premises, and his return is sufficient evidence of the sale. No deed is necessary to pass a title. *Sowers v. Vie*, 2 Harris. 99.

In New York, an execution sale of an interest in a lease for a term of which more than five years remain unexpired, and fixtures forming a part of a freehold estate, in the same manner as is provided

in respect to personal property, with a notice of only six days, is void. *Breese v. Bange*, 2 E. D. Smith, 494.

In Louisiana, a judicial sale of a lease binds the purchaser to pay the price of adjudication to the vendor, and also the rent accruing after the sale to the lessor, according to the terms of the lease. *D'Aquin v. Armant*, 14 La. An. 217.

(c) So, where the tenant mortgages the term to the landlord. *Cottee v. Richardson*, 8 Eng. L. & Equ. 498. An assignment, by the lessee to the lessor, as collateral security for notes to mature during the term, and any demands the lessor may afterwards have against the lessee, is a mortgage, and not a surrender of the lease, or merger of the term. *Breese v. Bange*, 2 E. D. Smith, 474.

extinct. So one term merges in another immediately expectant thereon. The same person cannot fill the characters of tenant and immediate reversioner in one estate. "*Nemo potest esse et dominus et tenens.*"<sup>1</sup> Thus if A leases to B, and, before the rent becomes due, conveys the reversion to C, and C conveys it to B; the rent is hereby extinguished.<sup>2</sup> But there is no merger, where the two estates are successive, not concurrent; as where a lease is granted to tenant "*pour autre vie*," to commence at the termination of his estate. Nor where there is any intervening estate, either vested or contingent,<sup>(a)</sup> or the estate in reversion or remainder is smaller than the preceding estate. Thus, if a lease be made to a man for life, remainder to him for years, he holds both estates, and may grant either of them distinctly; for a greater estate may uphold a lesser, though not the converse.<sup>3</sup> So where a lessee conveys his whole interest to the reversioner, reserving a rent, no reversion being left in the former; the rent is not incident to a reversion, as in ordinary cases, and there is no merger. As where a tenant for life leased for her own life to the reversioner.<sup>4</sup> But where a tenant for years demised to the remainder man, to have and to hold during the term, reserving to the lessor the right to erect buildings on the premises, without molestation, the lessee yielding and paying a yearly rent, and engaging to keep the fences in repair, and to pay all taxes, "it being understood, that in case the lessor should use any part of the land for buildings and their appendages, a proportionate amount shall be deducted from the rent

<sup>1</sup> Dyer, 112, pl. 49; 4 Kent, 98. See Sharp v. Carille, 5 Dana, 489; Doe v. Lawes, 7 Ad. & Ell. 195; Webster v. Gilman, 1 Story, 499; Tayloe v. Gould, 10 Barb. 388; Cottee v. Richardson, 8 Eng. L. & Equ. 498.

<sup>2</sup> York v. Jones, 2 N. H. 454.

<sup>3</sup> Doe v. Walker, 5 Barn. & Cress. 111; See Strout v. Notama, &c. 9 Cal. 78; Smiley v. Van Winkle, 6 Ib. 605; 3 Pres. on Conv. 166.

<sup>4</sup> M'Murphy v. Minot, 4 N. H. 251.

In Virginia it is provided, (St. 1849, ch. 260, sec. 1,) that a reversion expectant upon a lease shall merge in any other estate; but not to affect the reversioner's claim for rent.

(a) A conveyance in fee by lessor to lessee does not merge the lease, as against a prior attachment. Buffum v. Deane, 4 Gray, 385.

A bought a lot of land, subject to a ground-rent, and purchased in the rent. His title subsequently failed. Held, the rent was not extinguished, although the parties had so intended, but was payable to A after his title failed. Wilson v. Gibbs, 28 Penn. 151.

which the lessee is to pay;" held, the term merged in the remainder, and that the lessee could not maintain an action of waste against the lessor.<sup>1</sup>

§ 31. Where one is possessed of a term in his own right, and seised of the freehold in *autre droit*, or the converse, it seems the doctrine of merger does not apply; more especially where one of the estates falls to him by act of law. Thus, if a man having a term marries a woman who afterwards becomes seised of the freehold by descent; or if one having the freehold is made executor of a tenant for years in the same land;—the term does not merge. Lord Coke, however, says, that, where a man having a term for years takes the *feme* lessor to wife, the term is extinct. And, in the case of *Platt v. Sleaf*, this doctrine was sustained by a dissenting judge, who said to the counsel at the bar that as clear as it was that they were at the bar, so clear it was that the term was extinct.<sup>2</sup> And it is said that, where a wife has the inheritance, and the husband a term in the same land, if issue be born to them by which the husband becomes tenant by the curtesy, the term merges.<sup>3</sup> So, also, that a term held by one as executor will merge in the freehold held by him in his own right, as far as he is concerned, and as between his heir and executor, though not in relation to creditors of the estate, who would be thereby deprived of their debts.<sup>4</sup>

§ 32. A distinction is made, between the case of a term held by the husband, and a freehold by the wife; and that of a freehold in him, and a term in her. There shall be a merger in the former case, but none in the latter; upon the ground that marriage, being the free act of the husband, may fairly be allowed to prejudice his rights, but not those of his wife, on whose part the marriage is regarded as the act of law.<sup>5(a)</sup>

<sup>1</sup> *Pyncheon v. Stearns*, 11 Met. 804.

<sup>2</sup> See *Doe v. Pett*, 11 Ad. & Ell. 842; Cro. Jac. 275.

<sup>3</sup> Sug. on Ven. 583; *Platt v. Sleep*, 1 Bulstr. 118.

<sup>4</sup> 1 Rolle Abr. 934, pl. 9; 1 Cruise, 186; *Cage v. Acton*, 1 Ld. Ray. 520; Sug.

533. See *Gibson v. Crehore*, 3 Pick. 482.

<sup>5</sup> 1 Cruise. 186; Bac. Abr. Lease, R.; *Cage v. Acton*, 1 Salk. 326. But see Godb. 2; 4 Kent. 101; 3 Pres. on Convey. 278, 285, 294; *Donisthorpe v. Porter*, 2 Eden Rep. 162. See also *Huston v. Wickersham*, 8 Watts, 519.

(a) Where a husband, in right of his wife, accepted land at the appraised

value, under a partition, in the Orphan's Court, of the estate of her ancestor, and

§ 33. Analogous to merger is a *surrender*. The former never takes place, unless there is a legal power to make the latter. *Surrender* is the yielding up of an estate for life or years, to him that hath the next immediate estate in reversion or remainder. Hence it appears, that, while merger is the *act of law*, surrender is the *act of a party*. The former, indeed, as well as the latter, is often the *result* of a party's own act; as where he voluntarily purchases the reversion or remainder;—but the result or final operation itself, of *drowning* one estate in the other, is an act of law; while a surrender has this very extinguishment, in the mind of the party making it, for its sole object.<sup>1(a)</sup> It is said, that a *relinquishment* by the tenant to the reversioner or remainder-man constitutes a surrender; while a *grant* of it produces a merger. It is presumed, however, that no such subtle and artificial distinction would be now recognized. Thus, if a lessee conveys his interest to the landlord, by an instrument in the form of the lease, this is a surrender, and merges the term.<sup>2(b)</sup>

<sup>1</sup> See *Farson v. Goodale*, 8 Allen, 202; *Elliott v. Aiken*, 45 N. H. 80.

<sup>2</sup> 1 Prest. 23, 25, 153; Co. Lit. 338 a;

*Doe v. Forwood*, 3 Ad. & Ell. N. 627; *Shephard v. Spaulding*, 4 Met. 416.

entered into recognizances to pay the valuation to the other heirs; held, he acquired a life estate in his wife's share of the land, and a fee-simple in his own right in the residue. *Snevily v. Wagner*, 8 Barr, 396.

Merger is not favored in equity, and will not be allowed but for special reasons. At law, the intention of a party is not regarded; but in equity, if there is any beneficial interest to be protected, such as that of creditors, infants, legatees, husbands, or wives, or any right or intention to the contrary; the union of the legal and equitable interests—as, for instance, those of trustee and *cestui que trust*—in one person, will not effect a merger. The same rule applies, where the party in whom the two estates unite is under some personal incapacity, such as infancy or insanity, to make an election. Pres. on Convey. 48–49; *Gardner v. Astor*, 3 John. Cha. 53; *Starr v. Ellis*, 6, 393; *Freeman v. Paul*, 3 Greenl. 260; *Gibson v. Crehore*, 3 Pick. 475; *James v. Johnson*, 6 John. Cha. 417; *James v. Morey*, 2 Cow. 246; *Mechanics', &c. v.*

*Edwards*, 1 Barb. 271; *Lewis v. Starke*, 10 S. & M. 120.

The foregoing view of the doctrines relating to merger fully justifies the remark of a distinguished writer upon the subject, Mr. Preston, that the learning in relation to it is involved in much intricacy and confusion, and there is difficulty in drawing solid conclusions from cases that are at variance or totally irreconcilable with each other. 4 Kent, 102.

(a) A lease provided, that the lessee should surrender the premises at the lessor's request, upon failure to pay the rent within a certain time. Held, a provision for the lessor's benefit, and that it did not authorize the lessee to surrender for the purpose of giving up the lease. *Proctor v. Keith*, 12 B. Mon. 252.

(b) But if A and B lease to C, and C afterwards conveys to A, this is no surrender. *Sperry v. Sperry*, 8 N. H. 477. Where there is an outstanding lease for years, and the reversioner makes a second lease to a third person, to commence immediately; it is a vested estate, and will



§ 33 a. As the interest of an under-lessee would not merge in the reversion of the lessor, if acquired by the former; so he cannot surrender to the lessor, but only to his immediate landlord, or his assignee.<sup>1</sup>

§ 34. But, though a surrender is characterized as *the act of a party*, yet it may be *implied*, in law. Before the statute of frauds, the cancellation of a lease operated as such; but, since

<sup>1</sup> 2 Prest. Abstr. 7.

entitle the second lessee to take the rents reserved by the former lease, although his right of possession will not commence until the expiration of the first term; and, after the making of the second lease, if the first lessee becomes owner of the reversion, his lease will not merge in the greater estate; but if the term of the second lease, instead of commencing immediately, be to commence at the determination of the former term, then, on the first lessee's acquiring the reversion, his term will merge, and the term of the second lease commence at the same time. *Logan v. Green*, 4 Ired. Equ. 870.

Where rooms are hired for six months and vacated before that time, the owner may recover the whole rent, unless it appears that the rooms might have been let meanwhile, the burden of showing which is on the defendant. *Greene v. Waggoner*, 2 Hilt. 297.

An entry by the landlord, before the expiration of a term, upon premises demised, is unlawful, although the tenant have removed from the premises, unless such right is reserved. But without evidence of actual damage the tenant is entitled to nominal damages only. *Shannon v. Burr*, 1 Hilt. 89.

If the lessor take possession, this is held an implied surrender. 10 Gill & J. 116. Or allow the tenant to leave property on the premises, after having notice of his quitting. *Stanley v. Kochler*, 1 Hilt. 354. Or make any new agreement with the tenant, more especially if sanctioned by a decree in chancery. *Scott v. Hawsman*, 2 M'L. 180. As in case of a parol agreement that the land be given up, and no subsequent claim made for rent. *Gore v. Wright*, 8 Ad. & Ell. 18. And the words "re-nounce and disclaim, and also surrender and yield up, all right, &c., use, trust, terms, &c., of years, &c., and possession, &c.," constitute a surrender, not

a disclaimer. *Doe v. Stagg*, 5 Bing. N. 564.

But where the tenant, under a parol demise, during the term agreed to give up possession for one month, and then resume it, and accordingly quit, but the landlord would not re-admit him; held, the transaction was neither a surrender nor an eviction, and constituted no bar to a suit for rent. *Dunn v. DeNuovo*, 3 Mann. & G. 105.

An agreement between a landlord and tenant, that after the title was settled the tenant might buy, but that the landlord should prosecute his suit to settle the title, does not destroy their relation. *Smith v. Brannan*, 13 Cal. 107.

In an action for the consideration agreed to be paid by the owner to the tenant for surrendering, the owner may prove, that the tenant, in leaving, removed essential parts of the building. *Downing v. De Klyn*, 1 E. D. Smith, 568.

It has been intimated, that the quitting possession of premises leased, and delivering up the key, may amount to a surrender, where these acts are conformable to a well-known local usage. So, although a parol license to a tenant to quit does not discharge him, acceptance of a new tenant is a surrender, and does discharge him. But where a tenant for years quit in the middle of a year, and sent the key to the landlord, who gave notice that he should claim rent, took possession, and offered to let the house; held, the tenant was liable to an action for use and occupation, from the time of leaving till the premises were again leased. *Randall v. Rich*, 11 Mass. 496.

And if a tenant quits during the term, and the landlord accepts the key, stating that he receives the key, but not the premises, it will not be held an acceptance of the surrender. *Townsend v. Albers*, 3 E. D. Smith, 560. See *Lord, &c. v. Lumley*, 5 H. & N. 87.

A leased to B, one of the firm of C

the statute, it is otherwise. But the doctrine seems now well established, though once doubted, that the acceptance of a new lease, even by parol, or of any estate inconsistent with the old one, is a surrender in law, although the new lease be voidable, if not absolutely void. So an assent that the lessee shall cease to be liable, and the acceptance of a substituted tenant, discharges the lessee.<sup>(a)</sup> So an abandonment by the tenant is a surrender, and authorizes the landlord to re-enter.<sup>1</sup>

§ 35. Some of the cases cited, in reference to implied surrender, involve the effect of an *assignment* of the lease, when accompanied or followed by some act of recognition on the part of the lessor. A mere assignment, however, with the lessor's

<sup>1</sup> Brady v. Peiper, 1 Hilt. 61; Goodman v. Jones, 26 Conn. 264; Bailey v. Wells, 8 Wis. 141; Magennis v. McCulloch, Gilb. Cas. 236; Whitney v. Meyers, 1 Duer. 266; Livingston v. Potts, 16 John. 28; Jackson v. Gardner, 8, 394;

Smith v. Miner, 2 Barb. 180; Vir. Code, ch. 116, sec. 18; Greider, &c., 5 Barr, 422; Roe v. York, 6 E. 86; McKinney v. Reader, 7 Watts, 128; Hesseltine v. Seavey, 4 Shepl. 212. See Prestals v. McCall, 7 Gratt. 126.

and B, a store for B's sole use, as a jewelry and fancy goods store, in expectation that C and B would dissolve. The lease contained a restriction against any other business. C and B did not dissolve, and B desired to relinquish the lease, but could not agree with A upon the terms. B never entered, and, while the store was vacant, C leased it to D for a hat store, for a term corresponding with the unexpired time of B's lease, and delivered the key to D. Both C and D disclaimed all connection with B, and denied that he had been consulted or had any connection with either of them in the transaction. Held, with reference to A, D took the place of B. Howard v. Ellis, 4 Sandf. 869.

After A, a lessee, had underlet the whole of the premises, by two sub-leases, to B & C, D, the landlord, called on B & C, produced the sub-leases, demanded of them rent, forbade their paying more rent to A, and said he was rightful landlord, and had taken the place off A's hands; and he afterwards collected all the rents which were collected of B & C. Held, a surrender, and A was no longer liable. Bailey v. Delaplaine, 1 Sandf. 5.

So where a tenant, having determined to remove in consequence of disturbance of the premises, sent to the landlord the key, who declared himself satisfied, expressed a willingness to take the pre-

mises, resumed possession for the purpose of re-letting, posted the usual notice "to let," and then delivered the key to a person employed by him to re-let; held, notwithstanding the statute of frauds, a rescission of the lease and termination of the tenancy. Hegeman v. M'Arthur, 1 Smith, 147.

A lease contained a covenant of A, the lessee, not to assign or under-let without the consent of B, the lessor, in writing; which consent was thus given to his underletting. A afterwards assigned the residue of the term to C, who entered and occupied till he was ousted by B, and then brought an action against B, upon the covenant for quiet enjoyment. After the assignment, and before eviction, B received and accepted rent from C, giving this receipt: "Received, from C, &c., for rent, in full, as per lease, in advance. \$95. B." Held, whether the written consent embraced an assignment or not, the receipt of rent, with notice that C had become possessed by assignment, was a waiver of the restriction; and the receipt, referring to the lease, was evidence of such notice, and that B received C as his tenant. O'Keefe v. Kennedy, 8 Cush. 325.

(a) Parol evidence is not admissible of an agreement that the lessee might at any time surrender. Brady v. Peiper, 1 Hilt. 61.

permission, is not of itself a surrender, nor does it discharge the lessee from his covenants, or his liability for the acts of the assignee.<sup>1</sup>(a)

§ 35 a. A surrender extinguishes the relation of landlord and tenant, and all their rights as such. Thus it extinguishes all rent not then due.<sup>2</sup>(b)

§ 36. Tenant for years, unless specially restrained,(c) may either *assign*(d) or *underlet*; the former, by transferring all his estate;(e) the latter, by transferring the land for a less portion of time than his whole term, whereby a reversion is left in himself. In the latter case, he has the power of distraining for rent; but not in the former,—because he has no reversion. An under-lessee is not liable to the original lessor in an action of covenant. nor for use and occupation, there being no privity between them. But his goods and chattels upon the land have been held liable to distress for the rent in arrear. An assignee

<sup>1</sup> Jackson v. Brownson, 7 John. 227. See Fisher v. Milliken, 8 Barr. 111.

<sup>2</sup> Barton's case, Moore, 94; Webb v. Russell, 3 T. R. 401; 2 Shep. Touch.

(Prest.) 301; St. 4 Geo. 2, ch. 28, sec. 6; 1 N. Y. Rev. Sts. 744; N. J. Sts. 191-2.

(a) But where the lessor assented to the assignment, and verbally agreed to accept the assignee as his tenant, and took him for the rent; held, under the Revised Statutes of Michigan, 1833, s. 9, a surrender, and that the lessee was no longer liable for the rent. Logan v. Anderson, 2 Doug. 101.

Where a tenant has paid his rent, but the landlord notifies another person in possession to quit for non-payment, who quits accordingly; this is a surrender. Patchin v. Dickerman, 31 Verm. 666.

A lease reserved to the landlord the right to re-let, if the premises should become vacant, and apply the proceeds of the re-letting to the rent reserved. A surety, on notice from the tenant that he could not pay the rent, arranged with the landlord's agent that he should let them. The agent put up a bill and agreed to a letting; the original lessee removed; was succeeded by a new tenant, and he entered and paid rent for a short time. Held, that this substituted tenancy did not operate as a surrender, and that the original tenant and the surety were still liable. Ogden v. Rowe, 3 E. D. Smith, 312.

(b) So, it seems, while a surrender, made by the original lessee, has no effect to destroy the estate of his sub-tenant, it at the same time discharges the latter from his covenants and liability for rent. To remedy this evil, an English statute provides, that a surrender made for the purpose of *renewal* shall have no effect upon the relation between the first lessee and his tenant, a new lease being made by the landlord. Similar acts have been passed in New York, Virginia and New Jersey. *Supra*, n. 2.

The surrender of a lease in consideration of a certain sum is not *per se* an extinguishment of rent accrued. It is a question for the jury. Sperry v. Miller, 16 N. Y. 407.

(c) A sale on execution involves no forfeiture as an *assignment*. Patterson v. Silliman, 4 Oas. 304.

(d) In case of an *unsealed* assignment of a lease the assignee cannot maintain an action. Bridgham v. Tileston, 5 Allen, 371.

(e) Such an assignment carries with it all erections upon the land, unless a contrary intention is apparent. Brees v. Bange, 2 E. D. Smith, 474.

of the lessee is bound by a condition in the lease, and liable to an action of debt by the landlord, or his assignee, until he parts with the lease, upon the ground of *privity of estate*, and even notwithstanding an agreement to pay the lessee; while the lessee himself still remains liable upon his covenant, by *privity of contract*, notwithstanding acceptance of rent from the assignee. (a) But an assignment alters and transfers from the original parties the privity of contract, founded merely upon implication of law; so that the first lessee, after acceptance of rent from the assignee, is not liable to an action of debt, but only of covenant.<sup>1</sup>(b)

<sup>1</sup> 1 Cruise. 174; Robinson v. Perry, 21 Geo. 188. See Wooden v. Butler, 10 Miss. 716; Lawrence v. Williams, 1 Duer. 585; University, &c. v. Foslyn, 21 Verm. 52; McFarlan v. Watson, 2 Comst. 286; Graves v. Porter, 11 Barb. 592; Frank v. Maguire, 42 Penn. 77; Bailey v. Wells, 8 Wis. 141; Smiley v. Van Winkle, 6 Cal. 605; Stoppani v. Richard, 1 Hilt. 509; Crommelin v. Thiess, 31 Ala. 412; Damp v. Hoffman, 8 E. D. Smith, 361; Journeay v. Brackley, 1 Hilt. 447; Jennings v. Alexander, Ib. 154; Bailey v. Freeman, Ib. 196; Kair v. Hoxie, 2 Ib. 311; Roosevelt v. Hopkins, 83 N. Y. (6 Tiff.) 81; Levi v. Lewis, 6 Com. B., N. S., 766; Negley v. Morgan, 46 Penn.

281; M'Combs, &c. 48 Ib. 485; Tutliff v. Atwood, 15 Ohio St. 186; Dermott v. Wallach, 1 Wall. 61; Page v. Ellsworth, 44 Barb. 686; Martin v. O'Conner, 48 Ib. 418; 4 Bibb, 588; 4 Kent, 95; Holford v. Hatch, Doug. 188; Lekeux v. Nash, Str. 1221; Howland v. Coffin, 9 Pick. 52; Waldo v. Hall, 14 Mass. 487; Coles v. Marquand, 2 Hill, 447; Dewey v. Dupuy, 2 Watts & S. 556; Wollaston v. Hakewill, 8 Man. & G. 297; Wall v. Hinds, 4 Gray. 256; Mayhew v. Hardesty, 8 Md. 479. See Barnfather v. Jordan, Doug. 452; Esty v. Baker, 48 Maine, 495; Bridgham v. Tileston, 5 Allen, 871.

(a) Where the liability of a lessor is predicated upon his privity of estate and not on contract, the plea of *non est factum* is not responsive to the declaration, and bad. So in covenant by the assignee of the lessor against the assignee of the lessee for rent. Cross v. Button, 5 Wis. 600.

(b) The word *assigns* is not necessary to make the lessee's covenants binding on the assignee, if the intent otherwise appear. Thus a demise of unimproved land, to be built on by the lessee, was to be "at and for the rents and conditions," *habendum* "upon the terms and conditions." Held, a covenant to insure the buildings ran with the land, and bound the assignee. Masury v. Southworth, 8 Ohio. N S 340.

The assignee is liable on covenants concerning husbandry and repairs. Gordon v. George, 12 Ind 408.

For a very late case, deciding that a lessee corporation was discharged from

the rent by an assignment of the lease; see Haytor, &c., Law Rep. (Eng.) Equ. Jan. '66, p. 10. One interested in a lease belonging to a firm of which he is a member, and who has received rent from an under-tenant, though the underlease was not created by him, is liable upon the covenants as an equitable assignee in possession. Sanders v. Benson, 4 Beav. 250. And see Astor v. L'Amoureux, 4 Sandf. 524.

A parol promise to pay rent, made by the assignee of a sealed lease, does not affect the liability of the assignee upon the other covenants. Torrey v. Wallis, 3 Cush. 442.

It is held that the *mortgagee* of a term, after forfeiture, has the whole legal estate therein, and is liable on the real covenants in the lease, whether he becomes possessed of or occupies the premises in fact or not. Mayhew v. Hardesty, 8 Md. 479. See Engels v. M'Kinley, 5 Cal. 158; *Mortgage*.

§ 37. A party holding the legal title of land in trust is not liable for the ground rent in arrear, if, previously to the time the rent accrued, he has conveyed or assigned, by way of gift, the equitable interest to another, who is in possession and enjoyment of the land at the time the rent accrued, and was during the time for which it is due.<sup>1</sup> So where the assignee of a lease, which he has taken in trust for another, ceases to have any beneficial interest, and has yielded the possession to the beneficiary, the privity of estate between him and the lessor is dissolved, and he is no longer liable upon the covenants of the lease.<sup>2</sup> Thus, where A bid off a lease at a judicial sale, and received an absolute transfer of the same, and then agreed that B should have the lease on paying the price, and B immediately took and always kept possession of the demised premises, and subsequently paid A in full; held, after such payment, A was no longer liable to the landlord as assignee of the lease, although he did not transfer it to B, and was nominally assignee.<sup>3</sup>

§ 38. A party in possession, (not being the lessee,) in subordination to the lease, is presumed to be an assignee in favor of the lessor.<sup>4</sup> But it is competent for him to show that he is not

<sup>1</sup> *Wickersham v. Irwin*, 2 Harris, 108.

<sup>2</sup> *Astor v. L'Amoureux*, 4 Sandf. 524.

<sup>3</sup> *Ib.*

<sup>4</sup> *Durando v. Wyman*, 2 Sandf. 597; 1 Hilt. 196; *Acker v. Witherell*, 4 Hill, 112.

An assignee is liable to the lessor upon the covenants in the lease, though a part of the premises is excepted from the assignment. *Lee v. Payne*, 4 Mich. 106.

An assignment of a lease by the lessee, and acceptance of rent from the assignee by the lessor, do not discharge the lessee from liability on his covenant, for rent subsequently accruing. *Wall v. Hinds*, 4 Gray, 256.

A lease provided, that the lessor may terminate it by three months' notice in writing, and that, upon receiving such notice, the lessee, his legal representatives or assigns, by giving written notice to the lessor, may continue to hold at an increased rent, which the lessee, in that contingency, covenants to pay. Held, a notice in writing to the lessor, from assignees of the lessee, stating their receipt of such a notice from him, and their intention to hold the premises for the residue of the term at the increased rent, is admissible in evi-

dence against the original lessee, in an action upon his covenant for the increased rent. *Wall v. Hinds*, 4 Gray, 256.

We shall hereafter (s. 47) consider the effect upon a lease of an assignment by the landlord. Questions also arise in connection with transfers made by both the original parties to the lease. Where A leases to B, who assigns the lease to C, and A then conveys the land to D, and D to E, without mentioning the lease; E cannot maintain an action in his own name against B, upon an express covenant to pay rent. *Crawford v. Chapman*, 17 Ohio, 449.

Where a lessor sold the premises, directing that the rent be paid to the purchaser, and the lessee, with full notice, paid the rent to another party; held, the purchaser could not recover the rent of the lessee by a suit in his own name, without an express promise. *Marney v. Byrd*, 11 Humph. 95.



an assignee, but only an under-tenant.<sup>1</sup> And the presumption is rebutted, by proof of a surrender of the lease by the lessee to the lessor during such party's possession.<sup>2</sup> And, if the lessor produce the surrender, he thereby admits the tenancy of the lessee at the time of its date.<sup>3(a)</sup>

<sup>1</sup> Bagley v. Freeman, 1 Hilt. 196; Kain v. Hoxie, 2 ib. 811.

<sup>2</sup> 2 Sandf. 597.

<sup>3</sup> Ib.

(a) The ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term; the latter, for only a part of it. But it has been held in Ohio, that a transfer of only a part of the lands, though for the whole term, is an under-lease, and the assignee or under-lessee not liable for rent to the lessor. On the other hand, in Kentucky, such transfer is an assignment; and, for subsequent rent, the assignee is liable in covenant to the lessor. *Fulton v. Stuart*, 2 Ohio, 216; *Cox v. Fenwick*, 4 Bibb, 538. See *Wheeler v. Hill*, 4 Shepl. 829; *Trustees, &c. v. Clough*, 8 N. H. 22; *Daniels v. Richardson*, 22 Pick. 565; *Simpson v. Clayton*, 6 Scott, 469; *People v. Robertson*, 39 Barb. 9; *Bedford v. Terhune*, 30 N. Y. (8 Tiffa.) 453.

A strict and literal interpretation of a covenant or condition in a lease, "not to let or under-let the whole or any part of the demised premises without the written consent of the landlord, under the penalty of forfeiture and damages," would not include an assignment by the lessee of all his "right and interest." *Lynde v. Hough*, 27 Barb. 415.

A woman, having a life estate in certain land, leased it for her life, reserving an annual rent, but without a clause of re-entry for non-payment thereof. The lessee having conveyed the land in fee, and his grantee having taken possession; held, such grantee, his executor or administrator, was liable to the lessor in an action of debt for the rent. *Daniels v. Richardson*, 22 Pick. 565. Such grantee having conveyed a part of the land, held, the rent should be apportioned to each part according to its annual value. *Ib.* Where a feoffment was made to A and B, to the uses, &c., that the plaintiff C should have a yearly rent, which A covenanted that A and B, their heirs, &c., should pay; held, that A stood, in relation to C, like the assignor of a lease as to the landlord, and was not liable to

an action of debt. *Randall v. Rigby*, 4 Mees. & W. 180.

If a lessee under-lets a part of the demised premises, and the sub-tenant is recognized as such, and rent demanded of him, by the lessor, the lessee and sub-tenant are not jointly liable to the lessor, for the mesne profits of the whole premises. *Fifty Associates v. Howland*, 5 Cush. 214.

Where A erected a nuisance, and leased the premises to B, who sub-let to C, and he sub-let to D; it was held, that A, B, C and D should be made parties to a bill to restrain the nuisance; but, if B had assigned his whole interest to C, B would not be a proper party. *Brady v. Weeks*, 8 Barb. 157.

A, an under-lessee, agreed with B, his lessor, to pay rent to C, the original lessor, who, however, refused to recognize A, and recovered rent from B. Held, B should recover from A the rent agreed to be paid to C. *Heard v. Lockett*, 20 Ten. 162.

A written agreement, made without the lessor's consent, between the assignor and assignee of a lease, which contains a covenant against assigning or under-letting without such consent, that a third person shall occupy a part of the premises during the term of the lease, on the conditions that he pay rent therefor to the assignee, and "that the said assignee can, by virtue of said lease, allow him to occupy said part without restraint and damage to said assignee, and not otherwise," is in the nature of an under-lease to such third person, and entitles him to hold the premises (especially as against one to whom the lease is subsequently assigned without such consent) until the lessor enters for breach of covenant, and determines the lease. *Shumway v. Collins*, 6 Gray, 227.

An under-tenant, exposed to distress or ejectment for rent due the landlord, may, in default of payment by an intermediate tenant, pay it, and deduct the

§ 39. The assignment of a lease subjects the assignee to certain implied liabilities to the assignor as to the payment of rent. Thus, if the form of assignment is, "he (the assignee) paying" all past and future rent, and indemnifying the plaintiffs against their covenants, and the assignor is afterwards obliged to pay the rent, he shall recover it from the assignee upon the promise in law arising from his acceptance of the assignment.<sup>1</sup>(a)

§ 40. It is a principle of the English law, that a lease cannot

<sup>1</sup> Fletcher v. McFarlane, 12 Mass. 48.

amount from his rent. *Lagman v. Klopenburg*, 2 E. D. Smith, 126.

Where ejectment by metes and bounds is brought by the owner of land against sub-lessees, tenants of separate parts of a tenement, wrongfully left by the lessee on the premises at the expiration of his lease, contrary to the terms thereof; the action will lie jointly against all. *Pearce v. Ferris*, 10 N. Y. (6 Seld.) 280.

In covenant against the assignee of the lessee, for non-payment of rent, the declaration alleged, that all the estate of the lessee in the premises leased had come to and vested in the defendant by assignment. Issue being joined upon this averment, held, the point of such issue was, whether the defendant was assignee of the whole of the estate of the lessee in any part of the land; and, it being proved that he was lessee of the whole estate in a part only of the land; held, further, that there was no variance, and that the plaintiffs could recover such part of the rent reserved, as the defendant was liable to pay in respect to the part of the premises held by him. *Van Rensselaer v. Gallup*, 5 Denio, 454. Acc. *Same v. Jones*, 2 Barb 648.

Where a lessee parts with the residue of his term to another person, with the right of re-entry reserved to the lessee, it is not an assignment, but a sub-lease, and the lessee has the right to re-enter for a breach of the conditions. *Linden v. Hepburn*, 3 Sandf. 668.

The assignee of a lessee demised the premises for the residue of the term, reserving the delivery of possession at the end of the term, and the intermediate possession, in case of destruction by fire. Held, an under-lease, not an assignment. *Post v. Kearney*, 2 Comst. 894; *Kearney v. Post*, 1 Sandf. 105.

Where a lease contains a covenant, that the lessee shall keep the premises

insured for the benefit of the lessor, and provides, that, in default thereof, the owner may re-enter; the neglect of the lessee, for fourteen days after the commencement of the term, to effect insurance in the name of the lessor, or in such manner as to be available to him in case of loss, is a breach of the covenant, and entitles the latter to possession. An insurance effected by a sub-tenant, pursuant to an agreement between him and the lessee, and in view of this covenant, but in the sub-tenant's own name, is not sufficient; inasmuch as any insurance moneys, collected by the sub-tenant, could not be recovered from him by the lessor, at law, even if they might in equity. *Keteltas v. Coleman*, 2 Smith, 408.

(a) On the other hand, the assignor may agree to indemnify the assignee against all back rents. In such case, if the former refuse to pay them, the latter may do it voluntarily, and enforce his claim for indemnity. *Vechte v. Brownell*, 8 Paige, 212. Where the assignee agrees to pay rent to the assignor, the executor of the assignee's executor will be liable to the lessor, though he has done no other act than proving the will. If the rent reserved to the assignor exceeds that in the lease, the surplus is a *rent-seck*. *Wollaston v. Hakewill*, 3 Man. & G. 297.

The plaintiff, being a tenant for one year, paid the Croton water charge for that year. After four months, he gave up the possession, and the landlord, through the plaintiff's agency, re-let, for the residue of the year, to the defendant, who took possession and used the water. Held, the defendant was not liable to the plaintiff, for any part of the water rate, nor for the value of the water used, nor in any form of action for using it. *Loyd v. Fox*, 1 Smith, 101.



be validly assigned without writing. Mere delivery of the instrument itself, it seems, passes no title. This provision has been expressly re-enacted in nearly all the States (a transfer by operation of law only excepted).<sup>1(a)</sup>

§ 41. No consideration is necessary.<sup>2</sup> Where the consideration is paid by one and the assignment made to another, the whole legal and equitable title vests in the latter, except as to creditors of the former.<sup>3(b)</sup>

§ 42. The assignor of a term for years is liable to the assignee, upon any *express* covenants contained in the assignment; but whether covenants will be *implied* between them, against eviction by the lessor, or any one claiming under him, seems not fully settled. Thus A leases land to B, who afterwards, by a writing upon the lease, doth "grant, bargain, &c., to C the whole of the premises, &c., to have and to hold during the term, he, the said C, performing all covenants," &c. C is evicted by a person claiming under a mortgage from A, and brings an action of covenant therefor against B. Held, C had a claim against A upon his covenants in the original lease, which were inherent, and went with the land, and even upon the covenant implied in the words "grant and demise;" but that the action would not lie against B. It would be otherwise with an under-lessee.<sup>4(c)</sup>

§ 43. In an action of debt, by the assignee of the lessor against

<sup>1</sup> Anth. Shep. 245.; Ind. Rev. L. 269; Sts. of U. S., *passim*.

<sup>2</sup> Noy, 86, 90; 4 Dane, 135.

<sup>3</sup> Ostrander v. Livingston, 3 Barb. Ch. 416.

<sup>4</sup> Waldo v. Hall, 14 Mass. 486; Blair v. Rankins, 11 Miss. 440. See chap. 15.

(a) In New York it has been held, that the assignment of a lease need not be under seal. In Pennsylvania, a lease for less than three years may be transferred by parol. In Vermont, the assignment of a lease for more than a year must be by deed, acknowledged and recorded. Verm. Rev. St. 315; Holli-day v. Marshall, 7 John. 211; McKinney v. Reader, 7 Watts, 23. In Ohio, it is held that an assignment must be witnessed. Bisbee v. Hall, 3 Ohio, 465.

(b) The following clause in a deed, "I do hereby rent and lease unto the said A 100 acres, where he now lives, for the unexpired term of the general lease which I now hold, in trust for the use

of B during her life, and to the heirs of A after the death of the said B;" was held to vest such a legal interest of the term in A, as to enable him to maintain an action of trespass to try titles, even several years after the death of B. Johnson v. High, 3 Strobb. 141.

(c) But where a lessee assigned by deed, containing the word *grant*, and the lessor distrained upon the land for rent due before the assignment; held, the assignee might maintain an action of covenant against the lessee; but not *assumpsit*, though there were a subsequent promise. Baber v. Harris, 9 Ad & Ell. 532.

the assignee of the lessee, the latter cannot offer parol evidence that the rent exceeds the annual value of the premises.<sup>1</sup>

§ 44. A liability to pay rent does not run with the land, so as to bind the assignee upon the covenant, unless there be: 1st. Some estate or interest leased. 2d. A rent reserved, properly so called—that is, not a sum in gross, as a personal debt, but a reservation out of the leasehold estate or interest. 3d. A covenant of the lessee to pay such rent.<sup>2(a)</sup>

§ 45. An assignment need not always be positively proved, but may be inferred from acts and admissions of the parties. And one in possession of leasehold premises, under circumstances which imply an assignment of the lease to him, is liable to the landlord on the covenant to pay rent during his occupation of the premises, by virtue of his privity of estate.<sup>3</sup> So, where one enters into possession of vacant demised premises by the consent or permission of the tenant, he will be considered, in respect to the landlord, as substituted in the place of the tenant, although he disclaims all privity with him.<sup>4</sup> But whether an assignee of *property*, generally, shall be regarded as assignee of a lease belonging to the assignor, thereby incurring the liabilities incident to that relation, depends upon his own election.<sup>5</sup>

§ 45 a. The plaintiff leased land to A, in 1802. In 1812, A

<sup>1</sup> Howland v. Coffin, 12 Pick. 125.

<sup>2</sup> Croade v. Ingraham, 13 Pick. 85; Burden v. Thayer, 8 Met. 78. See Bordman v. Osborn, 23 Pick. 295. Flower v. Hartopp, 6 Beav. 476; Graves v. Porter, 11 Barb. 592.

<sup>3</sup> Glover v. Wilson, 2 Barb. 264.

<sup>4</sup> Howard v. Ellis, 4 Sandf. 369; acc. Carter v. Hammett, 12 Barb. 258.

<sup>5</sup> Ib.

(a) Whether the assignee of a lease is liable for rent accruing before the assignment, seems to be a doubtful question. M'Murphy v. Minot, 4 N. H. 256; Woodf. 274, 338; Church v. Clark, 3 Barb. Ch. 52.

A conveyed to B, subject to a lease for years previously given by A to C, and also to an assignment to D of A's interest in the rents reserved by such lease, for a portion of the term, all which appeared upon the face of the deed, which was duly recorded. C assigned his lease to B; and B conveyed different portions of the estate respectively to E and F. C became insolvent. Held, that

D, as assignee of the lessor, had a sufficient remedy at law against E and F, as assignees of the lessee, for the rent of the portions respectively occupied by them during the term for which they actually held the premises; but that he had no claim upon them for rent accruing before they acquired their title respectively, or after they in good faith parted with it; and that F was not liable for the rent of a portion of the premises of which he was merely a mortgagee, and on which he had not entered under his mortgage. Child v. Clark, 3 Barb. Ch. 52.

had ceased to occupy, and the defendant had entered and underlet. The plaintiff brings an action of covenant for rent against the defendant, as the assignee of A, and offers evidence that in 1810 he, the plaintiff, recovered a judgment against B, for rent of the land, as an assignee of the lease; and also, that in 1812 the defendant, having recovered a judgment against B, extended his execution upon the land, and acknowledged the delivery of seisin. Held, that the former part of this proof seemed sufficient to charge the defendant, as presumptive evidence of assignment; but, moreover, that the latter part was admissible, as showing admissions of the defendant, and the person under whom he claimed. Nor did it change the case, that the defendant levied his execution as upon a fee-simple, since by this levy all B's interest passed.<sup>1</sup>

§ 46. The liability of a lessee to pay rent to his lessor continues until this relation ceases, even notwithstanding a notice by the landlord to pay to a third party.<sup>2</sup>

§ 46 a. While a lessee may assign his lease, the landlord may also assign the reversion, and thereby render the former liable to pay subsequent, though not already accrued, rent (a) to the assignee.

§ 47. The general principles of law upon this subject have been thus well stated in Massachusetts by Mr. Justice Wilde.<sup>3</sup> At common law, the assignment of a reversion was incomplete without the *attornment* of the tenant—a formal process of acknowledging or adopting the transfer. If he refused to attorn, he was not liable to the assignee for the rent. But this principle was found inconvenient, as the tenant might unreasonably

<sup>1</sup> Adams v. French, 2 N. H. 386.

<sup>2</sup> Fox v. Corey, 1 Adams, 81.

<sup>3</sup> Farley v. Thompson, 15 Mass. 25; Abercrombie v. Redpath, 1 Clarke, 111; Gibbs v. Ross, 2 Head, 437. See Doe v.

Forwood, 8 Ad. & Ell. (N. S.) 627; Bowser v. Bowser, 8 Humph. 28; Kirk v. Taylor, 8 B. Mon. 282; Bennett v. Herring, 8 C. B. (N. S.) 870; Watson v. Hunkins, 18 Iowa, 547.

(a) This distinction is recognized with reference alike to both parties. An assignee of the lessor is not chargeable for a breach of a covenant real, running with the land, which happened before the assignment, and such breach is not available as a defence in an action against the lessee for the rent. Evidence of parol

promises by the assignor, to indemnify the lessee for breach occurring during his occupancy, is inadmissible against his assignee. In an action by the assignee, it is only an exclusion from the occupancy since the assignment that can be set up as a defence. Day v. Swackhamer, 2 Hilt. 4.

refuse to attorn, which was a great clog upon transfer. By St. 4 and 5 Anne, c. 16, assignments of reversions were made valid without attornment; but provision was made, that all payments of rents to the lessor, made before notice to the tenant of the assignment, should be held good.<sup>(a)</sup> I have always understood that attornment was never considered necessary under the provincial government. It was a doctrine of the old feudal law, and was not applicable to our tenures. But probably *notice* was required here, before the statute of Anne, as a substitute for attornment; or, if it were not so, as the provision of the statute is founded on a principle of universal equity, it must be supposed to have been adopted here, unless the contrary can be shown. On general principles, also, we should hold notice necessary in a case like this (where seven quarterly instalments had accrued). For, if the assignee of a reversion will lie by and suffer the lessee to pay rent to the lessor, as it falls due, he has no ground for complaint, although he may suffer by his neglect.<sup>(b)</sup>

(a) With this protection, however, the tenant is considered to have attorned at the time of assignment. The notice *relates*. Hence, the assignee is entitled to the back rents due at the time of notice. *Moss v. Gallimore*, Doug. 275; *Birch v. Wright*, 1 T. R. 384. See *Keay v. Goodwin*, 16 Mass. 4; *Fitchburg, &c. v. Melven*, 15 Mass. 269.

(b) Where one enters on land without title, and the tenants surrender their possession and attorn to him, the attornment is void, and not the commencement of an adverse possession. *Jackson v. Delancey*, 13 John. 587. Acquiescence on the part of a landlord, in the payment of rent by his tenant to a stranger, constitutes a valid attornment. *Jackson v. Brush*, 20 John. 5. But in ejectment against a tenant by the landlord, the former cannot show in defence a parol acknowledgment by the latter of title in another. *Jackson v. Davis*, 5 Cow. 128. Nor will a tenant's secret agreement to attorn destroy the possession of the landlord. *Rankin v. Tenbrook*, 5 Watts, 386. See *Doe v. Cooper*, 1 Man. & G. 135; *Harris v. Goodwyn*, 2, 418, n.

One purchased land occupied by a tenant. During the negotiation, the vendor informed the tenant of it, and the latter

thereupon agreed to accept the vendee as his landlord; but the vendee was not present at that agreement. Held, the vendee might recover rent from the tenant in his own name; that whether there was an agreement between the parties was a question for the jury; and that, if there was not an agreement, still there was such privity of contract, or estate, that the action would lie. *Abercrombie v. Redpath*, 1 Clarke, 111.

Notice of the assignment of the reversion, necessary to enable the assignee to maintain an action for the use and occupation after the expiration of the term, is sufficient, if given during the existence of the term. *Bachelder v. Dean*, 20 N. H. 467.

The observations in the text (s. 46 a) were made in a case where there was a cross-demand due from the lessor to the lessee, which it was agreed between them should go in payment of the rent. Whether, *after notice* by the assignee, this agreement would be a good defence against him in a suit for the rent, was not distinctly decided or considered; though the remarks above cited would seem to imply that such defence would not be allowed. It has since been held, in the same State, that, where rent is

§ 48. Where real estate leased is attached by a creditor of the lessor, and sold on execution, the lessee has no right to set off, against the purchaser's claim for rent, a debt contracted by the lessor to the lessee since the attachment.<sup>1</sup>

§ 49. If a tenant conveys or devises generally, his whole interest will pass.<sup>2</sup>

<sup>1</sup> Buffum v. Deane, 4 Gray, 385.

<sup>2</sup> Jackson v. Van Hoesen, 4 Cow. 825; Co. Lit. 42 a, n. 9.

paid in advance, and the land afterwards conveyed without notice of such payment, subject to the lease; the tenant is not liable for the rent to the grantee. *Stone v. Patterson*, 19 Pick. 476.

A landlord, having received rent in advance, sold the land before the expiration of the time for which rent had been paid. The purchaser brings an action for money had and received against him. Held, this action did not lie, even if it was agreed that the plaintiff should receive such rent. *Stone v. Knight*, 23 Pick. 95.

A purchased from B land, which a few days before B had leased to C for three years, C being in possession; with the right of cutting all the timber on the land; taking notes for the rent. Held, the lease was valid against A, but that he might claim payment of the notes, unless they had been *bona fide* transferred to a third person; in which case, he would have a claim for the amount of them against B. *Beebe v. Coleman*, 8 Paige. 392.

In South Carolina, by express statute, no payment of rent in advance, for more than twelve months, shall be valid against third persons. S. C. St. Mar. 1817, p. 36; *Willard v. Tillman*, 19 Wend. 358. See ch. 15.

In New Jersey, Delaware, Kentucky and Alabama, statutes expressly provide that no attornment shall be necessary, but that any payment of rent to the lessor, before notice of an assignment, shall be valid against the assignee. In those States where an execution may be levied upon the rents, the officer may require the tenant to attorn, or, if he refuses, deliver possession to the creditor. This provision is made by statute in Maine. In Vermont, it is extended to perpetual leases in fee, or for so long time as the lessee shall perform his covenants.

In Virginia, an assignee of the rever-

sion is placed in all respects, with regard to his claims upon the lessee and his assigns, upon the footing of the original lessor. (In the same State, in case of partition, a lessee shall hold of the party to whom his portion of the divided premises is assigned. Vir. Code, 525.) A lessee and his assigns, also, have all rights and remedies against an assignee of the reversion which they would have against the original lessor, excepting a recovery in value upon a warranty. This is substantially a re-enactment of the statute of Hen. 8. The same law prevails in North Carolina, New York, (the provision applies to grants in fee, reserving rent. *Van Rensselaer v. Smith*, 27 Barb. 104,) Kentucky and Delaware; and, it is said, the provision of the English act is so reasonable and just, that it has doubtless been generally approved and adopted as a part of our American law. Anth. Shep. 244; 1 Ky. Rev. L. 444; Aik. Dig. 98; 1 Smith, 851; Verm. L. sec. 326, 1885, 9-10; Ib. 476; 2 Ky. Rev. L. 1109; 1 N. C. Rev. St. 259; 1 N. Y. Rev. St. 747-8; Dela. St. 1829, 370; 4 Kent, 119; *Willard v. Tillman*, 2 Hill, 274; Dela. Rev. Sts. 421.

In Ohio, St. 32 Hen. 8. chap. 84, giving to the assignee of the reversion the assignor's right of action on covenants in the lease touching the thing demised, is not law; but if, with the reversion, the covenants be specially assigned, (as may be done in equity, whether they inhere in the land or are merely collateral,) the assignee, under the code, as the party in interest, may sue thereon, in his own name. And if the covenants run with the land, the lessee's assignee is liable on them to whoever is entitled to sue on them, that is, to the assignee of the reversion, where 32 Hen. 8, cap. 84, is in force, and to the assignee of the covenants under the code. And whether a covenant does so run, depends on its nature considered with reference to the

§ 50. Tenant for years, coming under the denomination of a *particular tenant*, forfeits his estate, by attempting to convey a greater interest than he has, if freehold. But not by attempting to convey a *longer term*; for the latter is a mere contract, and has no effect upon the reversioner or remainder-man. If a husband forfeits a term held *in jure uxoris*, the forfeiture binds the wife, because he would have power to dispose of it.<sup>1</sup>(a)

<sup>1</sup> Co. Lit. 251 b; Eastcourt v. Weeks, 1 Salk. 187; 1 Rolle Abr. 851.

estate demised, and upon the intent of the parties in the creation of the estate, as shown by the instrument construed with reference to their circumstances and the subject-matter. Masury v. Southworth, 8 Ohio (N. S.), 340.

In Missouri, attornment to a stranger is void, and shall not affect the possession of the landlord, unless made with his consent, under a judgment or decree, or to a mortgagee after forfeiture. Similar provision is made in Kentucky, New Jersey, New York and Virginia. Where execution has issued upon a *dormant* judgment, the attornment of the tenant is void. Misso. St. 877; 1 Ky. Rev. L. 444; 1 N. Y. Rev. St. 744; 1 Vir. Rev. C. 159; Hoskins v. Helm, 4 Litt. 811.

In Illinois the distinction is made, that, although mere indorsement of a lease by the lessor passes no legal title (Chapman v. v. M'Grew, 20 Ill. 101); yet he may thus pass the equitable right to receive the rent. Dixon v. Buell, 21 Ill. 208.

A suit against a lessee, to recover possession on account of the non-payment of rent, &c., is properly brought by the

lessor in his own name, although he has assigned the future rent. Chamberlin v. Brown, 2 Doug. 120. Where a lessor assigns the reversion, the assignee's right to the whole rent for the current quarter cannot be controlled by a contemporaneous verbal agreement to divide it between him and the assignor. Flinn v. Calow, 1 Man. & G. 589.

A, by virtue of a levy, acquired an estate in certain land, and leased the same for one year, for a rent payable quarter-yearly, the lease to terminate if the premises should be redeemed in that time. A assigned the lease, and the land was redeemed from the levy at the end of six months, the lessee having paid three quarters' rent to the assignee of the lease. Held, that A was not entitled to recover of the assignee the amount of the rent received by him for the third quarter. Southard v. Parker, 26 Maine, 214.

(a) Any disaffirmance of the landlord's title, by the lessee, operates as a forfeiture, and makes the latter a trespasser. Newman v. Rutter, 8 Watts, 51.

## CHAPTER XV.

## LEASE.

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|---|---|
| 1-2. Definition.  | 18. In the alternative.   |
| 3. Form.  | 19. Conditional.  |
| 5. Presumption of.  | 22. Who may lease—tenants in tail.                                    |
| 6. Words necessary; whether a contract or a lease.              | 23. Husband and wife.   |
| 8. Whether an assignment or a contract for it.                  | 24. Tenant for life.  |
| 9. Whether a lease or sale.                                     | 25. Guardian.   |
| 10. Whether a lease or an agency.                               | 26. Executor and heir.  |
| 11. Whether a lease or a partnership.                           | 28. Joint tenants, &c.  |
| 12. Contract upon shares; lease in some of the United States.   | 33. Infant.   |
| 13. Acceptance of lease.  | 34. Avoiding or forfeiture of lease, and what will be a confirmation. |
| 14. Commencement and termination; "date" and "day of the date." | 42. Covenants; usual; for title, repairs, &c.                         |
| 16. "Lease," import of the word.                                | 59. Renewal; perpetual lease.   |
|   | 60. Estoppel.   |
|   | 67 note. License.   |

§ 1. IN immediate connection with *Estate for years*, the subject treated in the last chapter, it seems proper to consider that particular form of transfer or assurance, called *Lease*, by which this estate is created.

§ 2. A lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or a conveyance of lands, &c., to one for life, for years, or at will, in consideration of a rent or other recompense.<sup>1(a)</sup>

4 Cruise, 51. See 4 Ad. & Ell. N. 367; U. S. v. Gratiot, 14 Pet. 526.

(a) A covenant by a lessee, to expend money or labor on the premises, is supposed to be made in consideration of the use and profit to be obtained from them. *Hancox v. Jaques*, 14 N. Y. (6 Seld.) 347.

There may be a lease, without any

reservation of rent. *Falling v. Schenck*, 8 Hill, 344; *Hunt v. Comstock*, 15 Wend. 667; *McKissack v. Bullington*, 37 Miss. 575. See *Mitchell v. Com.* 37 Penn. 187.

If payment of rent is the only proof offered of a tenancy, it may be rebutted by other evidence. *Doe v. Francis*, 2



§ 3. With regard to the *form* of a lease, it has been remarked<sup>1</sup> that in this country very great ignorance prevails, as to the legal effect of the covenants contained therein, owing to the general use of printed forms, or copies from books of forms, or from some old instrument in print.

§ 4. A lease for years must, in general, be *in writing*, parol leases passing only an estate at will. (a) Leases are usually *sealed*, as well as signed; and Mr. Dane suggests, that where, by statute, as is generally the case, leases for more than a certain length of time are required to be recorded, it is to be im-

<sup>1</sup> Per Parker, Ch. J. 16 Mass. 239. (The same learned judge remarks, that the printed form of lease sold at the

shops was originally drawn up by some unskilful person, and ought to be discontinued. *Brewer v. Knapp*, 1 Pick. 335.)

Carr & K. 57. Mere participation in profits, with a joint occupation, does not amount to a tenancy; as where a person contracted with a hotel company, that he should reside in the hotel free of charge for board, conduct and have the exclusive management of it, and, at the end of the term, the furniture be restored to the company. *State v. Page*, 1 Spear, 408.

A grant of franchises, for a limited time, after which they revert to the State, is not a lease. *Bridge &c. v. The State*, 1 New Jersey, 384. Lease to A. Annexed to the lease was an undertaking signed by B and C, and sealed with one seal opposite the name of B, in the following words: "In consideration of one dollar in hand to me paid by A, I hereby covenant and agree to become surety for the faithful performance of said A's covenant, as expressed in the aforesaid lease." In an action of covenant upon this instrument by the lessor against B and C; held, although it did not expressly appear to whom the covenant was made, yet, reference being made therein to the lease, both instruments must be read together, to ascertain the contract; that, taken together, they were equivalent to an express covenant to the plaintiff; that, even if this were not the rule, the fact of executing the covenant under the plaintiff's lease, and delivering it to the plaintiff, would enable her to recover thereon; that the consideration mentioned in the writing was sufficient to make the covenant valid, on the ground of mutuality; that the obligation of the defendants was joint and several; that they were both jointly

liable in covenant, although there was but one seal, and that was opposite the signature of the first signer; and that, the declaration averring the covenant declared on to be "sealed with the seals of the said defendants," and the truth of that averment being admitted by the demurrer, the court must regard the seal as affixed by both parties. *Van Alstyne v. Van Slyck*, 10 Barb. 383. See *McLaren v. Watson*, 19 Wend. 557, 26, 425.

(a) See *Estate at Will*. Whether certain premises are parcel of the premises demised, if not ascertained by the written contract, is always a question open to extrinsic evidence. *Crawford v. Morris*, 5 Gratt. 90. But, a written agreement to pay a certain rent cannot be varied, by parol evidence of a subsequent verbal contract for a smaller sum, and the actual payment thereof. *Crowley v. Vitty*, 9 Eng. L. & Eq. 501. (See Browne on the Statute of Frauds (Appendix) for the statutes of the several States in relation to leases for not more than one or two years.)

A parol agreement for renting real estate, made for one year, to commence at a future period, is not void under the provisions of the Revised Statutes of New York respecting "fraudulent conveyances and contracts relative to lands. *Taggard v. Roosevelt*, 2 Smith, 100.

A parol agreement for a lease, for one year, though void as a contract, may explain the subsequent holding, and show that it was not on the term of a prior valid lease. *Crommelin v. Thiess*, 31 Ala. 412.

plied that they must be under seal. But, ordinarily, no seal is necessary to the validity of a lease.<sup>1(a)</sup>

§ 5. Leases may be *presumed* from long possession, not otherwise to be explained.<sup>2</sup> The *onus*, of proving that no rent was to be paid where one occupies another's lands, is on the former. Thus where a man occupies the lands of his father-in-law by the permission of the latter, the presumption of law is that he was to pay a reasonable rent. There is nothing in the relationship of the parties which would raise a contrary presumption. Though the relationship of the parties, and their ability and condition in life, are circumstances to be submitted to the jury, to be considered by them in determining whether there was an express contract that no rent was to be paid.<sup>3(b)</sup>

<sup>1</sup> 4 Dane, 126; Hunt v. Hazleton, 5 N. H. 216; Kinzie v. Trustees, &c., 2 Scam. 188. See University, &c. v. Joslyn, 21

Verm. 52; Sharp v. Mayor, &c., 40 Barb. 256.

<sup>2</sup> 4 Pet.

<sup>3</sup> Sterrett v. Wright, 8 Cas. 259.

(a) In Delaware, no lease shall operate for a longer term than one year, unless made by deed. A written lease for more than three years, signed by the party making it, though not under seal, is valid under the Statute of Frauds, (Rev. Laws, 151, sec. 9.) of New Jersey, and can no more be turned into a lease at will, than it can be assigned or surrendered by parol. Mayberry v. Johnson, 8 Green, 116.

In Virginia and Kentucky, a conveyance for more than five years; in Vermont and Rhode Island, for more than one year; in Maryland, Michigan, New Hampshire, Maine and Massachusetts, for more than seven years; is invalid, unless sealed and recorded. In Vermont, *acknowledged* and recorded. Between the parties, recording, it seems, is unnecessary. In Indiana, leases for more than three years, to be valid against third persons, must be recorded. In Connecticut, leases for more than one year are good only against the lessor and his heirs, unless attested by two witnesses, *acknowledged* and recorded. In Ohio, an unsealed writing is good, as a lease, after entry and enjoyment. Before, it is only a contract. 1 Md. L. 126; Del. St. 1829, 368; Ind. Rev. St. 232; Virg. Code, 507; Conn. St. 850; 1 Ky. Rev. L. 432; 1 Va. Rev. C. 156; N. H. Rev. St.

248; Taylor v. Bailey, Wright, 646; Mass. Rev. St. 407; Anderson v. Critcher, 11 Gill & J. 450; Barney v. Keith, 4 Wend. 502; Me. Rev. St. 374; Chapman v. Bluck, 4 Bing. N. 187; Verm. Rev. St. 812; Taylor L. & T. 19; Burnett v. Thompson, 3 N. C. 879. See People v. Stiner, 45 Barb. 56; Wim v. Merter, 4 Greene, 54.

A statute which provides, that "no bargain, sale, mortgage or other conveyance of houses and lands, shall be good, &c., against any other person but the grantor, &c., unless the deed, &c., be *acknowledged* and recorded," &c., does not apply to a lease for years of land and a right of way. Stone v. Stone, 1 R. I. 425.

In Ohio, without acknowledgment and attestation, a lease for five years is bad. Richardson v. Bates, 8 Ohio (N. S.), 257. In North Carolina no registration is necessary. Barnett v. Thompson, 3 N. C. 879. In Tennessee, an agent may lease for seven years, though his authority is verbal. Johnson v. Somers, 1 Humph. 268.

(b) In New York, where a person is in the quiet and peaceable possession of premises with the knowledge and acquiescence of the owner, for upwards of a month, and has taken such possession under a purchase from one who claims to have a parol lease from such owner, and

§ 6. The words appropriated to this kind of contract are "demise, lease, and to farm let;" but any other expression, indicating an intent on the one side to quit, and on the other to take, possession for a given time, is sufficient to constitute a lease; more especially where there is a certainty as to the time when the term shall commence and terminate, and the amount of rent to be paid. So, although in the form of a license, covenant, or agreement.<sup>(a)</sup> It is enough, if there be express words of present demise, or equivocal words accompanied with others, to show the intention of the parties not to have a future lease, especially if possession be taken; and their intention may be gathered, not only from the instrument, but from their concurrent or subsequent acts.<sup>1(b)</sup>

<sup>1</sup> Co. Lit. 45 b; Bac. Abr. *Lease* K; *Wright v. Trevesant*, 8 C. & P. 441; *Moore v. Miller*, 8 Barr, 272; *Jenkins v. Eldredge*, 3 Story, 325; *Mosher v. Redding*, 3 Fairf. 478; *Merrick v. Lewis*, 8 McC. 211; *Right v. Proctor*, 4 Burr. 2208; *Tooker v. Squier*, 1 Rolle's Abr. 817; *Whitlock v. Horton*, Cro. Jac. 91;

*Hall v. Seabright*, 1 Mod. 14; *Doe v. Ashburner*, 5 T. R. 168; *Pineo v. Judson*, 6 Bing. 206; *Chapman v. Bluck*, Arn. 27; *Doe v. Benjamin*, 9 Ad. & Ell. 644; *Alderman v. Neate*, 4, 704; *Cushing v. Mills*, 6 Mann. & G. 178; *Bond v. Roshing*, 1 Ell. B. & E. 371.

was in actual possession for two months, he is to be deemed rightfully in possession, so far as to entitle him to occupy till the 1st of May then next, or, at least, until the tenancy be terminated by notice. The owner may not forcibly eject him, and defend the act by showing that such alleged parol lease was not binding upon him. *Marquart v. La Farge*, 5 Duer, 559.

Still less was the owner justified in closing the entrance, and refusing to permit such tenant to remove his goods. *Id.*

In an action for damages, in such case, the owner is liable for the value of the goods detained, and for the injury done by breaking up the business of the tenant, who kept a refreshment saloon within the purlieus of a theatre. *Id.*

In such case, it is not erroneous to allow evidence, that "the plaintiff did a pretty large business;" that "the business was good and profitable," and that "one-half the receipts were clear profit;" to be given to the jury, among other testimony, to aid them in fixing the amount of damages. *Id.*

(a) To constitute a lease, one must intend to dispossess himself; the other party to occupy in place of the former. *Waller v. Morgan*, 18 B. Mon. 186. See *People v. Kelsey*, 38 Barb. 269.

An agreement, that a future lease shall contain a special provision as to notice, is not itself subject to such provision, no lease being executed. *Tooker v. Smith*, 40 Eng. L. & Equ. 370.

A writing, acknowledging receipt of a bond for money, for the "purchase of the cypress timber" on land, with an agreement to let the purchaser have a certain length of time "to cut the timber off of the land," creates an estate, and enables the purchaser to occupy the land and take the timber for the time stated. *Moring v. Ward*, 5 Jones, 272.

On the other hand, the word *let* is a comprehensive term, which does not necessarily pass a mere term for years, but may convey the fee. "A hath *let* to B, his legal heirs and representatives—at the rate of \$15 per acre, to be paid by B, or his legal heirs, annually to A, his heirs and assigns." This passes the fee, subject to a ground rent in fee. *Krider v. Lafferty*, 1 Whart. 308.

Leases are to be construed like other contracts, so far as intention and custom are to govern in their construction. *Iddings v. Nagle*, 2 Watts & S. 24.

(b) "It is covenanted and agreed between A and B, in these words: First, that A doth let said lands for five years,

§ 7. On the other hand, it has been repeatedly held, that, notwithstanding words of present demise, an instrument shall not operate as an actual lease, if there is a manifest intention, appearing on the whole paper, that it should operate otherwise. An

to begin at the M. feast next ensuing; provided, that B should pay A annually during the term £120. Also the said parties do covenant, that a lease shall be made and sealed, according to the effect of these articles, before the next feast of S." Held, the words "doth let," made this a present lease, and that the following expressions of prospective import merely contemplated the making of further assurance. *Harrington v. Wise*, Cro. Eliz. 488. See *Jackson v. Keisselbrach*, 10 John. 436; *Poole v. Bentley*, 12 E. 168; *Hallett v. Wylie*, 3 John. 44.

So, where an instrument contained an agreement for a subsequent lease and demise, when a fence, &c., should be finished, but also a clause for re-entry, upon breach of covenant, and the proposed tenant entered and paid rent; held, a lease, not a mere agreement for one. *Alexander v. Bonnin*, 6 Scott. 611.

By articles between A and B, A covenanted, granted, and agreed, that B should have *and enjoy* the land for six years, in consideration of which, B covenanted to pay an annual rent to A and his heirs. Held, a good lease. *Drake v. Munday*, Cro. Car. 207. See *Tisdale v. Essex*, Hob. 34.

A and B agreed with C, that they would, with all convenient speed, grant him a lease of, and they did thereby set and let to him certain land. to hold for twenty-one years, at a certain rent, payable semi-annually. The lease to contain the usual covenants, and certain special ones, one of which spoke of "this demise." Held, these words, with the words *set and let*, made this a present lease, with an agreement for a more formal one thereafter. *Baxter v. Browne*, 2 Black. R. 978.

A hath let, and by these presents doth demise, &c., unto B for twenty-one years, to commence after A hath recovered said lands from C. Leases, with powers of distress and clauses for re-entry, &c., to be drawn and signed at the request of either party, as soon as A recovers, &c. Held, a present lease. *Barry v. Nugent*, 5 T. R. 165. A bargained, covenanted, and agreed with B, by articles, that he would lease to B a farm, for six years from April 1st, 1807, on condition B should pay \$250 on April 1st, each year

during the term. B covenanted to pay accordingly. Before April 1st, 1807, A sold the farm. Held, without paying \$250, B had a vested estate as lessee, and might maintain ejectment. *Thornton v. Payne*, 5 John. 74.

A and B entered into a sealed contract, which, after reciting a covenant by A to finish a certain building then erected, for the manufacture of cotton, furnish water-power and machinery therefor, by a certain day, and keep the machinery in repair for one month, proceeded thus: "And A does hereby lease said building to B for the term of ten years," from the day before named, but B is to have the use of the building, &c., after they are completed, free of rent, from a day prior to the date of the instrument, until they shall be ready for operation; "and B shall also use said building, free of rent, for the purpose of storing cotton and machinery and making repairs, from the date of this instrument;" and B covenants to keep the running machinery in repair after the expiration of one month. B took possession under the contract. Held, the instrument created a present demise, to commence *in futuro*, not merely an agreement for a lease. *Bacon v. Bowdoin* 22 Pick. 401.

An indenture, by which W. leases and demises "a mill to C for a term of ten years, yielding and paying rent therefor" a certain sum quarterly, to commence two months after this date; and C, "desiring that additions may be made to said mill, proposes to advance the capital necessary for said additions, said advance to be deducted from the rent," and "said C, lessee, agrees to pay an additional rent" for the additions, "of ten per cent yearly on their cost," and "proposing to hire water-power in connection with said mill, hereby covenants and agrees to pay W" a certain rent semi-annually for the water-power; and that he will pay the taxes, and not suffer waste, nor "assign the said lease or underlet, without the consent of the lessor;" and, at "the termination of this lease, said C is to have the right of renewing said lease for five years;" is a lease, and not an agreement for a lease. *Weed v. Crocker*, 13 Gray, 219.

agreement for a future lease will not constitute a lease, though followed by actual occupation.<sup>1</sup> This intention may be inferred from strong circumstances of inconvenience, connected with a different construction; such as a forfeiture.(a)

<sup>1</sup> Camden v. Batterbury, 5 C. B. (N. S.) 808, 896.

(a) Where the instrument referred to a parol agreement, and did not state the commencement or duration of the tenancy; held, a mere agreement, not a lease. Gore v. Lloyd, 12 Mees. & W. 468. Such agreement may operate as a license to enter, and give a right to claim specific performance or damages. Price v. Williams, 1 Mees. & W. 6. An express proviso, that the instrument shall operate only as an agreement, not a lease, will be carried into effect, though other clauses indicate a different intent. Per-ring v. Brooke, 1 M. & R. 510. But not the mere use of the word *agreement*. John v. Jenkins, 1 Cr. & M. 288.

A and B entered into the following articles: "A doth demise, &c., to B, to have it for forty years," with a rent reserved, and a clause of distress. A memorandum was afterwards written in the same paper, that these articles were to be ordered by counsel of both parties, according to due form of law. A lease was afterwards drawn by counsel, but not sealed, the parties differing as to *fire-botc*. Held, no lease. Sturghion v. Painter, Noy R. 128; Tenny v. Childs, 2 M. & S. 225; Pleasants v. Higham, 1 Roll. Abr. 848. See People v. Gillis, 24 Wend. 201; Jones v. Reynolds, 1 Ad. & Ell. (N. S.) 506; Rawson v. Eicke, 7 Ad. & Ell. 451; Bicknell v. Hood, 5 Mees. & W. 104; Chapman v. Towner, 6, 100; Brashier v. Jackson, Ib. 549; Helser v. Pott, 8 Barr. 179; Jackson v. Moncrief, 5 Wend. 26; — v. Myers, 3 John. 388; Tempest v. Rawling, 18 E. 10; Fenner v. Hepburn, 2 Y. & C. 159.

An instrument contained words of present demise, but also an agreement by the owner to make alterations and improvements, and by the other party, to take a lease when they should be made. Held, a mere agreement for a lease. Jackson v. Delacroix, 2 Wend. 433.

Agreement between A and B, that A should *enjoy the mills, &c.* and that B would give him a lease for a certain time, and at a certain rent, and purchase an additional piece of land and add it to that demised. Held, a mere agreement. 5 T. R. 168.

A agreed "to let premises to B, on lease, with a purchasing clause, for twenty-one years, at £63 per year;" B to enter any time on or before a certain day. Held, a mere agreement—there being no words of demise, the commencement of the tenancy being left uncertain, and the words as to purchasing showing that the letting was to be by a particular instrument, containing such lease. Denk v. Hunter, 5 B. & A. 822, 1042.

An agreement provided, that, out of the rent mentioned, a proportionate abatement should be made, in regard to certain excepted premises, and the tenant hold *under all usual covenants, &c.* Held, not a lease, because it might be disputed what are *usual covenants*. Morgan v. Bissell, 8 Taun. 65. But see Doe v. Benjamin, 1 Per. & Dav. 440.

The defendant entered into a contract with A, in writing; not under seal, "to let" to A a certain farm, to commence on the first of April, 1842, and continue from year to year for five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing; the produce of the farm "to be equally divided by weight or measure, between the parties." Held, although this gave A an interest in the land, and a right to occupy it without molestation from the defendant, while he continued in the performance of the contract, yet it did not constitute a lease, but A was a *quasi* tenant at will, while the contract continued in force, and the defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance. Aiken v. Smith, 21 Vt. 172. So, though the defendant, subsequent to the assignment, had caused an undivided half of the produce to be attached and sold on execution, as the property of A, and himself become the purchaser. Ib. [In this case, the case of Hurd v. Darling, 14 Vt. 214, 16 Vt. 377, was examined, and the correctness of the decision was questioned.] Held, also, the interest of A in the growing crops, before severance, was assignable, and the plain-



§ 8. The question sometimes arises, whether a transaction is an actual *assignment*, or only a contract for assignment, of a lease. The latter construction was given, where money was subsequently to be paid, though in the mean time the assignee was to pay rent, perform the covenants, and indemnify the lessee against them; with a condition of re-entry.<sup>1</sup>

<sup>1</sup> Line v. Stephenson, 7 Scott, 69. See Chase v. McDonnell, 24 Ill. 236; White v. Bayley, 10 C. B. (N. S.) 227.

tiff, having received from A a legal assignment of his interest, became tenant in common with the defendant, in place of A, and might sustain an action of account against the defendant, to recover his just proportion. *Ib.*

A doth hereby agree to let, and B agrees to rent and take, &c., all his estate, &c. It is agreed that said B shall enter immediately, but not commence payment of rent till, &c. It is further agreed that leases, with the usual covenants, shall be made on or before, &c. Held, no lease; but only an agreement for immediate possession, till a lease could be drawn. *Goodtitle v. Way*, 1 T. R. 785.

A certain instrument recited that A, if he should have a title to certain land upon B's death, would immediately lease it to C, and declared that he did thereby agree to demise the same, with a subsequent covenant to procure a license, &c., to do it. Held, only a contract for a lease. *Doe v. Clare*, 2 T. R. 789. See 10 John. 836; 4 Dane, 132. (The two last cases turned in part upon the point, that the proper *stamp* was wanting.)

A agreed to let her house to B during her life, supposing it to be occupied by B, or a tenant agreeable to A, and a clause was to be added in the lease to give A's son an option to possess the house when of age. Held, only a contract, not a lease. *Doe v. Smith*, 6 E. 530.

A town, by vote, directs that a lease of certain land may be made, "which shall vest in the lessee all the right of said town to enter upon said quarries and remove stones, and do any other lawful act for and in behalf of said town, in relation thereto." This vote, and a lease made in pursuance of it, give to the lessee a perfect right of entry and possession, with all the powers of the town in relation to the subject. The lessee becomes a legal owner, and may

maintain trespass either against a stranger or the agent of the town. But the mere vote of a town, that their agent may let certain land for a year, is no lease, and, if he let without writing, the lessee has only an estate at will. *Todd v. Hall*, 10 Conn. 559-60; *Hingham v. Sprague*, 15 Pick. 102.

"It is hereby agreed between A and B, that A will let to B the use of the county house in L, from December, 1817, to April, 1818, and B agrees to pay A therefor \$250, provided a majority of the county court agree thereto. November 13, 1817." Held, no lease, but an agreement upon condition precedent; and, in assumpsit by A for the rent, B was allowed to prove by parol that he occupied as tenant of the county. *Buell v. Cook*, 4 Conn. 238.

Agreement that A will give B a lease for ninety-nine years, as soon as he shall comply with certain conditions, manifestly to be executed by both, but signed by A alone, with the day of the month left blank, and never signed or attempted to be signed by B, and never delivered to him during A's life. Held, an inchoate instrument, passing to B no interest, either legal or equitable. So an order, directing possession of land to be delivered to a party "to whom it has been leased for ninety-nine years," is not itself a lease, nor an agreement for a lease, for that term, which equity can enforce, being defective, if for no other reason, in not showing what rent is to be paid. And possession taken in May, in pursuance of such an order, does not show that the subsequent holding was under a contract made in the following July. *Howard v. Carpenter*, 11 Md. 259.

Articles of agreement between A and B contained the following clause: "that the said mills, &c., he shall enjoy, and I engage to give him a lease in for thirty-one years from, &c., at the rent, &c., and that I will purchase one yard in

§ 9. The question may also arise, whether a particular transaction constitutes a lease or a *sale*. Thus, after sale of a house by written agreement, for a certain sum, and in the meantime a weekly rent reserved, the purchaser married the defendant, the purchase-money was paid, and the seller died. The executors then proceed in the county court against the defendant, to recover possession. Held, on application for a prohibition, that the relation of landlord and tenant did not exist, and a prohibition was granted.<sup>1</sup> So in February, 1842, A agreed with B to sell him a farm for a certain sum, \$375 to be paid, part in June following, and the balance the next April, whether B should decide to take a deed or not. B was to have immediate possession, and decide in July, 1842, whether he would keep the premises under the contract. Held, the agreement was a sale, not a demise, and the \$375 not *rent*, for which a distress could be made.<sup>2(a)</sup>

§ 10. So the question may arise, whether an occupant of land is a lessee, or merely a servant, of the owner. Thus the defendants, owning a manufactory, and a pond above it, and having purchased of the plaintiff the right to draw off water from the pond through his land, made a written contract with one B, by which B was to run the defendants' mill one year, and manufacture for them at a certain price cotton furnished by them, and to keep the mill in good running order at his own

<sup>1</sup> Banks v. Rebbeck, 5 Eng. L. and Equ. 298.

<sup>2</sup> Moulton v. Norton, 5 Barb. 286.

breadth to be laid to the race, &c. And if it be bought, and the purchase is more than £200 per acre, said B to pay "the additional cost. Held, the words *he shall enjoy*, and *I engage to give him a lease*, showed an unequivocal intention for a future lease; and this construction was confirmed by the consideration, that A was to obtain other land to be laid to the mill, before the lease should be made. If B should seek to enforce the instrument, as a contract, in Chancery, he would not be turned round with the objection, that he had already a legal, executed estate, but a lease would be decreed to be made. *Roe v. Ashburner*, 5 T. R. 168; 4 Kent, 105, and authorities.

(a) The lessor of a farm, for three years, covenanted to furnish ten cows with hay sufficient to winter them, to be kept for the use and benefit of the lessee during the term; to risk them against all unavoidable accidents; and to pay all taxes upon them. The lessee covenanted to deliver to the lessor, at the expiration of the three years, the same ten cows, or others worth as much in all respects, with hay sufficient to winter them through. Held, this did not pass the absolute property in the cows to the lessee, but was a lease merely, with the right in the lessee, in case any of the cows were lost by accidents, not unavoidable, to return other cows of equal value. *Smith v. Niles*, 20 Vt. 315.



expense, except the main gearing, which was to be repaired by the defendants, if necessary. No rent was to be charged by the defendants, and they were not to be called on for any expense, unless the main gearing should fail or some injury arise to the dam. Six or seven acres of land, where the factory stood, with the factory houses, blacksmith shop, &c., were to be used by B. In an action against the defendants for an injury to the plaintiff, caused by B's letting off the water from the pond so rapidly as to overflow the plaintiff's land; held, B was a lessee, not a servant of the defendants, and therefore they were not liable to this action.<sup>1</sup> So the defendant, owning a farm and ferry, leased them verbally for a year, the profits and proceeds to be equally divided between him and the lessee, the lessee to keep and manage the ferry at his own expense of labor, the defendant to put the boat in good order at the commencement of navigation, and the expense of repairs to be divided between the parties; the lessee to pay the defendant half the receipts weekly; the lessee to conduct all his business as such tenant, and manage the said "farm and premises" so leased to him, carefully, &c., and allow no one but a suitable man to attend the ferry, and be responsible to the defendant for "damages occasioned by wilful misconduct or neglect in the management of the said farm and premises, and in the management of the ferry, and the scow and boat." Held, the lessee was tenant of the defendant, both as to the farm and ferry, and the defendant not liable to a passenger in the boat, for an injury caused by the lessee's negligence in the management of the ferry.<sup>2</sup> But under an agreement between A and B, that B and his wife should work for A one year, B upon the farm of A, and his wife in the house connected therewith; B and his wife having taken possession, A afterwards ordered them to quit, and, upon their refusing, ejected them. Held, A and B stood in the relation of master and servant, and an action of trespass did not lie.<sup>3</sup> So A, the proprietor of a school, employing B as the steward, &c., assigned to him for lodgings a house

<sup>1</sup> *Fiske v. Framingham*, 14 Pick. 491. Equ., Apr., 1866, p. 71; *White v. Bay-*  
See *Anderson v. Nesmith*, 7 N. H. 167; *ley*, 10 C. B. (N.) 227.  
*Queen, &c. v. Spurrell*, Law Rep. (Eng.)

<sup>2</sup> *Felton v. Deall*, 22 Verm. 170.

<sup>3</sup> *Haywood v. Miller*, 8 Hill, 90.

within the curtilage, but not connected with A's dwelling-house, by any common covering or roof, and without rent. Held, it was in law the dwelling-house of A.<sup>1</sup>

§ 11. The further question may arise, whether a lessor, who is to receive for rent a certain portion of the profits of the land, does not thereby become a *partner* of the lessee.<sup>(a)</sup>

§ 12. On the other hand, a mere contract with the owner of land to raise a crop *upon shares* does not necessarily constitute a lease. The parties may be tenants in common of the crop. But the relation of landlord and tenant may exist, where the letting is for a year, and the rent is to be paid in part of the crop; and the parties will not then be tenants in common.<sup>2(b)</sup>

<sup>1</sup> State v. Curtis, 4 Dev. & B. 222.

<sup>2</sup> Alwood v. Buckman, 21 Ill. 200.

(a) To guard against this construction, it is provided in North Carolina, that a lessor of property for gold mining purposes shall not be held as a partner, though he is to receive a sum uncertain of the proceeds, or any other consideration which is uncertain, but may be made certain. 1 N. C. Rev. Sts. 426.

Lease of a ferry for a year; the lessee to take charge of the business, pay expenses, and pay the lessor half the gross receipts. Held, the parties were not partners, even as to third persons. Heimstreet v. Howland, 5 Denio, 68.

(b) A agreed with B to sow and raise on B's land a crop of wheat, B to find the team and one-half of the seed, and A to do the labor; the wheat, when harvested, to be put in B's barn, threshed and divided between them. The wheat, while cut and standing, was attached as A's. Held, A had no lease of the land, and no exclusive interest in the wheat, but it belonged to the parties jointly. But if A agree with B to raise a crop upon B's land, and pay him one-third of it, *as rent*, this is a lease, and A may have trover against B for taking the crop. (4 Kent. 95;) Bishop v. Doty, 1 Verm. 17; Hoskins v. Rhoades, 1 Gill. & J. 266. See chap. 16. Jackson v. Brownell, 1 John. 267.

Where a transaction of this kind is a mere contract for *personal services*, which would expire with the death of the party occupying, it is no lease. Maverick v. Lewis, 8 McCord, 211. In Pennsylvania, *landlord and cropper* is a phrase familiarly known to the law. Iddings v. Na-

gle, 2 W. and Serg. 24. Contract between A and B, that B should cultivate A's farm for one season, and deliver him one-half the crops, the grain to be threshed and then divided; and should have the use of a part of the barn to put his grain in. Held, before a division, the parties were tenants in common of the crops. Walker v. Fitts, 24 Pick. 19; acc. Putnam v. Wise, 1 Hill, 284. See Chamberlin v. Shaw, 18 Pick. 278; Caswell v. Districh, 15 Wend. 879.

By an indenture, A, the plaintiff, "demised, granted, and to farm let" to B and C his farm with the buildings thereon, reserving for his own use certain rooms and privileges in the kitchen, &c., *habendum* for one year, they covenanting to carry on the farm in a husband-like manner, to furnish one cow and other stock, one-half the seed, &c., and divide the grain, &c., and deposit A's portion in his part of the granary and cellar; and A agreeing to supply certain farming implements, to be kept in repair by B and C; 12 cows, &c., whose product should be equally divided; the winter manure to be put on the land at A's direction; the hay to all be fed out on the farm; half of the calves to be reared, if suitable and promising for that purpose, and the other half killed for veal. The hay and calves having been attached by creditors of B and C, A brings an action against the officer. Held, the above agreement did not so vest in B and C the hay and calves to be reared, produced on the farm during the term, as to render them liable to attachment; but the effect of it was, that

§ 13. Where a lease is made, the general presumption is, that it is *beneficial* to the lessee, and therefore accepted by him. But this benefit is to be judged of, not merely by the terms of the lease, but by all the circumstances of the case. If the lessee has himself a perfect title to the land, and the lessor no title, this is not a beneficial lease, and no acceptance will be presumed.<sup>1(a)</sup> See *infra*, 41.

§ 14. Every lease must have a *certain beginning and ending*. It may begin from a day past. If made to commence from an *impossible* date, as the 30th of February—or from the end of another lease, which does not exist, or is void, or misrecited, it takes effect from delivery; but if from an *uncertain* date, as where the month is mentioned, but not the year, it is void.<sup>2</sup> But it may commence or end upon a contingency which *must happen*, as from the lessor's death, running to a certain day.<sup>3</sup> So a lease for twenty-one years, to commence after the termina-

<sup>1</sup> *Camp v. Camp*, 5 Conn. 291.

<sup>2</sup> Co. Lit. 46 b, and n. 10; 1 Mod. 180; *Moore v. Hussey*, Hob. 18. See *Fox v. Nathans*, 32 Conn. 348. See p. 236.

<sup>3</sup> *Goodright v. Richardson*, 8 T. R. 462; *Child v. Bayley*, Cro. Jac. 459.

all the hay should be consumed on the farm, and such calves kept on the farm till the term expired, when the division was to take place. *Lewis v. Lyman*, 22 Pick. 437.

Lease of a farm, with the cows and sheep thereupon, for five years, at a certain annual rent, with a provision that cows of equal age, &c., should be returned at the end of the term, and also sheep. Held, the cows and sheep, as also others substituted for them, belonged to the tenant, and might be levied upon as his. *Carpenter v. Griffin*, 9 Paige, 310. (See ch. 16.)

A agreed by parol with B to clear and sow B's land and receive the crop. B sold the land to C, with notice of this agreement. Held, C was bound by it, and A might enter to take the crop. *Davis v. Brocklebank*, 9 N. H. 73.

In Delaware (Del. Sts. 1829, 368; Rev. Sts. 422), any *contract or consent*, pursuant to which a tenant enters into or continues in possession of lands, &c., under an agreement to pay rent, is a *demise*. The term is one year, unless the instrument specify a different term, or the property have been usually let for a shorter

time. In the city of New York, a lease not limited in duration continues to the first of May next, after possession taken; and the rent is payable at the usual quarter days for payment of rent in that city, unless otherwise expressed. 1 Rev. Sts. 744.

Where a writing is given for a lease, though not properly executed as such (as, in Connecticut, by sealing, acknowledgment and recording), it may be used as evidence that the defendant occupied with permission of the plaintiff. *Cornwall v. Hoyt*, 7 Conn. 420.

(a) It has been held, that a lessee may abandon his contract, if the lessor refuse to give possession on the day fixed. *Spencer v. Burton*, 5 Blackf. 57.

As to the acceptance of a lease by assignees in bankruptcy, see *Goodman v. Noble*, 8 Ell. & Bl. 587; *Journeay v. Bockley*, 1 Hilt. 447; *Hilliard on Bankruptcy*, 142.

Where a lessee, the rent being payable quarterly, assigns to a trustee for creditors, and the assignee enters in the middle of a quarter and occupies until the rent becomes payable; he is liable for

tion of a life, is good; because the commencement, though at first uncertain, is rendered certain by a subsequent event. So A may grant to B, that, when B grants him a certain sum, he shall have and occupy the land for twenty-one years; and this is a good lease to commence on payment of such sum.<sup>1</sup>

§ 15. As to the legal import of the words "from the date," "from the day of the date," &c., it was the old rule, that either expression would make the lease to commence the day after the date. But the modern doctrine is, that there is no general rule on the subject; that, in reckoning from an act or event, the day is to be inclusive or exclusive, according to the reason of the thing and the circumstances of the case; though, ordinarily, the day is inclusive, the words being used, not by way of computation, but of passing an interest, and because this construction is most favorable to the lessee.<sup>2</sup> In several cases, the rule is laid down, that, where the computation is from *an act done*, the day is included; as where it is "from the making hereof," or "from henceforth."<sup>3</sup> And where the expression is "from the date," the rule seems to be, that, if a present interest is to commence from the date, the day of the date is included; but if merely used to fix a *terminus*, from which to compute time, the day is excluded.<sup>4</sup>(a)

§ 16. The word "lease," as well as "term," seems to be of somewhat equivocal import. (*Supra*, ch. 14, s. 3.) Instead of applying to the instrument itself, it may be held to refer to the time for which it was to run.(b)

<sup>1</sup> Dyer, 124; Goodright v. Richardson, 3 T. R. 468; Bishop of Bath's case. 6 Rep. 84 b; Co. Lit. 45 b. See ch. 14.

<sup>2</sup> 4 Kent, 95 n. b, and authorities. See Farwell v. Rogers, 4 Cush. 460; Thomas v. Afflick, 16 Penn. 14; Bigelow v. Willson, 1 Pick. 485; Arnold v. U. S., 9 Cranch, 104; Jacobs v. Graham, 1

Blackf. 392; Wilcox v. Wood, 9 Wend. 346; Webb v. Dixon, 9 E. 15.

<sup>3</sup> Co. Lit. 46 b; Blake v. Crowninshield, 9 N. H. 304; The King v. Justices, &c., 4 Nev. & Man. 375; Brainard v. Bushnell, 11 Conn. 17; Glassington v. Rawlins, 8 E. 407.

<sup>4</sup> Arnold v. U. S., 9 Cranch, 104; Co. Lit. 46 b, n. 8, 9.

the rent of the whole quarter. Young v. Peyser, 3 Bosw. 308.

But where he continued to occupy for fourteen days after such rent became payable, and then surrendered to the lessor, who took possession; he was held not liable for the fourteen days. *Ib.*

(a) Under an agreement to quit on

notice of ten days, the day on which notice is given must be excluded. Aiken v. Appleby, 1 Morris, 8.

(b) The owner of land, containing a quarry, leases the quarry for ten years, and then conveys the land "reserving the use of the quarry until the expiration of the lease." By mutual consent,

§ 17. Where a statute requires registration of "any lease for more than seven years from the *making thereof*;" a lease to commence *in futuro*, though for a term less than seven years, is within the act, if the time be more than seven years from the making of the lease to the end of the term.<sup>1</sup>

§ 18. Where a lease is made for different periods, in the alternative—as, for instance, for seven, fourteen or twenty-one years; although not, as has been contended, void for uncertainty, the legal construction seems to be somewhat doubtful. Thus it has been held, in one case, that the duration of the lease, for one or the other of the times named, might be determined either by the lessor or the lessee, after due notice; but in a later case, that the latter alone could exercise his election. By continuing over one period, he extends his tenancy to the next.<sup>2</sup> So a lease for one year, so for two or three years, as the parties shall agree, from the first year, is a lease for two years; and, after the beginning of every subsequent year, is not determinable till the end of it.<sup>3</sup> So a demise "not for one year only, but from year to year," constitutes a tenancy for at least two years, not determinable by a notice to quit at the end of the first year.<sup>4</sup> So a lease *for years* continues two years.<sup>5(a)</sup>

<sup>1</sup> Chapman v. Gray, 15 Mass. 489.

<sup>2</sup> Ferguson v. Cornish, 2 Burr, 1084; Goodright v. Richardson, 3 T. R. 462; Dann v. Spurrier, 8 P. & P. 899-442; Leo, &c. v. Merritt, 21 Wend. 886.

See Waring v. King, 8 Mees. & W. 571.

<sup>3</sup> Harris v. Evans, 1 Wils. 262; 4 Dane, 188.

<sup>4</sup> Den v. Cartright, 4 E. 29.

<sup>5</sup> Bac. Abr. Leases, (L) 8.

the lease was cancelled within the ten years. Held, the reservation still remained in force, till the ten years expired. Farnum v. Platt, 8 Pick. 389.

(a) Lease of a dwelling and other buildings, used for manufacturing, meadow and pasture lands, with all water-courses, &c., to commence, as to the meadow, from the 25th of December last past; as to the pasture, from the 25th of March following; and as to the houses, mills, and other premises, from May 1st. Held, this last was the substantial time of entry, the houses, &c., being the principal subject, to which the other premises were merely auxiliary. Doe v. Watkins, 7 E. 551.

A executed to B a lease for one year, containing these words: "B to have the privilege to have the premises for one

year, one month and twenty days longer; but, if he leaves, he is to give four months' notice before the expiration of this lease." Held, the term did not terminate until the expiration of two years, one month and twenty days, in case the tenant did not give notice of his intention to quit four months previous to the expiration of the first year. Chretien v. Doney, 1 Comst. 419.

Lease dated March 25, 1783, to hold from the 18th of March last past. It was proved that the lease was executed some time after date. Held, the term commenced March 25th, 1783. Steels v. Mast, 6 Dow. & R. 892.

Possession of land taken in May does not show that a subsequent holding was under an agreement made in July. Howard v. Carpenter, 11 Md. 259.

§ 19. A lease may be made to terminate before its natural expiration, by *proviso* or *condition*. Of this nature, is the usual condition of re-entry upon non-payment of rent.<sup>(a)</sup> But such proviso is construed strictly, and its terms must be literally complied with. Thus a lease was made for twenty-one years, provided that either party, or their heirs or executors, might terminate it at the end of seven or fourteen years, by giving six months' notice in writing, under his or their respective hands. The lessor died, having devised the lands to three executors, as joint-tenants. Two of them gave notice, as for the whole. Held, this was insufficient, it not appearing that the termination of the lease would be a benefit to them; and that neither a subsequent ratification by the non-signing executor, nor his joining in a suit for the land, was sufficient to bind the lessee.<sup>1</sup>

§ 20. With regard to the *parties* to a lease, it is held, that one disseised can deliver a lease only as an *escrow*, to take effect after his entry, and it will pass his right of entry.<sup>2</sup>

§ 21. An *attorney*, either at law or in fact, has no implied authority to make a lease or confirm an imperfect one, or to perfect an inchoate agreement for a lease.<sup>3</sup>

§ 22. By St. 32 Hen. 8, c. 28, *tenants in tail* are empowered to make leases for life or for years, which will bind their issue, but not the reversioner or remainder-man. A lease conformable to this statute, though made by feoffment and livery, will not operate as a *discontinuance*.<sup>(b)</sup>

§ 23. By the same statute, all leases made for years or for life, by those having an inheritance *in right of their wives*, or jointly with their wives, of any estate of inheritance before or after coverture, shall bind the wife; provided the lease be by inden-

<sup>1</sup> Right v. Cuthell, 4 Dane, 133.

<sup>2</sup> Howard v. Carpenter, 11 Md. 259.

<sup>3</sup> Doe v. Watts, 9 E. 19.

(a) See *Rent*. Also, *Browning v. Haskell*, 22 Pick. 810.

(b) It has been already stated (ch. 8), that, in several of the United States, tenants in tail are empowered to convey in fee, and thereby bar the entailment. It has been questioned, whether such power involves the right of creating lesser es-

tates. In Delaware alone, it seems, tenant in tail is expressly authorized to convey a fee or any less estate. The English statute is said not to be in force in Massachusetts. 4 Cruise, 57; Vaugh. 383; *Walter v. Jackson*, 1 Rolle Abr. 688; *Wheelwright v. Wheelwright*, 2 Mass. 450; Dela. St. 1829, 197; 4 Dane. 126-7.



ture, in their joint names, sealed by her, and the rent reserved in such manner as to follow the estate itself. And the husband shall have no power over the rent beyond his own life, but by joining the wife in a fine. Where a lease is made not conformably to this statute, the wife, or, if she die before the husband, her heirs, may avoid it.<sup>1(a)</sup> The husband may lease lands owned in fee by the wife for a term of years, during the coverture at least; and an agreement to give such a lease, if not otherwise objectionable, may be enforced in Chancery.<sup>2</sup> But where a husband leased his wife's land for one year, and died, held, his life estate ceased at his death, and the rent belonged, not to his administrator, but to the wife.<sup>3</sup>

§ 24. A *tenant for life* cannot make a lease to continue beyond his own estate. One coming in as tenant to a tenant for life does not, upon his death, become the tenant of the remainder-man, without his assent, express or implied. And if A, tenant for the life of B, lease for years to C, and B die before the end of the term, A may re-enter, though he have since purchased the reversion in fee. So the leases of tenants by the curtesy and tenants in dower become void with their death (*supra*, sec. 23.) Where the tenant for life and the reversioner or remainder-man join in leasing; during the life of the former, it shall be his lease, and the *confirmation* of the latter; and afterwards *vice versa*.<sup>4(b)</sup>

<sup>1</sup> 4 Cruise 57.

<sup>2</sup> Eaton v. Whitaker, 18 Conn. 222.

<sup>3</sup> Arnold v. Hodges, 10 Humph. 39 (*infra* s. 24).

<sup>4</sup> Co. Lit. 47 b; 4 Cruise, 62; Co. Lit. 45 a; Treport's case, 6 Rep. 14; Horsey v. Horsey, 4 Harring. 517. See Oakley v. Monck, L. Rep. (Eng.) Mar. 1866, p. 158.

(a) The act above referred to, so far as it relates to husband and wife, has been substantially re-enacted by a statute of North Carolina, which, however, seems to leave it doubtful whether a lease, to be valid, must be an *indenture*. The wife is privately examined. The act is expressly declared not to apply to a grant of the reversion, or a lease without impeachment of waste, or for more than three lives or twenty-one years. 1 N. C. Rev. Sts. 261.

Land was conveyed to husband and wife, who executed articles, reciting a sale by them in consideration of a certain sum, and of certain quantities of grain

yearly, during their joint lives, with two acres of land for the same term, in consideration whereof, the husband leased, demised, &c. The wife, not having acknowledged the articles under the statute, survived the husband, and received the stipulated returns for two or three years, when she was ejected from the two acres, and the returns were not paid. Held, she was entitled to recover in ejectment, from those having no other title than under the articles, and denying her right. Clark v. Thompson, 2 Jones, 274.

(b) In South Carolina, where a tenant for life of land or slaves dies after the 1st of March in any year, having leased the



§ 25. A *guardian* in socage, in England, having an interest as well as a power, may lease the ward's land in his own name. But the lease expires upon the ward's coming of age.<sup>1(a)</sup> If a guardian lease by parol for a year, and during the year the ward die, his heir cannot recover the rent.<sup>2(b)</sup>

§ 26. An *executor* or *administrator* may lease lands, in which the deceased owned a term for years; and the rents will be assets.<sup>3</sup>

§ 27. An *heir* may lease before entry, but not after an abatement by the entry of a stranger.<sup>4</sup>

§ 28. *Joint tenants*, *parceners*, and *tenants in common* may lease their undivided shares, jointly or severally. And where one leases, the lessee has the same rights in relation to the others, which the lessor before had. So one may lease to another—this being a mere contract, by which the latter shall take the whole instead of half the profits.<sup>5</sup> So tenants in common may maintain a joint action, for rent due under a sealed lease, all the

<sup>1</sup> Bac. Abr. Lease, 1, s. 9. (See *Roe v. Hodgson*, 2 Wils. 129, 185; 2 Rolle's Abr. 41.)

<sup>2</sup> *Welles v. Cowles*, 4 Conn. 182.

<sup>3</sup> 4 Cruise, 62.

<sup>4</sup> 4 Dane, 185; Tayl. L. & T. 58; Shep. Touch. 269.

<sup>5</sup> *Ib.* 2 Ohio, 298; *Keay v. Goodwin*, 16 Mass. 4.

land or slaves to another, the lessee shall not be distrubed in his possession during the year, but he shall secure to the remainder-man the rent or hire which shall accrue after the death of the tenant for life. *Freeman v. Tompkins*, 1 Strobh. Equ. 58.

(a) In Virginia, a *testamentary* guardian may make a lease, reserving the best annual rent and most beneficial covenants, for any term, ending when the ward shall be of age, or continuing longer at the ward's election. So he may take or make a surrender of an old lease. The *committees* of an insane person are invested with the same power. In North Carolina, a guardian may lease slaves and land, the latter only in writing, during the minority of the ward, with special provisions as to the preservation of the estate, and to guard against waste. In Illinois, a guardian may lease for such time and on such terms as the court may direct, but not beyond the ward's minority, which in females is eighteen years. In the same State, a *testamentary* guardian, appointed by deed or will by father

or mother, has charge of the estate. In Connecticut, the *conservator* of an idiot cannot lease his land. Anth. Shep. 477; 1 Vir. R. C. 322, 285; 1 N. C. Rev. St. 311; *Treat v. Peck*, 5 Conn. 280; Illin. Rev. L. 455; Illin. St. 1885, 86.

(b) It is said in this case that a guardian has an authority only, not coupled with an interest. In Massachusetts, a lease by the father or mother, as guardian by nature of the child's land, is void; upon the principle, that such guardian is under no bonds for the faithful performance of his trust. In Connecticut and Missouri, the father, as guardian by nature, has control of the child's estate subject to an account in Connecticut, and also in Missouri, unless the estate is derived from the father. The father's power extends to land which descended *ex parte materna*. In Missouri, a mother has the same authority, where there is no lawful father, or where the father is dead. *May v. Calder*, 2 Mass. 55; *Foster v. Gorton*, 5 Pick. 185; Dut. Dig. 23; *Bacon v. Taylor*, Kirby, 368; *Kline v. Beebe*, 6 Conn. 494; Misso. St. 298.

covenants in which are with them jointly, although, by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each.<sup>1</sup> If two tenants in common lease the land, and one of them die, the other cannot maintain an action alone, for rent accruing after the death of the former.<sup>2</sup> If there be two parceners, owners of three acres of equal value, and one of them lease his interest, and upon partition only one acre be assigned to the lessor; the lessee may still have an additional half acre. But if two parceners own two acres, and one of them lease one acre, and upon partition the other is assigned to him; the lease becomes void.<sup>3</sup>

§ 29. Where there are several *trustees*, a part of them cannot exclude the others from possession; and a lease given by a part, although a majority, can give the lessees no better right to possession than the minority have.<sup>4</sup>

§ 29 *a*. One of three trustees has no authority to put an end to a lease of the property of the charity.<sup>5</sup>

§ 30. Where several persons become bound for the payment of rent, in contemplation of law the lease is to all, if there is nothing in the body of the instrument to negative that conclusion.<sup>6</sup> So under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent.<sup>7</sup> But where A, one of two lessees, occupied during the lease, and continued to occupy afterwards, and B, the other lessee, boarded with him throughout his occupation, and after the lessor's estate had been terminated by a conveyance to C; held, in an action brought by C against A and B for use and occupation since such conveyance, B was not liable.<sup>8</sup>

§ 31. An agreement between members of a firm, upon its dissolution, that the premises held by them jointly, under a lease to the firm, shall henceforward be occupied separately, accompanied by a separate possession, cannot affect the right of the lessor to sue them jointly for rent.<sup>9</sup>

<sup>1</sup> Wall v. Hinds, 4 Gray, 256.

<sup>2</sup> Burne v. Cambridge, 1 M. & Rob. 639; Jurist (Jan. 1818), 413.

<sup>3</sup> Co. Lit. 46 a; and n. 5.

<sup>4</sup> Cox v. Walker, 26 Maine, 504.

<sup>5</sup> Kingsley v. Sch. Dir's, &c. 2 Barr, 28.

<sup>6</sup> Magee v. Fisher, 8 Ala. 820.

<sup>7</sup> Kendall v. Carland, 5 Cush. 74.

<sup>8</sup> Theological Institution v. Barbour 4 Gray, 329.

<sup>9</sup> Hurlbut v. Post, 1 Bosw. 28.

§ 32. A lessor, agreeing in his lease to render service to a firm consisting of two persons, the lessees, for a commission, is not bound to render them to either separately, if the firm is dissolved before the expiration of the lease, and each party continues to prosecute the same business on his individual account; nor is his failure to do so a bar to a suit for rent coming due afterwards, nor does it establish a counter-claim in favor of either lessee, in an action against both for the rent.<sup>1</sup>

§ 33. If *an infant* lease his lands, the lease, it seems, is not void, although sometimes so held, but only voidable, whether with or without rent; inasmuch as the infant cannot plead to an action upon it "*non est factum*," but must plead his infancy specially. If such rent is reserved as to make the lease a beneficial one, it is *prima facie* binding; but may be avoided by the infant when he comes of age, or by his heir, if he die in minority. If an infant make a lease, and after coming of age mortgage to the lessee, the mortgage referring to the lease, this is a confirmation of the latter. So, if an infant receive rents, he cannot demand them again when of age.<sup>2(a)</sup>

§ 34. A lease may *become void*, or *be forfeited*, by various causes. In some points of view, this subject will be considered hereafter.(b) So far as this consequence follows from some act

<sup>1</sup> Hurlbut v. Post, 1 Bosw. 28.

<sup>2</sup> Bac. Abr. Lease B.; Co. Lit. 45 b, n. 1; Zouch v. Parsons, 8 Burr, 1806;

Stody v. Johnson, 2 Y. & Coll. 586; Parker v. Elder, 11 Humph. 546.

(a) In England, the subject of leases by *ecclesiastical persons* is an important one, and has been regulated by *enabling* and *restraining* statutes, the construction of which has given rise to many nice questions. In the United States, these acts are not in force, and the subject itself is of little importance. I have met with no statutory provisions relating to it. In Vermont, (1 Ver. L. 284,) lands appropriated or granted for the use of the ministry, or "social worship of God," may be leased by the selectmen of the town where they lie. In the same State, *glebe rights*, granted by the Crown to the Church of England, are declared to be public reservations, and to have vested in the State; and they are granted to the towns where they are located, with

power to the selectmen to lease them, the rent to be applied in aid of *schools*. See Pawlet v. Clark, 9 Cranch, 292; Cheever v. Pearson. 16 Pick. 278; Verm. Rev. St. 403. A lease of a benefice, by which it is provided that certain tithes shall be collected by the lessee, and appropriated to the payment of the debts of the rector of the parish, is void under the 18 Eliz. c. 20. Walthew v. Crofts, 4 Eng. L. & Eq. 504.

(b) See *Rent; Condition*. A very strong case of avoiding a lease for *illegality* is found in a late English decision, that a lease for a *brothel* is void, and the lessee can recover nothing from an assignee. Smith v. White, Law Rep. (Eng.) Equ. 1866, Apr. & May, p. 625.

or neglect of the lessee, it is said to be doubtful, whether a lease can be forfeited by a mere neglect of the lessee to perform his contract. A sub-lessee certainly cannot allege such forfeiture, until it has been claimed by the party interested.<sup>1</sup>

§ 35. Where a lease made by any *particular tenant* is merely *voidable*, if, after his death, the heir, reversioner or remainderman accept or sue for rent from the lessee, or do any other act recognizing the existence of the lease; this operates as a confirmation of it. But if it were void, there can be no confirmation.<sup>2</sup> And, in order to have the effect above referred to, the act of the party entitled must be done with a knowledge of his title at the time; or he must have lain by, and suffered the tenant to make improvements.<sup>3</sup> Both these principles are illustrated in the case of a lease by tenant in tail, not conformable to Stat. 32, Hen. VIII. If *the issue* receive or sue for the rent, or sue for waste, this is a confirmation. But as to *the reversioner or remainderman*, the lease is *void*, and no act of his will make it good.(a)

§ 36. A lease by *husband and wife*, not conformable to the statute upon the subject, is *voidable* merely, and may therefore be confirmed by the wife after the husband's death. Whether a lease by the husband alone is absolutely void, seems an unsettled point.<sup>4</sup>

§ 37. All leases made by *tenants for life* (unless by virtue of a *power*), become absolutely void by their death. Thus, where such lease was made for twenty-one years, and the remainderman, after the death of tenant for life, allowed the lessee to occupy four or five years, and regularly received rent from him; held, he might still, after notice to quit, maintain ejectment. So where the remainderman, after the death of tenant for life, sold the land at auction, and both in the conditions of sale and

<sup>1</sup> Todd v. Hall, 10 Conn. 559-60.

<sup>2</sup> Noy's Max. 88.

<sup>3</sup> Jenkins v. Church, Cowp. 482.

<sup>4</sup> Doe v. Weller, 7 T. R. 478; Bac. Abr. Lease C.; Wotton v. Hele, 2 Saun. 180, n. 9; Doe v. Butcher, Doug. 52.

(a) Courts of equity will grant relief, as against remainder-men, to lessees claiming under a defective execution of a power to lease, made by life-tenants, in cases depending upon equitable circumstances. Howard v. Carpenter, 11 Md. 259.

the deed to the purchaser the lease was mentioned, and excepted from the covenant against incumbrances; and the purchaser made a mortgage, in which the same notice was taken of the lease, and the mortgagee received rent from the tenant; still the lease was held void.<sup>1</sup> Nor will the circumstance of the tenant's laying out money upon the land operate at law as a confirmation, where there seems to have been no intention to confirm the old, or grant a new lease; but both parties acted under the mistaken belief, that the original lease was good.<sup>2</sup> But where a remainder-man receives rent, and allows improvements to be made, knowing the defect in the lease, Chancery will compel him to execute a new lease.<sup>3(a)</sup>

§ 38. In reference to an *unlawful use* of leased premises, mere knowledge of the lessor, that the lessee will thus use them, will not avoid the lease, unless he was a party to such intent, and did some act in aid and furtherance of it.<sup>3</sup> And, if the tenant uses the premises illegally, the lease is thereby rendered *voidable*, not *void*.<sup>4</sup> So unlawful use by an assignee does not discharge a surety of the lessee.<sup>3(b)</sup>

<sup>1</sup> Doe v. Archer, 1 B. & P. 531.

<sup>2</sup> Doe v. Butcher, Doug. 50.

<sup>3</sup> Opdike v. Campbell, 4 E. D. Smith, 570.

<sup>4</sup> Trask v. Wheeler, 7 Allen, 109.

<sup>5</sup> Way v. Reed, 6 Allen, 364.

(a) A tenant for life leased under a power, but not conformably to it. After his death, an assignee of the lessee erected buildings, and the remainder-man received rent for six years. The latter then brings ejectment, and recovers the premises; and the tenant prays, in equity, for an injunction against proceedings at law, and that he may be quieted. The defendant, in his answer, did not deny notice. Held, he should execute a new lease. *Stiles v. Cowper*, 8 Atk. 692.

If a tenant for life make a lease for years, and die before its expiration, and the remainder-man evict the lessee, no action on the implied covenant will lie against the executor of the lessor. *McClowry v. Croghan*, 1 Grant's Cas. 307.

Where a tenant for life, with full power of appointment by his last will, leased for years, and died during the term, without having exercised the power, and the tenant was evicted by the remainder-man;

held, he might maintain an action against the administrator for breach of the covenant implied in the lease. *Hamilton v. Wright*, 28 Mis. 199.

(b) In New York, a lease is avoided by conviction of the tenant of using the premises for a bawdy-house. 2 Rev. Sts. 702. See s. 34.

To defeat an action for rent, on the ground that the lease is void by the statute against gambling, it must be shown that the landlord, at the time of the lease, was a party to the illegal intent, and let the premises in furtherance thereof.

And where a landlord lets premises for a certain term, and for an illegal purpose, and during the term A, the tenant, surrenders the premises to B, who agrees with the landlord to take them, and to pay at the end of the term the rent contracted for with A; it does not follow, as matter of law, that the agreement with B is illegal. *Gibson v. Pearsall*, 1 Smith, 90.

But where a lease stated that the premi-

§ 39. Where a lease contains the proviso, that, if the rent shall not be paid at a certain time, the lease shall be void, and the rent is not paid at that time; a subsequent acceptance of rent will not operate as a waiver of the lessor's right to avoid the lease, or as a confirmation thereof. Thus, where the condition was, that upon non-payment within forty days the lease should be void: and the rent was not thus paid, but afterwards the lessor accepted it, and made an acquittance as if it had been paid at the day, and afterwards for several years continued to receive the rent: held, the above proviso was a *limitation to determine*, not merely a *condition to undo*, the estate; that, upon non-payment, the land became discharged of the contract; the tenant held neither at will nor at sufferance; and the lessor might re-grant the land.<sup>1</sup> But if there be a proviso in a lease, that *upon alienation* the lessor may re-enter; acceptance of rent after breach of condition will be a waiver, if the lessor had knowledge of such breach; more especially where such rent has subsequently accrued.<sup>2</sup> (See *infra*, c. 16.) So, where a lessor re-enters for non-payment of rent under a condition for re-entry, acceptance of the instalment due, as well after entry as before, is a waiver of the breach, and the tenant is not a trespasser for entering and gathering vegetables on the land.<sup>3(a)</sup> But if a lessee covenants to plant a certain number of trees, and always to keep that number on the land; and, after the breach, the lessor receives rent: he may still re-enter for any subsequent breach.<sup>4</sup>

§ 40. In some cases, a lease, though avoided in part by a party having a right so to do, will afterwards revive. Thus,

<sup>1</sup> *Finch v. Throckmorton*, Cro. Eliz. 221, Poph. 58. In this case, however, Queen Elizabeth was the lessor, and the non-payment of rent was *found by office* before the second grantee entered. Co. Lit. 215 a. & n. 117; *Symson v. Butcher*, Doug. 51; *Gwynn v. Jones*, 2 Gill & J. 188.

<sup>2</sup> *Pennant's case*, 3 Rep. 64; *Roe v. Harrison*, 2 T. R. 425; *Goodright v. Davids*, Cowp. 808; *Chalker v. Chalker*, 1 Conn. 79; *Jackson v. Brownson*, 7 John. 284.

<sup>3</sup> *Coon v. Brickett*, 2 N. H. 168.

<sup>4</sup> *Bleecker v. Smith*, 18 Wend. 580.

ises were "to be used as cabinet ware-rooms," and also prohibited the manufacture of cabinet-ware; the tenant having used them for the sale of cigars, held, on a bill in equity, that no injunction should be granted against his business. *Brugman v. Noyes*, 6 Wis. 1. See s. 44.

(a) "It is unjust, that a lessor should receive both the penalty and the rent; accept performance of the condition, and retain the forfeiture for non-performance." 2 N. H. 164.

where a widow avoids a lease made by the husband during marriage, it shall be in force again after her death.<sup>1</sup>

§ 41. The law presumes a lease to be *beneficial* to the lessee. (See *ante*, 13.) Hence idiots, infants and married women may be lessees. They may disclaim, upon the removal of their disabilities; but a subsequent occupancy will give validity to the lease.<sup>2</sup> A lease to an infant is not void, but voidable only; and, if it be beneficial to him, he is liable to an action of debt for the rent reserved.<sup>3(a)</sup>

§ 42. A lease usually contains *covenants*, both on the part of the lessor and the lessee. If the lessor alone signs the lease, he cannot maintain an action of covenant. But the assignee of a lease has been held to be bound in equity by the covenants, though he did not sign any instrument.<sup>(b)</sup>

§ 43. Where it is agreed that a lease shall contain the *usual* covenants, the question "what are usual covenants" depends upon circumstances, such as the usage of the place and the nature of the property; but is always for the jury.<sup>4</sup> Thus a lessor cannot, as matter of right, demand a covenant from the lessee, not to assign or underlet without license; or not to carry on a particular trade on the premises; or to keep them insured or pay taxes; nor will he be bound to covenant that he will rebuild in case of fire, with a stipulation that the rent shall cease on his failure to do so. But a covenant for the lessee's quiet enjoyment, without interruption from the lessor or those claiming under him, is said to be *usual*.<sup>5</sup>

<sup>1</sup> Co. Lit. 46 a.

<sup>2</sup> 4 Cruise, 67.

<sup>3</sup> Ketsey's case, Cro. Jac. 820.

<sup>4</sup> Bennet v. Womack, 7 B. & C. 627.

<sup>5</sup> Church v. Brown, 15 Ves. 258; Van v. Corp, 8 My. & K. 269, 280, 282; Ben-

net v. Womack, 7 B. & C. 627; Doe v. Sandham, 1 T. R. 705; Tayl. L. & T. 27; Buckland v. Papillon, Law Rep. (Eng.) Equ., 1866, April and May, p. 477. See Page v. Broom, 8 Beav. 36.

(a) Therefore, where an infant paid money to A. as a premium for a lease, and enjoyed the same for a short period during his infancy, but avoided it after he became of age, and quitted the premises; held, that he could not recover the sum so paid, in an action against A for money had and received. Holmes v. Blogg, 8 Taunt. 508; 2 Moo. 552.

(b) See Trustees, &c. v. Spencer, 7 Ohio, 149; Willson v. Leonard, 3 Beav. 878; Duffield v. Whitlock, 26 Wend. 55; Gardner v. Keteltas, 3 Hill, 380; Twycross v. Fitchburg, 10 Gray, 293; Libbey v. Tolford, 48 Maine, 316. A covenant, as surety for the payment of rent, written upon the back of the tenant's agreement, is valid, although no consideration



§ 44. Equity will sometimes restrict a lessee to the specific performance of his covenants. Thus, where a lease contained a clause, restricting the use of the premises to "the regular dry goods jobbing business," and the lessee commenced selling goods at auction therein; held, although there was no damage or irreparable injury done to the lessor, nor any nuisance at law, yet it was a breach of covenant, and the lessor could restrain the tenant by injunction.<sup>1</sup> See s. 38, n. b.

§ 45. With regard to covenants affecting the *title* to the demised premises, it has been held, that no implied covenant against eviction arises from the mere relation of landlord and tenant.<sup>2</sup>

§ 46. The covenants of the lessor do not extend to tortious evictions or disturbances. Thus a covenant, that the lessee shall quietly enjoy the premises "free from all eviction, interruption or molestation from or by any person," is not broken by a forcible disturbance and injury committed by a mob, against the will of the covenantor, although the mob were exasperated by some of his previous acts.<sup>3</sup> So in case of a written, unsealed agreement between A and B, that B shall have the sole and uninterrupted use and occupation of A's land; if, at the commencement of the term, C, a former tenant, but whose term has expired, is in possession, A is not liable for breach of his contract.<sup>4</sup> And though the words, "doth agree that the lessee shall hold and occupy" during the term, amount to a general covenant for quiet enjoyment; yet it does not apply to disturbances made by virtue of subsequently acquired rights. As, for instance, the subsequent location of a town-way over the land; the establishment of which, at the time of making the lease, was a mere naked possibility; and for which, moreover, the

<sup>1</sup> Steward v. Winters, 4 Sandf. Ch. 587.

<sup>2</sup> Jackson v. Cobbin, 8 Mees. & W. 790; Granger v. Collins, 6 Mees. & W. 468. See 6 Scott. 447; Piston v. Cater, 9 Mees. & W. 315; Walker v. Hatton,

10, 249; Mechanics, &c. v. Scott, 2 Hilt. 550.

<sup>3</sup> Surget v. Arighi, 11 S. & M. 87. See Hamilton v. Wright, 28 Mis. 199.

<sup>4</sup> Gardner v. Keteltas, 8 Hill, 880.

for such covenant or guaranty is in terms therein stated. The seal is a sufficient consideration to satisfy the stat-

ute of frauds. Rosenbaum v. Gunter, 2 Smith, 415.

lessee, as *owner*, has a perfect constitutional remedy against the public, to the extent of the damage sustained by him. Upon these grounds, the case is held to be in principle like a *tortious* eviction.<sup>1(a)</sup> So where the lessor covenants against all claiming under him, it is no breach, that the tax collector enters and seizes goods for arrears due even prior to the lease.<sup>2</sup> So the taking of part of a leased lot by the government of a city, to widen the street, does not annul the lease, or discharge the liability for rent during the term.<sup>3</sup>

§ 47. For breach of the covenant for quiet enjoyment, the damages consist of the costs incurred by the lessee, in defending against the suit of an adverse claimant, with the rent paid the lessor since eviction, for a period not exceeding six years.<sup>4</sup>

§ 48. A lease often contains covenants on the part of the lessor or lessee, to put or keep the premises *in repair*.

§ 48 a. In the absence of an express covenant, at common law, a landlord is not obliged to repair, nor in any way to provide for his tenant's security against any lawful acts of the tenant of the adjoining premises; as in case of excavations on the adjoining land so deep as to endanger the safety of the demised premises. Nor is his obligation affected by (New York) Stat. 1855, ch. 6.<sup>5</sup>

<sup>1</sup> *Ellis v. Welch*, 6 Mass. 246. See *Wilson v. Anderson*, 1 Carr. & K. 544; *Frost v. Earnest*, 4 Whart. 86; *Wainwright v. Ramsden*, 1 Nicholl, &c. 714; *Patterson v. Boston*, 23 Pick. 425; *Lister v. Zoble*, 7 Ad. & Ell. 124; *Queen v. London*, &c., ib. 717.

<sup>2</sup> *Stanley v. Hays*, 3 Ad. & Ell. N. 105. See *Succession*, &c. 15 La. An. 881.

<sup>3</sup> *Parks v. Boston*, 15 Pick. 198; *Wainwright v. Ramsden*, 5 Mees. & W. 602.

<sup>4</sup> *Kelly v. Dutch*, &c. 2 Hill, 105. See *Dexter v. Manley*, 4 Cush. 14; *Smith v. Howell*, 6 Eng. L. & Equ. 490.

<sup>5</sup> *Sherwood v. Seaman*, 2 Bosw. 127. See *Ball v. Wyeth*, 8 Allen, 275; *Lunn v. Gage*, 37 Ill. 19; *Estep v. Estep*, 23 Ind. 114; *Mirick v. Bashford*, 38 Barb. 191; *McGlashan v. Tallmadge*, 37 Barb. 318.

(a) A covenant to pay assessments, in a lease of land in the city of New York, executed in 1799, was held to extend to assessments imposed for opening streets pursuant to statutes passed subsequently, and imposing them in a mode unknown to the laws existing when the lease was executed. *Kearney v. Post*, 1 Sandf. 105.

Where a statute authorised the widening of a street, providing compensation to land-owners by application to a judi-

cial tribunal; held, a party who took a lease of land subsequently to the statute, being evicted, had no remedy upon the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whart. 86.

But where a landlord covenanted to repair all external parts of the premises leased, and the corporation, by virtue of an act subsequently passed, took down an adjoining tenement, leaving the partition and wall without support, which thereby gave way; held, an action would

§ 48 b. As to the question, whether a landlord impliedly undertakes that the premises shall be *tenantable*, a leading case is one where the house was infested with *bugs*.<sup>1</sup> There is also a similar later case,<sup>2</sup> where the same nuisance existed, but the tenant had agreed to keep in repair, and a garden was let with the house. In this case the tenant quit before the rent was due, and without having had any beneficial occupation. Held (overruling some prior cases), that the facts furnished no defence to a suit for the rent.<sup>3</sup> So where a wharf was leased, and, before entry of the tenant, a large portion of it was destroyed by natural decay, of which the lessee gave notice to the landlord, requesting him to repair, but he neglected to do it, and the lessee then refused to enter or pay rent; held, he was still liable for the rent.<sup>4</sup> So it is no defence, that the premises were unfit for the purpose of the lessee in hiring them.<sup>5</sup> But it is held, that there is an implied covenant that a store is fit for use, if the terms of the lease and the acts of the parties so imply.<sup>6</sup> And, in Louisiana, the failure by a lessor to maintain premises leased in a *tenantable* condition dissolves the lease, although such lessor be not at fault.<sup>7</sup>

§ 48 c. Where a lease is in writing, parol evidence cannot be given, that the landlord, at the time of executing it, promised to repair.<sup>8</sup> But an action lies upon a subsequent parol agreement by the landlord to repair, made upon a new and sufficient consideration,<sup>9</sup> or on a covenant to repair, without previous notice of want of repair; especially if there is a covenant that the lessor may enter "to view and make improvements."<sup>10</sup>

§ 48 d. Where the lessor is to erect new buildings, and the lessee to pay a further rent of ten per cent on the cost; no rent

<sup>1</sup> *Smith v. Marrable*, 11 Mees. & W. 5.

<sup>2</sup> *Hart v. Windsor*, 12 Mees. & W. 68.

<sup>3</sup> *Acc. Mayer v. Moller*, 1 Hilt. 491; *Post v. Vetter*, 2 Smith, 248; *Tattershall v. Hass*, 1 Hilt. 56.

<sup>4</sup> *Hill v. Woodman*, 2 Shepl. 38. See *Hinde v. Gray*, 1 Man. & G. 195.

<sup>5</sup> *Academy, &c. v. Hackett*, 2 Hilt. 217.

<sup>6</sup> *LaFarge v. Mansfield*, 31 Barb. 345.

<sup>7</sup> *Coleman v. Haight*, 14 La. An. 564.

<sup>8</sup> *Cleves v. Willoughby*, 7 Hill, 88; *City, &c. v. Price*, 3 Fost. 542.

<sup>9</sup> *Post v. Vetter*, 2 Smith, 248; *Libbey v. Tolford*, 48 Maine, 316.

<sup>10</sup> *Hayden v. Bradley*, 6 Gray, 425.

lie upon the covenant, notwithstanding a provision in the statute for compensation. He was bound immediately to

make the necessary repairs. *Green v. Eales*, 2 Ad. & Ell. N. 225.

is due till notice of such cost.<sup>1</sup> So, in case of the lease of a mill, the lessee covenants to pay rent for certain water-power to be furnished by the lessor, and at his own expense to put in all machinery "except the main shaft and wheel, which is to be furnished by the lessor." Held, no rent was due till the lessor had furnished the main shaft and wheel.<sup>2</sup>

§ 48 e. Where the lease reserves to the lessor the right to enter and make necessary repairs, he is not responsible for loss resulting therefrom, unless there be negligence or want of skill.<sup>3</sup>

§ 48 f. The tenant, in an action on a covenant to make improvements, for a larger rent, can only recover the difference between the rent and improvements.<sup>4</sup>

§ 48 g. Where the lessor does not agree to repair, the lessee cannot, when sued for the stipulated rent, set up the want of repairs, either in defence or mitigation.<sup>5</sup> Tenants cannot charge their landlords for repairs, unless by express contract; *a fortiori*, where they knew the condition of the premises, and covenanted to return them as received.<sup>6</sup> But the landlord's covenant to repair is a defence against a suit for rent.<sup>7</sup> So a tenant, making new repairs and erections on the farm, under a promise to give it to him and his wife, the landlord's daughter, may recover their value, if he devise the farm to another.<sup>8</sup>

§ 48 h. If a tenant has liberty to erect a stable and shed, and make other needful and proper repairs, within a certain limit, and makes repairs to that limit, but does not erect the buildings specified; the estimated expense of such buildings must be deducted from the repairs.<sup>9</sup>

§ 48 i. A tenant was bound to make necessary repairs. The premises being in want of repairs, the landlord voluntarily made certain alterations, and, the alterations being defective, made a parol agreement with the tenant, authorizing him to repair such

<sup>1</sup> Weed v. Crocker, 18 Gray, 219.

<sup>2</sup> Ib.

<sup>3</sup> Turner v. McCarthy, 4 E. D. Smith, 247.

<sup>4</sup> Berrian v. Olmstead, 4 E. D. Smith, 279.

<sup>5</sup> Moffatt v. Smith, 4 Comst. 126.

<sup>6</sup> City, &c. Moorhead, 2 Rich. 480.

<sup>7</sup> Strohecker v. Barnes, 21 Geo. 480.

<sup>8</sup> Cornell v. Varnartsdalen, 4 Barr, 864.

<sup>9</sup> Bachelder v. Dean, 20 N. H. 467.

defects, and promising to reimburse him therefor. Held, such parol agreement was valid.<sup>1</sup>

§ 48 j. Where a lease authorizes the lessee to pay the rent in repairs; if he use materials of the lessor, with his consent, for repairs, he cannot charge them to an assignee of the lessor.<sup>2</sup>

§ 48 k. Upon a covenant to deliver up the premises at the end of the term in as good order, &c., as they then are or may be put into by the lessor; the lessee is bound to make the repairs necessary for this purpose.<sup>3</sup>

§ 49. In an action of covenant, by a lessor against two lessees, for rent due upon a lease, containing a covenant on the part of the lessor to repair; the plaintiff need not prove that the premises were put in repair before possession was taken, nor that both defendants went into possession, the taking possession by one being in law a possession by both, and a waiver of the condition to repair, and the fact that the premises were out of repair being a matter of defence, to be proved by the defendants.<sup>4</sup>

§ 50. Where, in an action against a tenant upon his covenant to repair, the breach alleged was, that he *suffered and permitted* the premises to be out of repair; but the proof, that windows were voluntarily removed: held, a variance.<sup>5</sup> So a covenant by the landlord to *pay* all repairs does not bind him to *make* them.<sup>6</sup> And where a tenant himself agrees to make certain repairs, and others become necessary in order to make the premises habitable, he cannot leave because the landlord fails to make them.<sup>7</sup>

§ 51. A covenant to surrender all improvements embraces everything affixed to the land.<sup>8</sup>

§ 52. The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised pre-

<sup>1</sup> Oettingen v. Levy, 4 E. D. Smith, 288.

<sup>2</sup> Bachelder v. Dean, 20 N. H. 467. As to forfeiture for breach of the covenant to repair, see Bennett v. Herring, 8 C. B. (N. S.) 370.

<sup>3</sup> Jaques v. Gould, 4 Cush. 364.

<sup>4</sup> Harger v. Edmonds, 4 Barb. 256.

<sup>5</sup> Edge v. Pemberton, 12 Mees. & W. 187.

<sup>6</sup> Loomis v. Rutter, 9 Watts, 516.

<sup>7</sup> Arden v. Pullen, 10 M. & W. 321.

<sup>8</sup> French v. New York, 29 Barb. 363.

mises, and to deliver up the same at the end of the term, together with all things affixed thereto, though such removal may be made in such a way as to amount to non-repair.<sup>1</sup>

§ 52 a. It has been held, that, in assumpsit for rent, the tenant may avail himself of a breach of the landlord's agreement to repair, by way of *recoupment*, though not as a set-off.<sup>2(a)</sup> So in replevin, after a distress for rent, although it seems that the defendant may avail himself of a breach of the landlord's agreement to repair, by way of *recoupment*, yet he cannot by way of set-off, nor under a plea of eviction, nor can the *recoupment* be pleaded in bar.<sup>3</sup> So it has been held, that damages occasioned to a tenant by great, unnecessary and tortious negligence, and delay of the landlord's servants in making repairs during the term, and by the unworkmanlike manner of doing the work, cannot be set up as matter of *recoupment* in an action for the rent.<sup>4</sup> Nor damages for a wilful trespass of the landlord upon the premises, if claimed for the trespass, as such, and not as a breach of the contract declared upon.<sup>5</sup>

§ 52 b. Where a lessor agreed to put the barns on the premises in repair, but neglected to do so; held, the damages of the lessee, which he was entitled to *recoup* in a suit for rent, were the amount it would cost to put the barns in repair, and not the detriment which he suffered by their remaining out of repair during the term.<sup>6</sup>

§ 53. In an action of covenant for rent, the defendant cannot *recoup* for damages arising from violation of a covenant by the plaintiff since the commencement of suit,<sup>7</sup> even though they exceed the amount of rent.<sup>8(b)</sup>

<sup>1</sup> Burrell v. Davis, 1 Eng. Law & Equ. 408.

<sup>2</sup> Whitbeck v. Skinner, 7 Hill, 53. See 1 Smith, 563; Lafarge v. Mansfield, 31 Barb. 345; Ellis v. McCormick, 1 Hilt. 813; Craven v. Hardman, 4 E. D. Smith, 339.

<sup>3</sup> Nichols v. Dusenbury, 2 Comst. 283.

<sup>4</sup> Cram v. Dresser, 2 Sandf. 120

<sup>5</sup> Levy v. Bend, 1 Smith, 169.

<sup>6</sup> Dorwin v. Potter, 5 Denio, 306.

<sup>7</sup> Hargen v. Edwards, 4 Barb. 250.

<sup>8</sup> M'Cullough v. Cox, 6 Barb. 386; Kendall v. Moore, 30 Maine, 327. See Edgerton v. Page, 1 Hilt. 320.

(a) A lease from father to son, with a covenant by the lessee to support the lessor during his life, is no evidence of a settlement of accounts, so as to bar a set-off by the son, in an action by the

father, upon the covenants in the lease. Hart v. Hart, 22 Barb. 606.

(b) With regard to the respective liabilities of landlord and tenant to third persons, for neglect to repair, it has been

§ 54. If a lessee covenant to repair, he is bound upon his covenant, although the premises are burned down without his fault; nor can he legally quit, although the premises become untenable. So, where he covenants to keep in repair, "saving and excepting the natural decay of the same," and to surrender up at the end of the term in as good condition, &c., reasonable use and wearing thereof excepted.<sup>1</sup>(a)

<sup>1</sup> Bullock v. Dommitt, 2 Chit. K. B. 608; Phillips v. Stevens, 16 Mass. 288; Arden v. Pullen, 10 Mees. & W. 821.

See Belcher v. M'Intosh, 8 Carr & P. 720; Doe v. Rowlands, 9, 784.

held, that the tenant is liable for an injury resulting from the want of repair of the grate over a vault, under the highway, in front of his premises; and the landlord is not liable, if the premises were let in good repair, and he was not bound by the lease to keep them in repair. Bears v. Ambler, 9 Barr, 198.

Where a town was compelled to pay damages for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellar-way constructed in the sidewalk, and leading to a building adjoining thereto, which was in the occupation of a tenant; held, the occupant and not the owner was liable to the town for such damages. But if, in such case, there were an express agreement between the landlord and tenant, that the former should keep the premises in repair, then, to avoid circuitry of action, the landlord would be liable in the first instance. Lowell v. Spaulding, 4 Cush. 277.

A tenant for years in the occupation of the premises, and not the landlord, is liable for the penalty incurred by a violation of the ordinance of the city of New York against any persons suffering any sink, &c., to run upon or within three feet of any wharf. &c. City, &c. v. Corlies, 2 Sandf. 301.

(b) A covenant to leave all buildings now on the land binds a lessee to repair, in case of fire. Pasteur v. Jones, Cam. & Nor. 194; Ashby v. Billup, 85 Miss. 618. But where a lease contains a covenant, to deliver up the premises at the end of the term in as good order and condition as at the date of the lease, ordinary wear and tear excepted, but not to repair or rebuild, and the buildings are destroyed by fire; the lessee is not bound to rebuild. Warner v. Hitchins, 5 Barb. 666.

Although, where fixtures attached by the lessee are severed by the fire, and are carried away by the lessee, the lessor may recover their value in an action on the lease. *Ib.* Seizure and eviction by public enemies is a defence to the obligation of giving up the premises in repair. Pollard v. Shouffer, 1 Dall. 210. And a covenant to repair binds the tenant only to suffer no further dilapidation than results from natural causes. If the house is old, he is merely required to keep it up as such. Harris v. Jones, 1 Moo. & R. 178. Not to give the landlord a new house. Young v. Morton, 6 Scott, 217; Stanley v. Tuesgood, 3 Bing. N. C. 4. So although, in general, a tenant, in neglecting to repair, is guilty of *permissive waste*; a tenant *from year to year* is only bound to make ordinary tenantable repairs, which will keep the house wind and water tight, and to replace what he breaks or injures. But, if the house is substantially out of repair or untenable, it is said the tenant is not bound to repair, but may quit without paying rent. 4 Kent, 110 and n.; Pindar v. Ainsley, 1 T. R. 812; Mumford v. Brown, 6 Cow. 475; Edwards v. Hetherington, 7 T. R. 117; Collins v. Barrow, 1 M. & R. 112; Long v. Fitzsimmons, 1 W. & S. 582; Belcher v. McIntosh, 2 Carr. & K. 186. See Aldis v. Mason, 6 Eng. L. & Equ. 391; Beach v. Crain, 2 Comst. 66.

The distinction is made, that, if a penalty is annexed to the covenant to repair, inevitable accident will excuse from the former, though not from the latter. As where one covenanted to sustain and repair the banks of a river, under pain of forfeiture of ten pounds. The banks being suddenly destroyed by a great flood, held, the party was bound to repair, but not subject to the penalty. 1 Dyer, 83 a. (It is to be observed, how-



§ 55. Sometimes the lessor and lessee covenant respectively to pay different charges connected with the estate. Thus, a lessor agreed to pay all taxes, (a) and the lessee all other costs, expenses, &c., and it was further agreed that the lessee might make any additions and repairs not injurious to the estate. The city having assessed the lessor for paving the footway in front of the estate, under the Massachusetts statute of 1795, c. 31, s. 2, and he having paid the same, held, he could not recover it from the lessee under the covenants.<sup>1</sup>

§ 56. If a lessee covenant with several lessors jointly, that he will pay to each lessor severally a specified proportion of the rent, the interest of each lessor will be several, and each may maintain a separate action for his part of the rent.<sup>2</sup>

§ 57. Where the lessor of a steam mill covenanted to furnish so much power every day in the year, and that the rent should cease during any failure to do so; held, the suspension of the rent was not a liquidation of damages for such failure.<sup>3</sup>

§ 58. A covenant in a lease to pay rent during the term, and for such further time as the lessee shall occupy, binds him to pay rent accruing after the expiration of the time stipulated; and a surety for the lessee incurs the same liability. (b)

<sup>1</sup> *Torrey v. Wallis*, 8 Cush. 442. See *Twycross v. Fitchburg*, 10 Gray. 298. See *Sweet v. Seager*, 2 C. B. N. S. 119.

<sup>2</sup> *Gray v. Johnson*, 14 N. H. 414.

<sup>3</sup> *Fisher v. Barrett*, 4 Cush. 881.

ever, that this was a case of loss by *act of God*.)

In New Jersey, by statute, no action lies against any person, on the ground that a fire began in a house or room occupied by him. But this provision does not impair the effect of any covenant. In Missouri, if a building is burned or injured without fault of the tenant, his servants, agents or family, he is not responsible, unless the lease so provides; and a covenant to repair will not require a tenant to rebuild. 1 N. J. St. 210; Mis. St. 1840-1, 26.

(a) A lessor of land, the taxes upon which are assessed against his lessees, is liable to a vendee who pays the taxes under levy for the amount so paid, in the absence of any contract between the lessor and lessees, by which the latter

were bound to pay them. *Caldwell v. Moore*, 1 Jones, 58. Where A, having a lease upon certain premises, and a mortgage upon fixtures therein, as security for advances made by him to B, hired them to B, who agreed to pay the rent and taxes; held, that, B having failed to pay the taxes, A could pay them, and maintain an action therefor against B, such payment not being a *voluntary* payment. *Lageman v. Klopenberg*, 2 Smith, 126.

(b) Lease for one year, the lessee paying a certain rent per annum, and at the same rate for any shorter period. The lessee covenants to pay said rent in quarterly payments, and to pay the rent as above stated, and all taxes and duties levied and to be levied thereon, during the term, and for such further time as

§ 59. In this connection may properly be considered the subject of the *renewal* of leases. It is said, in case of church leases, or those made by trustees of charities, which are usually renewable for a fine or increased rent, although the lessors are not legally bound to renew, yet the tenant has in equity a transferable interest in this privilege.<sup>1</sup> A landlord is not bound to renew the lease, without an express covenant to do it. Covenants for *continual* renewal are not favored, for they tend to create a perpetuity, and have been said to be equivalent to an alienation of the inheritance. Hence, in the case of trustees of a charity, they have been held invalid in chancery. But, if explicit, the weight of authority is in favor of their validity. Covenants of renewal run with the land, and bind a grantee of the reversion. A covenant to renew implies the same term and rent, and perhaps the same conditions. But a covenant to renew, upon such terms as may be agreed on, is void for uncer-

<sup>1</sup> *Phyfe v. Wardell*, 5 Paige, 268.

he shall occupy. On the back of the lease the defendant guaranteed performance of the within covenants, and the lessee, by another writing, agreed to quit on reasonable notice, if the lessor should wish to sell or pull down the house. Held, the covenants bound both the defendant and the lessee, so long as the latter occupied, even beyond the year; and that the defendant was liable for several quarters' rent, although not notified at the end of each quarter, having suffered no damage from the want of such notice. *Salisbury v. Hale*, 12 Pick. 416. See *Gosberger v. Badway*, 2 Hilt. 342; *Shufeldt v. Gustin*, 2 Smith, 57; *Atkins v. Sleeper*, 7 Allen, 487.

To discharge a surety, an intent to create a new contract, and to annul the lease as against the original lessee, must be clearly shown. Per *Bigelow, C. J. Way v. Reed*, 6 Allen, 369. Re-entry for breach of condition, and a new lease, if authorized by the lease, do not discharge a surety for the rent. A surety is not discharged from his covenants in the lease by the lessee's assigning the lease with the lessor's consent, although the assignee makes a new agreement for the rent, secured by a guarantor, with

the lessor and lessee, without notice to the surety. *Ib.*

A tenant *holding over* is bound by all covenants applicable to his new situation. *De Young v. Buchanan*, 10 Gill & J. 149.

He is a tenant from year to year, subject to all the covenants and stipulations in the lease, so far as they are compatible with a yearly holding. *Laquerenne v. Dougherty*, 85 Penn. 45.

Under a lease for a term, and at the election of the tenant for a further term at an increased rent, an election to hold for the additional term may be inferred from his continuing to occupy and paying rent for two quarters at the increased rate. *Kramer v. Cook*, 7 Gray, 550.

And, in case of a lease which is void, the law implies a similar parol contract as to the rent. *Anderson v. Critcher*, 11, 450. So where the assignee of a void lease holds through the term, paying the rent reserved, assumpsit lies against him upon an implied promise to repair, conformably to the covenants. *Beale v. Sanders*, 5 Scott, 58.

But a tenant holding over does not of course hold on the same terms as before. *Elgar v. Watson*, 1 C. & Mar. 494. In case of lease to A and B, if A holds over

tainty. An agreement made while the tenant is in possession, for a subsequent increased rent, does not constitute a new tenancy.<sup>1(a)</sup>

<sup>1</sup> 4 Kent, 108; Geeckie v. Monk, 1 Carr. & K. 307; Rutgers v. Hunter, 6 John. Cha. 215; Whitlock v. Duffield, 1 Hoffm. 110; Simpson v. Clayton, 4 Bing. N. 758; Simpson v. Clayton, 6 Scott, 469; Harney v. Harney, 5 Beav. 134;

Richards v. Richards, 2 Y. & Coll. Cha. 419. See Ranlett v. Cook, 44 N. H. 512; Cottee v. Richardson, 8 Eng. L. & Equ. 498; Moss v. Barton, Law Rep. (Eng.) Equ. 1866, April and May, page 474.

with B's consent, both are liable for the rent. Whether, if without such consent, *qu.* Christy v. Tancred, 9 Mees. & W. 488.

(a) The renewal of a lease, with an agreement for performance of certain work stipulated for in the former lease, is not a waiver of damages for non-compliance with the former lease. Walker v. Seymour, 18 Mis. 592. A covenant to renew a lease at a certain rent does not carry with it any of the covenants in the old lease. Willis v. Astor, 4 Edw. Ch. 594.

Demise by A to B, for fifty-five years, in consideration of £530. subject to a yearly rent of £84. covenant to repair, &c. The consideration being unpaid, B assigned to A, by way of mortgage, the whole of the residue of the term, subject to the rent and covenants, and with a power of sale. Notice of sale having been given by A, pursuant to the power, in consideration of £500, he by deed "bargained, sold, assigned, transferred and set over" to the defendant the premises described in the lease. to hold for all the residue of the term, discharged from the mortgage debt. but subject to the payment of the yearly rent and to the covenants in the lease; and the defendant covenanted to pay the rent and perform the covenants. The defendant then entered. Held, although the term was merged by the mortgage, the effect of the conveyance was to create a new term of the same duration as the unexpired part of the old term. and that the defendant was liable upon the covenants to pay the rent, and to perform the repairs. Cottee v. Richardson, 8 Eng. L. & Equ. 498.

Where trustees leased a part of the estate, with a covenant to renew the lease, or to pay for certain erections, which the lessee covenanted to make, on the termination of the lease; held, on refusal of the trustees to renew, the trust estate was liable to pay for the

erections. Robinson v. Kettletas, 4 Edw. Ch. 67.

In New York, a lease of agricultural lands for twelve years, with a covenant of renewal for twelve years longer if the lessor shall live, and a further covenant to continue the renewals every twelve years so long as the lessor shall live, is good for the first twelve years; but the covenants for renewal are void under section fourteen of article one of the constitution. The covenant for renewal being an independent covenant, may fall, without impairing the grant for the first twelve years. Hart v. Hart, 22 Barb. 606.

In Ohio, (Walk. Intro. 278; Swan's Dig. 289. See Loring v. Melendy, 11 Ohio, 355; Blackmore v. Boardman, 28 Mis. 420; Carter v. Burr, 89 Barb. 59; Van Rensselaer v. Read, 26 N. Y. (12 Smith) 558; Tyler v. Heidorn, 46 Barb. 489.) it is said, *perpetual lease*, renewable forever, are very common, but are mere chattels. But, by a late statute, they are invested with all the incidents of estates in fee, in respect to descent, distribution, and sales upon legal process. But in Pennsylvania, where a lease was made for twelve months, and so from year to year, at the pleasure of both parties, with a covenant by the lessee not to assign without permission under seal, and a proviso that the lessor should reimburse money laid out in improvements; held, this passed no freehold. Krause, 2 Whart 398.

It would be otherwise, it seems, where, upon a long lease, the landlord covenants to pay for improvements, or, if not, to convey in fee. Eli v. Beaumont, 5 S. & R. 124.

Where a lease is made to a person, his heirs and assigns, to continue while he pays the rent, and he covenants for himself and his heirs; on failure to perform the covenants, the lessor may treat the lease as forfeited. but not the lessee. Folts v. Huntley, 7 Wend. 210.

§ 60. It is the general rule, that, in any action between land-

How far a tenant himself may cause the implied renewal of a lease, by holding over after his term, will be more particularly considered hereafter. See ch. 19. In Kentucky, if a tenant holds over, he is liable to the same rent. In Connecticut it is held, that, if a lessee for one year hold over, this is a renewal of the lease, (of course at the option of the lessor,) for the same term. The same consequence follows where a sub-tenant occupies; or, having occupied, abandons the possession. *Bacon v. Brown*, 9 Conn. 338. See, also, *Dorill v. Stephens*, 4 M'Cord, 59. In Delaware, a lease is considered as renewed, unless three months' notice be given before its termination. Del. Rev. Sts.

On a lease at an annual rent of \$550, was indorsed an extension of the term at a rent of \$600, and, during the extended term, another indorsement was made, providing that the "within lease" be "extended the further period of one year, without alteration." Held, the terms "within lease" referred to the prior indorsement as well as the original lease, and that a yearly rent of \$600 was thereby reserved. *Cram v. Dresser*. 2 Sandf. 120.

An agreement contained in a memorial to demise certain lands for three lives, "with a clause of renewal, provided the lessee, his heirs, &c., should, within six calendar months from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life as the sum of £11 7 s. 6 d. for renewing or adding such life or lives forever," is sufficiently distinct to import a covenant for perpetual renewal. *Sadlier v. Biggs*, 27 Eng. Law & Equ. 74.

A lease of lands, suitable for the breast of a mill-dam, for 100 years, providing that the lessee, his heirs and assigns, may hold so long as he and they shall think proper, after the expiration of the term, at the same rent, with liberty to erect mills thereon, &c., on the faith of which the lessee makes extensive and valuable improvements; is not determinable by the lessor, after the expiration of the term, except on tender of compensation for such improvements. *Lewis v. Effinger*, 6 Casey, 281.

Where a lease for ten years contained

a covenant of renewal for ten years if the parties could agree upon the rent, and the lessor covenanted, in case they did not so agree, to pay for improvements which the lessee should place upon the premises; and the lessee covenanted, in the like case, that at the end of the term, "upon the lessor's paying for the improvements as aforesaid," he would peaceably surrender possession to the lessor and his assigns: held, the lessor's right to demand possession at the expiration of the term was not qualified by the obligation to pay for the improvements, and therefore, that his assignee (there being no renewal of the lease) could recover in ejectment, although the improvements were not paid for; and that the words, "upon the lessor's paying," &c., did not constitute a condition precedent to the lessor's right to have possession after the lease had expired. *Talman v. Coffin*, 4 Comst. 184.

Where premises were leased to two partners for a year, with a right of renewal, and before the year expired the partnership was dissolved, and one partner remained in possession, held over after the expiration of the lease, and applied for a renewal, which was refused by the landlord; held, an action for possession might be maintained by the landlord against the partner in possession, without joining the other. *Geheebe v. Stanley*, 1 La. An. 17.

It was agreed, that the tenant should get the house at the price herein stated, for one year after his present year expires, and is to have the preference each succeeding year thereafter. Held, this did not create a tenancy from year to year, entitling the tenant to a legal notice to quit. *Crawford v. Morris*, 5 Gratt. 90.

Where, simultaneously with the execution of a lease for years, the landlord stipulates that at the end of the term he will renew the lease or pay for the buildings erected by the tenant, and at the end of the term he tenders a renewal, which the tenant refuses to accept; the landlord may recover possession without paying for the buildings. *Pearce v. Golden*, 8 Barb. 522.

An extension of a term, subject to the covenants in the original lease, will apply such covenants to subjects within their scope existing at the extension, although they were unknown when the term was created. *Kearney v. Post*, 1 Sandf. 106.

lord and tenant, the latter is precluded or *estopped*,<sup>(a)</sup> by his lease or occupation, from disputing the title of the former to the land, or setting up the adverse title of another acquired by him since the lease, either in pleading or by evidence. The principle is said to be not a technical one, but founded in good faith as well as public policy, and so firmly established that "you may as well attempt to move a mountain." As a consequence, or perhaps more properly a part, of the same rule, a third person, having title to the land paramount to that of the lessor, cannot recover rent of the tenant until he has actually entered, or made an effectual claim under his title. An action for rent does not lie in favor of a stranger for the purpose of trying his title, or by one of two litigating parties claiming the land; such action not depending on the validity of the plaintiff's title, but on a contract between the parties, express or implied. It is said the only exception to this principle of estoppel is where it would work a fraud upon the lessor or the commonwealth. It applies not merely to a *tenancy*, strictly so called, but to any occupation *by permission* of another. So, it applies alike to an action for rent, for recovery of the premises on the ground of forfeiture or otherwise, or for mesne profits. Or, though the lease be void, and so appear upon the plaintiff's own evidence; as for instance where it is executed by attorney, but not in the name of the principal. So also it is applicable not only to the lessee or lessor himself, but to any one claiming under him or in continuation of his estate; as to an assignee, sub-lessee or purchaser; or the wife of a deceased tenant; or an assignee or the heir of the lessor; or as between heir and administrator. So if a man take a lease *of his own land*, or land of which he has possession, he is concluded, though it would be otherwise in the former case if the lease were merely of the

A covenant for perpetual renewal runs with the land. *Blackmore v. Boardman*, 28 Mss. 420. So a covenant for pre-emption. *Laffan v. Naglee*, 9 Cal. 662.

Notice to quit pending the term rebuts the inference from the tenant's holding over, that the lessor assents to the continuance of the tenancy at the former

rent. *Bachelder v. Dean*, 20 N. H. 467.

(a) An estoppel is a restraint or impediment imposed by the policy of the law to preclude a party from *averring the truth*. *Gibson v. Gibson*, 15 Mass 110. See *Prettyman v. Walston*, 24 Ill. 189; *Brown v. Keller*, 32 Ib. 152.

*herbage*. By agreeing to hold under the true owner, the adverse possession of an occupant ceases; while, by disclaiming the landlord's title, the lessee forfeits his lease or becomes a trespasser, and is not entitled to notice to quit. But the principle has been held not applicable to a *parol* disclaimer. On the other hand, the tenant cannot show a *parol* admission by the landlord of an adverse title. (a)

(a) Where an administrator leased the mansion house of his intestate, while the heirs were minors, and after the lease expired the tenant held over, under a claim of an agreement with the administrator to purchase: held, the lease, though made without authority, was to be assumed to have been made for the benefit of the heirs; the right of action for use and occupation was in them; and they were not to be affected by the tenant's claim of title until they were proved to have had notice of it after their majority. *Burk v. Osborn*, 9 B. Mon. 579.

C leased premises to the defendant, reserving rent to herself, her executors, administrators and assigns, with covenants by the lessee to pay the rent and to yield up the premises at the expiration of the term, to C, her executors, &c. C afterwards conveyed the reversion to D and another, in trust for the wife of the defendant, with power to the trustees to receive and retain their trust expenses. The defendant underlet and received the rent, the trustees never interfering, but assenting to his so receiving it on behalf of his wife. Certain expenses were incurred in relation to the trust. D, the surviving trustee, died, leaving the plaintiff, his widow and administratrix, who sued the defendant for four years' rent, three of which accrued in the lifetime of D, and one since his death. The defendant pleaded that he, before action, paid the rent to his wife, with the consent of the trustee and of the plaintiff respectively. Held, the facts above stated did not sustain the plea, and whether the interest of C were freehold or a chattel, the plaintiff, as administratrix, was entitled to recover the rent accruing in the lifetime of the trustee. *Dollen v. Batt*, 4 C. B. (N. S.) 760.

An occupant of land, under a grant from the commissioners of a county, which they had no legal right to grant, cannot set up this illegality in a suit for rent; nor his execution creditors against

a distress for such rent. And where such lease was signed by only one commissioner, its acceptance by the others would estop them, and therefore the liability for rent remained perfect. *Northampton, &c.* 6 Cas. 805.

Land of the plaintiff, in the occupation of the defendant as lessee, was levied upon by a creditor of the plaintiff, and the defendant evicted. The defendant afterwards occupied, as lessee of the creditor, and then purchased the fee from him. The land was afterwards levied upon by another creditor, the former levy being defective and void. The plaintiff brings an action for the rent accruing between the two levies. Held, as the defendant had occupied, either as lessee of the first creditor, or as owner, there was no contract, express or implied, between him and the plaintiff; that the remedy of the latter was against the first creditor, and this action would not lie. *Allen v. Thayer*, 17 Mass. 299.

A, having leased land, with a building upon it, to B, entered into a negotiation with C for a sale of the land alone to him. It was left to referees to settle the price, and A put into their hands a deed, to be delivered to C with the award. A was to remove the building by a certain day. The referees, having awarded a certain price, delivered the deed to C, which was recorded; but A excepted to the award, refused the price, tendered the penalty agreed on, and denied that the deed passed any title. C never notified A to remove the building, but notified B to quit at the time fixed for removing the building, or pay rent to him subsequently. B continued to occupy, and expressly promised to pay rent to A, A indemnifying him against C's claim, and actually paid rent to A for a period subsequent to the award; but paid a subsequent instalment to C, receiving from him an indemnity against A. For the latter rent A brings an action against B. Held, the above facts furnished no defence to such action.

§ 61. Inasmuch as a tenant cannot even defend against an action at law, by denying the title of the lessor; *a fortiori* equity will not aid him in such a denial. Thus A took possession of land, as the tenant of B. B, the term having expired, demanded possession, and brought a process of forcible entry, upon which, however, A was finally acquitted. B then brought ejectment against A, who purchased an adverse title of C. A files a bill in equity for an injunction against the suit. Held, the acquittal of A proved nothing as to the title of the land; that the purchase of an adverse title, or disclaimer of that of the lessor, was a forfeiture, from which the statute of limitation would run; but, until the legal time of limitation expired, A could not dispute the landlord's title at law, nor have relief in equity.<sup>1</sup>

§ 62. The principle of estoppel does not apply, if waived by the landlord, for whose benefit it is adopted. So it does not apply, if a tenant has in any way ceased to stand in that rela-

<sup>1</sup> Payton v. Stith, 1 Pet. 486.

Binney v. Chapman, 5 Pick. 124. See Jackson v. Welden, 3 John. 288; — v. Davis, 5 Cow. 123.

A had agreed to become tenant to C until a certain time, at such rent as the arbitrators should award. In an action for use and occupation by C against A; held, A was not bound by an implied contract to pay rent to C after the time stipulated, and that the title could not be thus tried. Boston v. Binney, 1 Pick. 1.

A demised land to B, who paid him rent. C afterwards disputing A's title, it was left to arbitrators, who awarded in C's favor. A then gave up the title-deeds, and by his authority C directed B to pay rent to himself, which he did. A then distrains for the rent. Held, he had no claim to it, being estopped by the acts above stated. Downs v. Cooper, 2 Ad. & Ell. N. S. 256.

A, holding a lease of certain land, took possession from B of a house which B had erected, before A had a lease, upon adjoining waste land, to which B had no title. A leases the house to C. In ejectment for the house by A's landlord against C; held, C was estopped to deny the plaintiff's title. Doe v. Fuller, 1 Tyr. & G. 17.

Complaint under the Massachusetts statute, 1825, c. 89, by a landlord against his tenant, to recover possession of a piece of land. Held, the tenant could not set up as a defence that the landlord was disseized by his refusal any longer to pay rent. Sacket v. Wheaton, 17 Pick. 108; acc. 14 Conn. 271.

A, having been in peaceable and adverse possession of land for twenty years, by way of compromise of a claim made upon him for rent, gives a note to B. In a suit thereupon, held, the above facts constituted no legal defence. Cobb v. Arnold, 8 Met. 408.

The land of A being levied on by an attachment at the suit of B, A conveyed the same to C, under circumstances supposed to indicate an intention to defraud his creditors. C rented the land to D; B then obtained a judgment against A, and the land was sold to satisfy it. C brought an action against D to recover possession. Held, if D showed no title acquired subsequent to the commencement of his tenure, he could not defeat it, by setting up such fraudulent conveyance. Randolph v. Carlton, 8 Ala. 606.



tion. The principle is said to have a *present*, not a *future* operation; not being enforced, for instance, where the lease is ended, or the landlord transfers the reversion, or the tenant has restored possession, or obtained a decree for the title; or where he disclaims the landlord's title,<sup>(a)</sup> and holds over; or a judgment in ejectment <sup>(b)</sup> has been rendered against him, or he has been evicted by an adverse claimant; though mere payment of rent to a stranger, claiming the land, will not be sufficient.<sup>1(c)</sup> The distinction is made, that a tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord, although it may be a better title.<sup>2</sup> It is said, "by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines." It is also said that whether one, who

<sup>1</sup> Jackson v. Rowland, 6 Wend. 666; — v. Davis, 5 Cow. 123; Presbyterian, &c. v. Pickett, Wright, 57; Avery v. Barnum, 1b. 577; Boston v. Binney, 11 Pick. 8; Johns v. Church, 12, 561; 1 Mar. 99, 330; 2, 243; Fowler v. Cravens, 3 J. J. Mar. 429; Logan v. Steel, 6 Mon. 105; Maverick v. Gibbs, 3 M'Cord, 211; Greeno v. Munson, 9 Verm. 37; Hall v.

Dewey, 10, 593; Swift v. Dean, 11, 323; Nerhooth v. Althous, 8 Watts, 427; Newell v. Gibbs, 1 W. & Ser. 496; Bel-four v. Davis, 4 Dev. & B. 800; Hough v. Dumas, 1b. 328; Bullard v. Copps, 2 Humph. 409; Agar v. Young, 1 C. & Mar. 78.

<sup>2</sup> Bailey v. Moore, 21 Ill. 165.

(a) In which case, if the landlord has knowledge of such disclaimer, the possession is adverse, and the landlord cannot sell or lease the premises while so adversely held. Stephenson v. Richmond, 11 Humph. 591. See Sherman v. Champlain, &c. 31 Verm. 162.

(b) In Illinois, Missouri and New Jersey, where a tenant is sued in ejectment by a stranger, he is required, under a penalty, to give notice of it to the landlord. Illin. Rev. L. 676; Mis. Sts. 376; 1 N. J. L. 192.

Ejectment to enforce specific performance of a contract for the sale of land, judgment and *habere facias*. The tenant of the vendee agreed to accept a lease, and hold under the plaintiff while such writ and return thereon remained in force. Held, such lease was valid, and the tenant's relation to his former landlord dissolved. But when such writ and return were afterwards set aside by the court, the lease fell without any express order of restitution, and the tenant was restored to his former condition of subor-

dination to the vendee as his landlord. Conghanour v. Bloodgood, 8 Cas. 285.

(c) Where a tenant pays the rent, after the expiration of the year, which was due at its close, in an action by the landlord for possession, such payment will not estop him from showing that the landlord's title was extinguished during the year. Randolph v. Carlton, 8 Ala. 606.

A parol agreement by a tenant in possession, at the death of the landlord, to pay rent to one claiming to be guardian of the remainder-man, does not estop him from denying the title of the latter. Stokes v. McKibbin, 1 Harr. (Penn.) 267.

In ejectment, evidence of former admissions of the defendant's father, that he was tenant of the plaintiff, accompanied by evidence that the defendant resided on the land with his deceased father, and had remained there ever since, will not estop the defendant, claiming merely by his own possession, from denying the plaintiff's title. Emery v. Harrison, 1 Harr. 317.

receives possession from another, is estopped from claiming title, must depend upon the inquiry whether the claim attempted to be set up is consistent with the contract under which the possession was taken.<sup>1</sup> Nor does the principle apply to the case of a defective conveyance in fee.<sup>2</sup>(a) Nor where the estoppel is *mutual*.(b) And a tenant may purchase the landlord's estate; as where it is sold on execution. If he buy the whole, the rent is entirely extinguished; if a part, it is extinguished *pro tanto*. So if A, being in possession, acknowledges the title of B, or attorns to him, A is still not estopped to show that he acted under a wrong belief as to B's title.<sup>3</sup> So, it has been held, that,

<sup>1</sup> *Baskin v. Seechrist*, 6 Barr, 164. See *Isaac v. Clark*, 2 Gill, 1; *Miller v. Bonason*, 9 Ala. 317; *Williams v. Garrison*, 29 Geo. 508.

<sup>2</sup> Co. Lit. 47 b; *Claridge v. M'Kenzie*, 4 Scott, N. 796; *Ripley v. Yale*, 19 Verm. 166.

<sup>3</sup> *Hughes v. Trustees, &c.*, 6 Pet. 369; *Hodges v. Shields*, 18 B. Mon. 128; *Kenada v. Gardner*, 8 Barb. 589. See *Walton v. Newson*, 1 Humph. 140; *Chilton v. Niblett*, 3, 404; *Love v. Edmondston*, 1 Ired. 152; *Page v. Hill*, 11 Mis. 149; *Dikeman v. Parish*, 6 Barr, 210.

(a) A sold and conveyed to B, and remained in possession. After his death his widow also remained in possession. The estate, after the sale to B, was sold on execution to C, and A's widow took a lease from C. Held, the principle of estoppel applies only to the relation of landlord and tenant created *by contract*, and not to that created by *operation of law*; that the widow was the lawful tenant of C; and that, the possession of C having been therefore continuous for seven years, the Tennessee act of 1819, c. 28, vested in him the title. *Vance v. Johnson*, 10 Humph. 214.

Where one enters into possession under a parol contract of purchase, pays a portion of the purchase-money in advance, and is, by the contract, to receive a deed upon furnishing certain security for the remainder, which security is offered, but the vendor refuses to convey: the purchaser may claim adversely to the vendor; and his possession, if open and exclusive, accompanied by claim of title, will avoid a deed, executed by the vendor to a third person, subsequent to the performance of the contract on the part of the purchaser. *Ripley v. Yale*, 19 Verm. 166.

And even if the purchaser could be considered as a tenant at will to the vendor, until the completion of the con-

tract; yet, if he offer to perform the contract on his part, and the vendor refuse to convey, and the purchaser thereupon give notice to the vendor that he shall "*hold on to the land*:" the possession of the purchaser becomes adverse, and will avoid a deed subsequently executed by the vendor to a third person. 1b.

A covenanted to make and deliver to B, at the end of a year, "a good and sufficient deed, with covenants of warranty," of a farm then in the possession of B; all the green grain growing in the ground at the time of executing the deed "to pass" to B. B covenanted to pay therefor \$35 per acre, with interest from a day prior to the date of the contract. A afterwards tendered the deed, pursuant to his covenant; but B refused to perform his covenant, and A brought ejectment against him. Held, that B, by his covenant, had recognized A's title, and agreed to hold under him for a year, and was therefore estopped from disputing A's title. *Tindall v. Den*, 1 New Jersey. 661.

(b) The tenant in a real action conveyed the land to A; in 1813 A demised it to the demandant. In 1816 A reconveyed to the tenant, by an indenture for one year, "all the land, &c., which A held from the tenant by deed, dated March 20, 1813, now improved by" the tenant.

in an action for rent, the tenant may prove a verbal promise of the plaintiff that he would claim no rent if the title was in another, and that such is the fact.<sup>1</sup>(a) And where a person is induced to accept a lease by false representations, promises and threats, he may afterwards dispute the lessor's title, especially when, at the time of accepting the lease, the lessee was in quiet occupancy of the premises.<sup>2</sup> And it makes no difference, in such case, that the false representations were made under a mistake of the lessor.<sup>3</sup> More especially if the tenant did not first enter under him.<sup>4</sup> So the mere fact, that one had been in possession as tenant of his father-in-law, is not a bar to the proof of a parol sale and gift to him by his father-in-law, where he ceased to pay rent for several years, continued to hold the land under his contract, paid part of the purchase money, made valuable improvements, and had the property assessed in his own name.<sup>5</sup> So where A, having been tenant at will to B, remained in possession fifty-seven years after B's death; held, the jury might presume that the land had been restored to B's heirs, and an actual ouster of them, and that A had acquired a perfect title. So, in ejectment by the heirs or devisees of a lessor against the lessee, the latter may show in defence that the lessor had only a life estate. Thus, where a lessee covenants to pay rent, and to give up the land to the lessor, his heirs and assigns, and a devisee of the lessor brings ejectment against an assignee of the lessee, after the expiration of the term; the lessee is not estopped to show that the lessor was but a tenant for life.<sup>6</sup>

<sup>1</sup> *Nellis v. Lathrop*, 22 Wend. 121; *Washington v. Conrad*, 2 Humph. 562; *Doe v. Brown*, 7 Ad. and Eil. 447. See *Doe v. Errington*, 6 Bing. N. 79.

<sup>2</sup> *Wood v. Chambers*, 8 Rich. 150.

<sup>3</sup> *Wood v. Chambers*, 8 Rich. 150.

<sup>4</sup> *Carpenter v. Thompson*, 8 N. H. 204.

<sup>5</sup> *Aurand v. Wilt*, 9 Barr, 54.

<sup>6</sup> *Camp v. Camp*, 5 Conn. 291; *Heckhart v. McKee*, 5 Watts, 385; *Doe v. Seaton*, 2 Crompt. M. & R. 728; *Tilghman v. Little*, 18 Ill. 239. See *Heath v. Williams*, 25 Maine, 209; *King v. Murray*, 6 Ired. 62; *Byrne v. Beeson*, 1 Doug. 179.

The term having expired, held, the tenant was not estopped to claim under the deed of 1816. Also, that, if he were, the demandant, claiming under A, would be estopped by the deed of 1816, to say that A in 1822 held under the deed of 1813, and "estoppel against estoppel sets the matter at large." *Carpenter v.*

*Thompson*, 8 N. H. 204. See *Warren v. Leland*, 2 Barb. 618.

(a) A hires land of B, and pays him rent. Afterwards, B having agreed with C to give him a long lease of the land, A pays rents to C. In an action by C against A for another quarter's rent, held, A was not estopped from showing,

§ 63. A *surrender* of the estate by a lessee to his lessor will not authorize him to deny the title of the latter, unless it be made fairly, and so as to give time to the lessor to take possession. Thus, if immediately after such surrender the tenant takes a lease from an adverse claimant, this proceeding will avail him nothing.<sup>1</sup> And the purchaser of a term is bound to surrender it to the lessor, not to the original lessee.<sup>2</sup>

§ 64. An *infant* will not be estopped to deny the title of his landlord, though he has admitted that he held under him, and given a note for the rent.

§ 65. A lessee is not estopped to aver a *mode of payment* of rent, varying from the literal import of the lease, and provided for by an independent parol agreement. Thus, in an action by an assignee of the reversion, though the rent is by the lease to be paid quarterly, the lessee may plead that before the time when the lease was made he loaned money to the lessor, the interest of which it was agreed should go to pay the rent.<sup>3</sup> But parol evidence is inadmissible that the rent was not to commence till a later day than that mentioned in the lease.<sup>4</sup> So parol evidence is inadmissible that the land was part of a larger lot, taken from the plaintiff's by one A, and by agreement between them subdivided, and deeds of the several portions made to persons designated by A, including the defendant; and with the understanding that A should pay the whole rent.<sup>(a)</sup><sup>5</sup>

§ 66. It is held that the attornment of a tenant to a stranger, though invalid against the landlord, is still binding upon himself.<sup>6</sup> But a contract, by which a tenant is induced to desert his

<sup>1</sup> Boyer v. Smith, 3 Watts, 449.

<sup>2</sup> Bruce v. Halbert, 3 Mon. 65; Byrne v. Beeson, 1 Doug. 179.

<sup>3</sup> Farley v. Thompson, 15 Mass. 18;

McCoon v. Smith, 3 Hill, 147; Robins v. Kitchen, 8 Watts, 390.

<sup>4</sup> Henson v. Coope, 8 Scott N. 48.

<sup>5</sup> Buck v. Fisher, 4 Whar. 516.

<sup>6</sup> Kenada v. Gardner, 3 Barb. 589.

that the above named agreement had been rescinded, and that he had paid this rent to B. Brook v. Briggs, 2 Bing. N. 572.

(a) In an action for rent, by an assignee of the reversion against an assignee of the lease, it appeared that upon the execution of the lease the lessee gave several promissory notes, not proved to be negotiable, equal in amount to the

rent reserved, payable respectively as the rents would fall due, and stated in the deed of assignment of the reversion, to be given as collateral security. The notes were transferred with the reversion to the plaintiff. Held, it was a question for the jury whether the notes were intended by the parties to be in payment of the rent. Howland v. Coffin, 9 Pick. 52.

landlord, is corrupt and void ; and the person to whom he has attorned cannot maintain an action upon it. And if an adverse claimant tampers with a tenant, and gets possession, either by his consent or a collusive recovery, he is estopped to deny the landlord's title. So a tenant is estopped, though he has surrendered to a stranger.<sup>1</sup>(a)

§ 67. The principle of estoppel may be applied to the lessor as well as the lessee. Thus, if the lessor at the time of leasing has no vested interest in the land, but subsequently acquires such an interest, it passes to the lessee or his assigns, from the latter period, by estoppel ; or rather, that which was before an estoppel is turned into a lease in interest. This rule applies where the lessor, at the time of leasing, has a future and contingent interest ; as, for instance, where he is an heir apparent or claims under a contingent remainder or executory devise ; but not where any actual interest, however small, passes by the lease. Thus if A, tenant for the life of B, lease to C for years, and purchase the reversion in fee ; upon the death of B he may still avoid the lease.<sup>2</sup>(b)

<sup>1</sup> Morgan v. Ballard, 1 Mar. 558 ; Stewart v. Roderick, 4 Watts & S. 188. See Cushing v. Adams, 18 Pick. 110 ; N. Y. Code, 1851, 38-4 ; Cravenor v. Bowser, 4 Barr, 259 ; Dela. Rev. Sts. 421 ; Schultz v. Arnot, 83 Mis 172.

<sup>2</sup> Weale v. Lower, Pollexfen, 54 ; Helps v. Hereford, 2 Barn & A. 242 ; Co. Lit. 48 a, n. 11 ; Ib. 46 a, 47 b ; 4

Kent, 97 ; Blake v. Tucker, 12 Verm. 39 ; Hubbard v. Norton, 10 Conn. 422 ; Logan v. Moore, 7 Dana, 76 ; Brown v. McCormick, 4 Watts, 60. See Burchard v. Hubbard, 11 Ohio, 816 ; Hubbell v. Clark, 1 Hilt. 67 ; Richardson v. Richardson, 9 Gray, 213 ; M'Crea v. Marsh, 12 Gray, 211 ; Russell v. Harford, Law Rep. (Eng.) Equ. 1866, Aug. p. 507.

(a) In regard to the *estoppel* of a tenant, the old law seems to have made a distinction between leases by indenture, and those by *deed-poll*. Littleton says (sec. 58). the lessee may plead that the lessor *had nothing in the tenements* at the time of the lease, "except the lease be made by deed indented;" and Lord Coke (47 b), that by a deed-poll the lessee is not estopped, and may even plead *non dimisit*, and give the want of title in evidence. See Naglee v. Ingersoll, 7 Barr, 185. But the distinction seems to be now entirely exploded. The principle of the modern doctrine is, that the lessee is estopped, not so much by an express agreement on his part, as by his acceptance of the lease and occupation of the land. And the case seems analogous to

that of rent reserved upon a *feoffment* by deed-poll, which is said to be reserved by the words of the *feoffor*, and not by the *grant of the feoffee*, and binds the latter. Co. Lit. 148 b. And see Ingersoll v. Sergeant, 1 Whart. 350-1.

(b) Of the nature of a lease, is a *license* to occupy, use or take the profits of land. This, however, seems to pass no *estate*, but merely confer a certain *right* or *privilege*. It is a mere authority to enter upon the lands of another, any do an act or series of acts, without having any interest in the land ; founded in personal confidence, not assignable, and valid though not in writing. Mumford v. Whitney, 15 Wend. 380 ; Folsom v. Moore, 1 Appl. 252.

It amounts to nothing more than an

excuse for the act, which would otherwise be a trespass. *Cook v. Stearns*, 11 Mass. 587; *Whitney v. Holmes*, 15, 152. See *Whitmarsh v. Walker*, 1 Met. 818. Hence a plea of license does not bring in question the title to real estate. *Wheeler v. Romell*, 7 N. H. 515. A license is sufficient to disprove any claim arising from adverse possession. *Luce v. Corley*, 24 Wend. 451. A distinction is made in a late English case between a license of profit, or profit *a prendre*, and a personal license of pleasure; the former of which may be exercised by an agent. In this case there was a grant to *heirs and assigns*. *Wickham v. Hawker*, 7 Mees. & W. 68. A license to search for metals, raise and carry them away, and convert them to the party's own use, is assignable. *Muskett v. Hill*, 5 Bing. N. 694; 7 Scott, 866. A parol license to build and maintain a bridge on another's land is valid. *Ameriscoogin, &c. v. Bragg*, 11 N. H. 102.

An executory contract for the purchase of land, with leave to the purchaser to enter and possess until default in payment of the purchase-money, without any fixed period or compensation, is a license, and not a lease; it is not an easement or a permanent interest in land, nor does the relation of landlord and tenant exist. The purchaser cannot be treated as a wrongdoer until default, without a demand of possession. *DeLittle v. Eddy*, 7 Barb. 74.

On the other hand, it may be proved by parol that a grantor was authorized to enter upon the land and remove certain property; this being a mere license. *Parsons v. Camp*, 11 Conn. 25.

A parol license to enter on land and lay down aqueduct logs for the purpose of conveying water from a spring to adjoining land, with liberty to enter from time to time to examine and repair the same, is not a sale of land, or an interest in land, within the statute. *Sampson v. Burnside*, 18 N. H. 64.

Where a parol contract, being for the sale of an interest in land, is void as a contract, it may still operate as a license, which will excuse the entry of the purchaser. But in an action of trespass by the vendee, the vendor may justify under a revocation of the license by his re-entry, after default. So a deed invalid as a conveyance, for want of a witness, may be good as a license. *Carlington v. Roots*, 2 Mees. & W. 248; *Sullivan v. Franklin, &c.* 8 Ohio, 89; 7 Barb. 74.

The owner of wild land agreed with

another person to go on and clear a part of it, and to fence, and to help the latter to build a house, reserving to the former the use of the timber, except what was needed for "house, rails and firewood." Held, a mere license to occupy the land, giving no right to dispose of any timber cut in clearing it. *Callen v. Hüty*, 2 Harr. (Penn.) 286.

So in an agreement for the sale of land, the purchaser agreed not to cut or suffer to be cut, any timber from the land, without the consent of the vendor in writing. In trover by the vendor against one claiming under the purchase, to recover the value of timber cut from the premises; held, the defendant could not give evidence of a parol license from the plaintiff to the purchaser to cut the timber. *Pierrepont v. Bernard*, 5 Barb. 364.

A parol license from A to B, to take trees from A's land so long as B pleases, expires upon A's death. *Putney v. Day*, 6 N. H. 480. But where the defendant gave a written license to two persons to take logs from the land of the plaintiff, and one of the two died, but the other, under his license, and without any intimation by the defendant of a purpose to revoke the license, subsequently took the logs; held, the license was not revoked by the death of one of the parties, but the defendant was liable in trespass. *Chandler v. Spear*, 22 Verm. 338.

A general parol license, to cut and carry away wood growing upon land, if available to all, must be acted on within a reasonable time; and applies only to the wood, as it is substantially at the time of giving the license. And what is a reasonable time, the facts being agreed, is a question for the court. Such license does not continue fifteen years, not being acted upon. *Gilmore v. Wilbur*, 12 Pick. 120.

Devise to A's children "of a plantation, to come into their possession, or into the hands of the executors for their benefit, at the testator's death, providing that A have the privilege of living on the place with his children during his life." Held, A did not take an estate for life, but his title was under a license, and of A's children only those took who were in *esse* at the testator's death. *Calhoun v. Jester*, 1 Jones, 474.

An unsealed lease provided as follows: "All the hedges, trees, thorn-bushes, fences, with lop and top, are reserved to the landlord." The landlord having entered the close, and drawn the trees, when cut down, over it, the tenant brings an action against him. Held, the

above agreement might be shown under a plea of leave and license. *Hewitt v. Isham*, 7 Eng. L. & Equ. 596.

By an indenture between the town of B and a mill-dam corporation, the latter granted to the former a certain proportion of a tract of land covered with water, "excepting the mill creek, and such other canals as may be agreed to be kept open for the passage of boats." By a subsequent indenture between the same parties, it was agreed that the town might put a covering over part of the creek or canal, "provided only, that no interruption or impediment shall be made or permitted below said covering, to boats on passing through or into said canal." Held, these provisions did not constitute a license to the abutters to navigate the creek.

The creek being kept open for boats, held, although there was an implied public license to navigate it, this was not such a perpetual license as could be pleaded as a grant, or a dedication to the public; and that no individual could acquire a prescriptive right, by the use of it while thus open. *Baker v. Boston*, 12 Pick. 184.

If a transaction between two parties amounts to the grant of a *permanent privilege* in the land, it will constitute a lease, not a license, though the words might seem to import the latter. That either construction may sometimes be given, see Year-Book, 5 Hen. 7, pl. 1; *Hall v. Seabright*, 1 Mod. 16. See, also, *Williams v. Morris*, 8 Mees. & W. 488.

A, in consideration of £5, grants to B the privilege of flowing certain land for twelve years without restriction, and for eighty years in the winter during one-half of the year. This is a lease. *Smith v. Simons*, 1 Root, 318. But the grant of a mere license to flow passes no property. It does not create an easement, which can arise only by deed or prescription. It is a mere *remitter* of damages. *Clinton v. M'Kenzie*, 5 Strobb. 86. See *Woodward v. Seely*, 11 Illin. 157.

Where A, under a license from B, the owner of land through which a water-course flowed, erected a mill thereon, and ever afterwards held and occupied such mill as if it were his own; but it did not appear that there was any consideration for the license, or that it was to continue for any definite period, or that there was any agreement as to the nature of the occupation, or any mutual stipulations: in an action brought by A against C, the owner of a mill below, for setting the water back upon A's mill, by

means of a dam erected by C, it was held that such license did not amount to a lease from B to A, nor create any privity of contract or estate between them. *Branch v. Doane*, 17 Conn. 402.

It is said that licenses which, in their nature, amount to the granting of an estate, for however short a time, are not good without deed, and are considered as leases, and must always be pleaded as such. Thus a license from the owner of land to make a dam, bank, or canal on his land, to raise water for working a mill, merely saves the other party from being a trespasser, in doing the particular act; but does not authorize him to enter upon the land afterwards for the purpose of making repairs. *Cook v. Stearns*, 11 Mass. 537; *Whitney v. Holmes*, 15, 152. See *Jamison v. M'Credy*, 5 Watts & S. 129; *Crabs v. Fetick*, 7 Black. 373.

Where the proprietor of a wharf in a harbor was authorized by statute to extend it into the channel to the line of the harbor; and, before any extension thereof, in pursuance of such act, the legislature incorporated a railroad company, with authority to locate and construct a railroad across and over the flats between such wharf and the line of the harbor: held, the act operated as a grant, and was not a mere license, revocable at the pleasure of the legislature, and revoked by the act incorporating the railroad company. *Fitchburg, &c. v. Boston, &c.* 3 Cush. 58.

The declaration stated, that the plaintiff had been tenant to one A, and during his tenancy had put up certain fixtures; that, during the tenancy, A granted, to the plaintiff leave and license to keep the fixtures on the premises after the expiration of the tenancy, in order that he might sell them to the incoming tenant, and to enter and recover them, if such tenant would not purchase them; that the defendant subsequently became tenant; that he would neither purchase the fixtures, nor allow the plaintiff to enter and remove them. The defendant traversed that A granted such license to the plaintiff. At the trial, the plaintiff gave in evidence the following letter written to him by A's attorney: "Mr. A has no objection to your leaving the fixtures on the premises and making the best terms with the incoming tenant." Held, that this document, if it gave a license at all, gave one coupled with an interest in land; and, therefore, not being under seal, it could not be enforced



against the in-coming tenant. *Ruffey v. Henderson*, 8 Eng. Law & Equ. 305.

An *executory* is to be distinguished from an *executed* license. The former, where the authorized act has not been done, is revocable, and a mere transfer of the land, without express notice, has been held a revocation; but the latter, where the act has been done, is irrevocable, so far as to exempt the party from any liability to the owner of the land. *Cheever v. Pearson*, 16 Pick. 273; *Wallis v. Harrison*, 4 Mees. & W. 538; *Woodward v. Seely*, 11 Ill. 157; *Sampeon v. Barnside*, 13 N. H. 264.

So a license is to be distinguished from mere acts of assent or acquiescence, which constitute evidence of one. Thus, the defendant erected a dam, the plaintiff was present during such erection, made no objection, said he thought it would benefit his mill; and that he was satisfied with defendant's mode of using the water. Held, no license, but only evidence of one for the jury. *Johnson v. Lewis*, 18 Conn. 303. Even an *executory* license cannot in all cases be revoked. Thus, where A purchased goods sold upon the land of B, and a condition of sale, to which B was a party, was, that the purchaser might enter to take them; but B locked his gates and forbade an entry: held, A was not liable for breaking the gates. *Wood v. Manley*, 11 Ad. & Ell. 84.

If one enter upon the land of another by virtue of a *parol* license, given for a consideration, and erect *fixtures*, such license becomes irrevocable, and trespass will lie against the owner of the land for destroying them. *Wilson v. Chalfant*, 15 Ohio, 248.

Such license, executed, gives the right of possession to control, repair and protect the fixtures. *Ib.*

What is the nature and extent of the estate or interest in him who erects the fixtures. *Quere*. *Ib.*

Where a license is pleaded to *erect and maintain*, evidence to *erect* only does not sustain such plea. *Alexander v. Bonnin*, 6 Scott, 611.

Where a landlord had distrained for rent, and, in consideration of his giving up the distress, the tenant agreed to surrender the premises in a week, and accordingly removed his furniture, and after a week the lessor entered; held, he was not liable to an action of trespass, the facts showing a *license* from the plaintiff, which, it seems, was not revocable. At any rate, a revocation must

be distinctly replied. *Feltham v. Cartwright*, 7 Scott, 695.

A license to build and maintain a bridge over another's land is not revocable, it seems; certainly not without compensation. 11 N. H. 102.

S gave to J an oral license to erect and continue a mill-dam on S's land, and to dig a ditch through said land to convey water to a mill that J was about to build on his own land. J erected the dam and dug the ditch, and afterwards erected the mill, and continued them during the life of S. After S had granted the license, he conveyed his land to M, without any reservation. J continued the dam and ditch, after the decease of S, for the purpose of working the mill, and M requested him to remove the dam and fill up the ditch, and, upon J's refusal so to do, M attempted to remove the dam, and tore down a part of it, and J forcibly interposed, prevented M from proceeding further, and repaired the injury so done to the dam by M. M thereupon filed a bill in equity, praying that J might be enjoined and prohibited from any longer continuing the dam, which was alleged to be a nuisance, and that the same might be ordered to be abated. On an issue framed and submitted to a jury, they found that the dam was a nuisance. Held, that M was entitled to a decree for an abatement of the nuisance, and for a perpetual injunction against J, to prevent its renewal. Held, also, that J was not responsible for any acts done in pursuance of the license before it was countermanded, and therefore was not liable to pay any expenses incurred by M in removing the old dam; but that he was liable for building a new dam or repairing the old one, after the license was countermanded, and that M was entitled to have the same abated at the expense of J. *Stevens v. Stevens*. 11 Met. 251.

A and B were joint tenants; and, although no partition had been made between them, it was understood that A should have the east, and B the west end of the tract. B agreed that A might build a mill on A's half, and cut as much timber off the west half, and overflow as much of the land as was necessary for that purpose. Afterwards B sold to C, who agreed with A to abide by these stipulations. After the dam was partly erected, and timber collected for building the mill, C sold to D, who soon after notified A to discontinue the work; and, on his refusal, brought trespass for over-

flowing the land. Held, the action could not be maintained, and that the original parcel agreement could not be revoked after it had been executed at the defendant's expense. *Sheffield v. Collier*, 8 Killy, 82.

For any abuse of a license, the party injured may maintain an action. Thus,

the plaintiff, having a way over the defendant's land, gave him a license to build an arch over such way, but the defendant, in so doing, unnecessarily and unreasonably obstructed the way. Held, the plaintiff might maintain an action on the case for this obstruction. *Cushing v. Adams*, 18 Pick. 110.

## CHAPTER XVI.

## RENT.

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|--|---|
| 1. Definition.   | 25. To whom it passes upon the lessor's death.  |
| 3. Must be certain   | 31. Remedies for recovery of rent—distress.   |
| 4. In what payable; effect of a reservation of part of the produce, and whether the landlord has a lien. | 35. Re entry; mode and time of demand.  |
| 5. Kinds of rent; rent-service; rent-charge; rent-seck; fee-farm rent.                                   | 40. Actions of debt, covenant and assumpsit.  |
| 6. Seisin of rent.   | 41. Election of remedies; restoration of land after forfeiture; attachment for—before due |
| 7. From what it may issue.   | 42. Suit in Chancery.   |
| 10. On what conveyance reserved.   | 43. Estates in a rent.  |
| 11. Several rents, reserved by one deed.   | 51. Not lost by non-user.   |
| 13. To whom reserved.  |   |
| 22. When payable.  |   |

§ 1. In the natural order of topics, we now proceed to state the rules of law applicable to the most important incident of an *Estate for Years* and a *Lease*, which were respectively treated of in the two preceding chapters, viz, *Rent*. This, for the most part, though not exclusively, pertains to the two subjects above referred to, and therefore finds a proper place in immediate connection with them.

§ 2. *Rent* is a periodical return made by any *particular* tenant of land, either in money or otherwise, in retribution for the land.

§ 3. A rent must be *certain*, or capable of being made so by either party.<sup>1</sup>(a)

<sup>1</sup> 3 Cruise, 186; Co. Lit. 142 a.

(a) Parol proof that the rent for the first year, under a written lease, was fixed by the parties at a different rate from that therein stated, is inadmissible. *Patterson v. O'Hara*, 2 Smith, 58.

The mode of paying rent may depend upon the *election* of one of the parties. A lessor agreed to take one-half the monthly rent of a hotel "in board as the same falls due." Held, he might

§4. The old doctrine is, that rent must *issue out of* the thing granted, and not be *a part* of the thing itself.(a) Thus, it cannot consist of the annual vesture or herbage, for that should be repugnant to the grant.<sup>1</sup> It is often reserved, however, in a certain portion of the produce.(b) But it has been held, that

<sup>1</sup> 3 Cruise, 186.

require payment in board, but was bound, if he so elected, to call for payment in this mode, as the rent accrued. *Evans v. Norris*, 6 Mich. 369.

The maxim applies in this, as in other cases, "*id certum est, quod certum reddi potest*." *Smith v. Fyler*, 2 Hill, 648.

A demise at will, in consideration of services rendered annually to a religious society, "as foresinger and organist," is not, within the Pennsylvania act of 1772, for uncertainty in the rent. *Hohly v. German, &c.*, 2 Barr, 298. See *Glasgow v. Ridgeley*, 11 Mis. 34.

The rent of a quarry, at a certain number of cents per perch, (the amount varying with the quality,) of each and every perch of stone quarried, is a *certain money rent*. *Cross v. Tome*, 14 Md. 247.

Where rent is to be paid in certain articles, the prices of which are specified in the lease; if the lessee tenders the articles at the day, the rent is paid, though the real value is much greater or less than that agreed upon. *Heywood v. Heywood*, 42 Maine, 229.

(a) A rent may issue out of lands and tenements corporeal, or out of them and their furniture. *Mickle v. Miles*, 1 Grant, 320; 81 Penn. 20. See *Com. v. Cartner*, 6 Harris, 439.

And to such a rent the right of distress is incident. *Ib.*

(b) Chancellor Kent considers this the most judicious mode of reservation in long leases, on account of the fluctuating value of money. He mentions the case of the N. Y. University, whose annual income is limited by law to 40,000 *bushels of wheat*. 3 Kent. 369. See *Van Rensselaer v. Jewett*, 5 Denio, 185; — *v. Gallup*, *Ib.* 454; *Tayl. L. & T.* 7; *Butterfield v. Baker*, 5 Pick. 522; *Buskirk v. Cleveland*, 41 Barb. 610; *Ream v. Harnish*, 45 Penn. 376; *Garrett v. De-wart*, 43 Ib. 342; *Smalley v. Corliss*, 37 Verm. 486; *Brown v. Burrington*, 36 Ib. 40; *Bellows v. Wells*, 36 Ib. 599; *La Point v. Scott*, 36 Ib. 603; *Fowler v. Hawkins*, 17 Ind. 211.

Where the rent reserved is one-half of the crop, this entitles the landlord to one-half the straw. *Rank v. Rank*, 6 Barr, 211.

Where a farm is let on shares for cultivation and wheat is raised, the straw is a part of the crop, and belongs to the owners thereof, unless there is some stipulation or custom to the contrary. It does not necessarily belong to the farm, nor is there any general usage requiring it to be used as manure upon the land. *Fobes v. Shattuck*, 22 Barb. 568.

Where the rent of land leased for the cultivation of sugar is payable in a portion of the crop, it will be presumed, in the absence of any express stipulation, that the sugar is to be delivered in the usual manner; that is, in hogsheads or barrels: and the lessee cannot claim any allowance for the cost of the hogsheads or barrels. *Wilcoxon v. Bowles*, 1 La. An. 280.

The owner of land rented it to raise a crop of corn. Before the crop was gathered, the owner sold it, and the purchaser turned a number of hogs into the field. Held, this was a trespass to the lessee. *Rodgers v. Lathrop*, 1 Smith, 347.

If A make a parol agreement with B to clear and sow the land of B for the crop, and before harvest B convey the land to C with notice of such contract, C will be bound by it. *Dewey v. Bellows*, 8 N. H. 278.

Rent may be reserved in *labor* as well as produce. And, if a tenant agrees to pay in this way by the month, when he ceases to labor his title comes to an end without notice to quit. *McGee v. Gibson*, 1 B. Mon. 105.

Where a tenant agreed to cultivate and bag the *hop* crop in payment of the rent; held, such crop belonged to the landlord. *Kelley v. Weston*, 2 Appl. 282. See, for a recent case, in which rent was to be paid by a share of the product, viz., *petroleum*; *Kier v. Peterson*, 41 Penn. 357.

the whole property in such produce remains in the lessee till it is divided, and the lessor's share delivered to him.<sup>(a)</sup> And a creditor of the former may legally seize the whole. So upon his death it passes to his administrator.<sup>1</sup> And the same principle has been adopted, where the lease provides that the lessor shall have a claim upon the produce, as security for the rent. Thus a lease, provided that the produce, whether growing or harvested, if deposited upon the land, should be held for the rent and be at the lessor's disposal, who might enter and take it for rent in arrear. Before rent-day, previous instalments having been paid, a creditor of the lessee seized by legal process a quantity of corn raised upon the land. Held, no property had vested in the lessor as against creditors, either by way of sale, mortgage or pledge, for want of delivery and continued possession; and the agreement, giving the lessee an absolute title until the lessor should take possession, was fraudulent against creditors. So, where a rent is reserved in money, but the lessor reserves a right to take a portion of the produce at a certain valuation, in lieu of money, he acquires no property until he has elected and actually taken the produce; and, upon the lessee's death, the right of election ceases, and the whole existing produce vests in the administrator, leaving the lessor, in case of insolvency, only the rights of a general creditor. So where a lease provided, that, in case of non-payment of rent, the lessor should have all the crops, to dispose of as he pleased; held, until delivery of the crops, or possession taken, in payment of the rent, they remained the property of the lessee, liable to be sold by him or attached by his creditors.<sup>2</sup> But the contract between the parties may be of such a nature as to make

<sup>1</sup> *Stewart v. Doughty*, 9 John. 118; *Bachelder*, 5 Shepl. 257; *Whitcomb v. Dockham v. Parker*, 9 Greenl. 187. See ch. 15, n. 12; also *Rinehart v. Olwine*, 5 Watts & S. 157; *Morgan v. Moody*, 6, 338; *Deaver v. Rice*, 4 Dev. & B. 481; *U. S. v. Gratiot*, 14 Pet. 526; *Turner v. Tower*, 12 Met. 487; *Thompson v. Spinks*, 12 Ala. 155; *Rees v. Baker*, 4 Greene, 461. <sup>2</sup> *Butterfield v. Baker*, 5 Pick. 522; *Walt, &c.*, 7 Pick. 100; *Munsell v. Carow*, 2 Cush. 50.

(a) Any act intended to, and which does in fact, enable the landlord to obtain dominion over the thing paid, is sufficient. By an orphan's court sale, the right to a share of the growing crops, reserved as rent, passes to the purchaser. If the tenant deliver the landlord's share to the former owner, the purchaser may maintain replevin for it. *Burns v. Cooper*, 31 Penn. 426.

them *joint owners* of the crop or produce. Thus A rented a farm from B, upon the following terms: A was to give B one-half of everything that was made, to carry all the crops to market, and pay B one-half of the proceeds. A made a crop of tobacco, and assigned in writing all his interest therein to C, who was to have the crop prepared for market and sold, and to pay over to B one-half of the net proceeds. The tobacco was left in the possession of B's agent, and A retained possession of no part thereof, after his agreement with C. Held, the contract between A and B created the relation of landlord and tenant, and vested in each a joint interest in the crop; that the sale to C, if effectual, could only constitute him a tenant in common with A; and that B could not, therefore, maintain replevin against A.<sup>1</sup> So the defendant entered into a contract with A, in writing, not under seal, "to let" to A a certain farm, to commence on the first of April, and continue from year to year for five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing, the produce of the farm "to be equally divided by weight or measure." Held, although this gave to A an interest in the land, and a right to occupy it while he continued in the performance of the contract; yet, it did not constitute a lease, but A was a *quasi* tenant at will while the contract continued, and the defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance.<sup>2(a)</sup> And, contrary to the doctrine above stated, it has been held in Vermont that, where stock and farming utensils worth \$1,000 were leased with the land, with a provision that they should remain the property of the lessor, and be security for the rent and covenants, as also other articles of the same kind and value, which might be substituted for, or

<sup>1</sup> Ferrall v. Kent, 4 Gill, 209.

<sup>2</sup> Aiken v. Smith, 21 Verm. 172.

(a) A landlord, entitled to one-half of the crops, when divided, cannot maintain trespass against the tenant for taking the hay which the landlord had in his possession, but which had never

been divided. Briggs v. Thompson, 9 Barr, 338.

Where two persons agree to cultivate land on shares, either may go upon the land to remove his part of the crops. Com. v. Rigney, 4 Allen, 316.

added to them; this was a valid contract, and the lessor had a good title to the property leased, and all purchased with its avails, or those of the products of the farm, to the amount of \$1,000.<sup>1</sup> Also, that the property thus on the farm, to the amount of \$1,000 in the whole, could not be attached by the creditors of the lessee; but that the right of the lessor extended only to that amount, and could not extend, under the terms of the lease, to the excess of property over that value, nor to property acquired by the lessee from the avails of his individual means.<sup>2</sup> And, the creditors of the lessee having attached and sold the stock and farming utensils on the farm, a part of which consisted of property placed upon the farm by the lessor at the commencement of the term, and the remainder of which was property purchased by the lessee, in place of stock, &c., sold by him, with the consent of the lessor; held, in the absence of all proof of fraud, that the lessor was entitled to recover against the attaching creditors, to the amount of \$1,000, and interest from the time of the taking.<sup>3</sup> So it has been held, that a lease of land, reserving rent, and which provides that all the crops are to be the property of the lessor until the rent is paid, is valid, and will entitle the lessor to hold such crops against the creditors of the lessee.<sup>4</sup> Thus A leased land to B for two years, reserving rent, B executing at the same time a promissory note for the first year's rent. The lease provided that the lessor was to have entire control and ownership of all the crops until the rent of each year was paid. A indorsed the note to C, and delivered to him the lease as security. Held, C would hold the crops raised the first year, as security against one who attached them, as the property of B, and became the purchaser of them upon the execution sale.<sup>5</sup> And in a recent decision it is held, that, in case of a provision for a lien on the crops, the lessor may maintain trover for them against the lessee.<sup>6</sup> And this, although a note with surety was given for the rent.<sup>7(a)</sup>

<sup>1</sup> *Paris v. Vall*, 18 Verm. 277.

<sup>2</sup> *Ib.* 10 Verm. 277.

<sup>3</sup> *Ib.*

<sup>4</sup> *Smith v. Atkins*, 18 Verm. 461.

<sup>5</sup> *Ib.*

<sup>6</sup> *Baxter v. Bush*, 3 Wms. 465.

<sup>7</sup> *Ib.*

(a) In connection with the somewhat contradictory doctrines stated in the



§5. By the English law there are three kinds of rent, viz.: *rent-service*, *rent-charge* and *rent-seck*. And this division has been recognized in New York; although in that State a statute has done away with all distinctions as to *remedies*.<sup>1</sup> A *rent-ser-*

<sup>1</sup> *Cornell v. Lamb*, 2 Cow. 652; 8 Kent, 868-9. (As to the rent called *rack-rent*, see *Simpson v. Clayton*, 6 Scott, 469.)

text, (secs. 4-10,) it may be mentioned, that in many of the States express statutory provisions have given the landlord a claim or title to the produce of the land which he would not otherwise have. Thus, in Missouri, Tennessee, Illinois, Arkansas, Ohio, (it seems,) Iowa, Mississippi and Alabama, the landlord has a lien upon the crop for rent, usually for a specific time after it falls due. In Virginia, Kentucky, Alabama, Mississippi, Delaware, New York, Pennsylvania, he has the same lien upon the tenant's goods on the land. The word *property* is also sometimes used. In Maryland, he has a lien on the crop for rent, if payable in produce. In Delaware, if the rent is payable in produce of a certain kind, the lessor has a lien upon this amount of the crop; and if sold on execution, the purchaser succeeds to the tenant's liability for rent and good husbandry, and the crop is still liable to distress. But see *Bryan v. Buckholder*, 8 Humph. 561. In New York, the tenant may discharge the lien by giving a bond with surety for the rent. If the landlord claim and receive more rent than is due, he is liable to double damages. Tenn. Sta. 1825; ch. 21; Misso. Sta. 377; 5 Watts, 184; Del. Sta. 1829, 366-7; 1 N. J. L. 187; Aik. Dig. 367; 1 N. Y. Rev. Sta. 746; 6 Yerg. 267; 4 Griff. 671; 3, 404; 1 Ky. Rev. L. 639; Md. L. 1881, ch. 171; Illin. Sta. 1842-3, 142; Martin, 5 W. & S. 220; Clay, 506; *Hardeman v. Shumate*, 3 Port. 398; *Bromley v. Hopewell*, 2 Harr. 400; *Thompson v. Sprinks*, 12 Ala. 165; *Denham v. Harris*, 18, 465; Iowa Code, ch. 82, sec. 1290; Va. Sta. 1840. 1, 77; *Tift v. Verden*, 11 S. & M. 153; *Forman v. Proctor*, 9 B. Mon. 124.

The following are some of the leading miscellaneous decisions in construction of these statutes.

In Virginia, if an officer take the goods of the tenant without satisfying the lessor's claim, the measure of damages in a suit by the latter is not the value of the goods, but the amount of rent—the former exceeding the latter. *Crawford v. Jarrett*, 2 Leigh, 630. The

landlord's lien, for a year's rent, on the goods and chattels of his tenant, does not protect them from an execution, except where they are in or upon the premises. *Geiger v. Harman*, 8 Gratt. 180.

In Tennessee, an action lies by the landlord against a purchaser of the crop, but not until he has recovered a judgment against the tenant for the rent. The landlord has a lien even against a sub-lessee, who has paid the original tenant. *Ballantine v. Greer*, 6 Yerg. 267; *Rutledge v. Walton*, 4, 458.

This lien is superior to the claim of the debtor under the laws exempting certain property from execution. *Hill v. George*, 1 Head, 894.

Under the act of 1840, in North Carolina, which gives to a landlord, whose rent is to be paid in a part of the crop, a certain interest in the crop; if the tenant retains possession, and the whole crop is levied upon as his property, the landlord may bring an action on the case against the officer, but not trespass—having neither property nor possession. *Peebles v. Lassiter*, 11 Ired. 78. An execution against the tenant gives a lien upon the crop from its *teste*, paramount to any claim of the landlord under a subsequent transfer for the rent. *Deaver v. Rice*, 4 Dev. & B. 431.

In New York, where a sheriff, having in his hands an execution against a tenant, previous to a sale receives a notice from the landlord that rent is due to him, and requiring the sheriff to levy the amount of the rent and pay the same to the landlord; the payment of the money collected by the sheriff into court will not be a bar in a suit against him by the landlord for the amount of such rent. *Acker v. Ledyard*, 8 Barb. 514.

Where an execution creditor, as well as the tenant, admits that there is a certain sum as rent due the landlord, the sheriff cannot discharge himself from liability to the landlord by paying the money into court, in a suit in which the landlord is not a party. *Ib.*

Where an offence was committed against the New York statute, prohibit-

*vice*, the only one known to the common law, and the one chiefly in use in the United States, is thus defined:<sup>1</sup> "Where a tenant holds his lands by fealty or other services and a certain rent." The name *service* was applied to this rent, because it was a substitute for the feudal services which in early times the tenant

<sup>1</sup> 5 Lit. 218.

ing the removal of goods from demised premises, to avoid the payment of rent, (2 Rev. Sts. 503, sec. 17,) so that the landlord's right to sue for the penalty imposed was perfect, before distress for rent was abolished by the act of 1840, (p. 869); held, his right of action was not taken away by the latter statute. *Couley v. Palmer*, 2 Comst. 182.

Only one penalty can be recovered, and all who assist may be sued together. *Ib.*

In Pennsylvania, a sheriff who sells land on execution which is subject to arrears of ground-rent, and distributes the fund to other persons, is personally liable to the owner of the ground-rent. *Mather v. McMichael*, 1 Harris, 801.

So, though he stipulates in the conditions of sale, that, unless the claim for ground-rent is presented before he parts with the purchase-money, the arrears will be paid by the purchaser. *Ib.*

The preference of a landlord for one year's rent is not confined to the rent for the year immediately preceding the execution, although a new year has commenced, for which the rent accrued has been paid; nor does it make any difference that the year's rent due accrued under a former lease, which has expired. *Richie v. McCauley*, 4 Barr, 471; *Parker's Appeal*, 5 Barr, 890.

Where the property of a tenant is levied on upon the premises, the landlord is entitled only to the rent due at the time of the levy, out of the proceeds of the sale. Nor can he set off the rent becoming due after the levy, against the tenant's book account against him, for which credit is asked, as a deduction from the rent, in a feigned issue between the landlord and the execution creditors, to try the amount of rent due. *Case v. Davis*, 3 Harris, 80.

Where the tenant was to pay taxes, the landlord is not entitled to the amount of taxes paid by him after the levy. *Ib.*

Three years prior to a sheriff's sale of a tenant's goods found on the demised premises, the tenant incurred a forfeiture

of his lease, six months' rent being then in arrear. Held, that the landlord was entitled to be paid the rent in arrear, at the time the forfeiture was incurred, out of the proceeds of sale. *Moss's Appeal*, 85 Penn. 162.

The landlord's right to be paid out of the proceeds of sale depends on his power to distrain on the goods sold; and, a landlord having power to distrain after the determination of the term, he is entitled to payment out of the proceeds of a sheriff's sale of goods found on the demised premises, under an execution against the lessee. *Ib.*

A landlord is entitled to claim rent payable in advance, out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises. *Appeal of Collins*, 85 Penn. 83.

The waiver of the benefit of the exemption law by the tenant, in favor of the execution creditor, will give the latter no preference over the claim of the landlord, in whose favor there is no such waiver. *Ib.*

In Maryland, arrears of rent, of which the sheriff had notice by a due warrant of distress, before sale, cannot be retained for the use of the landlord by the sheriff out of the proceeds of the goods of a stranger levied upon, while on the demised premises, under a writ of attachment, to compel an appearance at law; the same goods having been duly condemned, and afterwards sold by *seri jactas*, under the judgment of condemnation. *Fisher v. Johnson*, 6 Gill, 854.

In Kentucky, under the act of 1848, a tenant, after entering upon the premises, cannot defeat his landlord's lien upon his property by mortgaging it. *Beckwith v. Bent*, 10 B. Mon. 95.

If the landlord (prior to the act of February 18, 1868) claim the lien conferred by section 14, article 2, title Landlord and Tenant, Rev. Sts., he can only obtain it by having a distress warrant levied on the property. If this be not done, he is only entitled to the benefit of section 20, by which the officer levying

paid to his lord. In a very late case it is said: "Rent-service was an essential element of the feudal tenure. It did not depend on contract; it resulted necessarily out of the grant of the feud."<sup>1</sup> To a rent-service the power of distress was inseparably incident.<sup>2</sup> A *rent-charge* is a rent granted out of lands by deed. Such rent is not *in itself* subject to be enforced by distress, but is usually *charged* expressly with this right, and hence derives its name of *rent-charge*. It is said that rent-charges, though of great antiquity, were against the policy of the common law, inasmuch as they were commonly for the benefit of the younger children, and rendered the grantor less competent to perform his feudal services, while they did not subject the grantee to such services. Hence a rent-charge is *against common right*.

<sup>1</sup> Per Woodward, J. *Wallace v. Harmstad*, 44 Penn. 497.

<sup>2</sup> Lit. 218.

an execution or attachment on the property of the tenant is only required to pay the landlord out of the proceeds thereof the amount due and in arrears not exceeding one year's rent. *Williams v. Wood*, 2 Met. (Ky.) 41.

The act of 1848, in Missouri, "concerning landlords and tenants in St. Louis county," gives no lien, unless the rent be due and certain. But where a certain rent has been reserved for a house, and additional premises are rented at an uncertain rent, the whole rent is not thereby rendered uncertain. *Glasgow v. Ridgeley*, 11 Mis. 84.

In South Carolina, where a sheriff levied, under execution, on goods and chattels, other than slaves, which were liable to distress for rent, and left them in possession of the tenant under bond for delivery, and the goods and chattels were removed by the tenant from the premises before the day on which they were advertised to be sold by the sheriff; it was held, that the sheriff, who had notice of the landlord's claim for rent, was liable to the landlord for the rent due on the day of levy, although the goods were never sold by him. the execution having been otherwise satisfied after the goods were removed by the tenant. For rent due after the levy, the sheriff is not liable. *Matter of Connor*, 12 Rich. 849.

Goods seized in attachment by the sheriff are in the custody of the law,

and are not liable for rent not due but growing due. *Dawson v. Dewan*, 12 Rich. 490.

Service of attachment on a garnishee is not equivalent to seizure by the sheriff. *Ib.*

In Louisiana, in a suit brought by a lessor against the syndic of an insolvent lessee, although the lessor's privilege can only be regularly considered upon a tableau of distribution, yet a prayer for general relief in the petition will enable the court to reserve the rights of all parties interested in the matter. *Dubois v. Xiques*, 14 La. An. 427.

Where the goods of third persons are placed, with their consent, in a leased house or store, they become subject to the pledge of the lessor. *Twitty v. Clarke*, 14 La. An. 508.

As the converse of the landlord's lien referred to in the text, in some cases the tenant may acquire a lien upon the land against the landlord. Thus, he shall have such lien in Kentucky, where he has been compelled to pay taxes upon the land beyond or against his contract. In Maryland, New Jersey and New York, the tenant is allowed to deduct the amount of such taxes from his rent. 2 Ky. Rev. L. 1364; 3 Md. L. 121; 1 N. Y. R. S. 419; 4 Griff. 1274. As to special remedies in case of landlord and tenant, see *Ward v. Wandell*, 10 Barr, 98; *McCaskle v. Amarine*, 12 Ala. 17.

But where a rent-charge is granted for valuable consideration, as in case of partition between parceners, or in lieu of dower, it is said the owner may *distrain of common right*. A section of the statute of uses transfers to the *cestui que use* of a rent-charge the legal seisin and possession of such rent.<sup>1</sup> A *rent-seck* or barren rent is one, for recovery of which by distress, at common law, no power is given either by law or by agreement. It does not differ from a rent-charge, except in this particular. Being connected with the power of distress, a rent-charge is regarded as an interest in, or specific portion of the land—bound by a judgment and subject to execution; while a *rent-seck* has none of these properties. Where a lessee assigns, reserving rent to himself, the excess over that reserved to the lessor is said to be a *rent-seck*.<sup>2</sup> A *fee-farm* rent is a perpetual rent reserved on a conveyance in fee-simple. It is said that in England, since the statute of *quia emptores*—by which tenure was to be always of the *chief lord*, instead of the immediate donor—a fee-farm rent is impracticable, because a grantor in fee retains no reversion, which is essential to a rent. It seems, however, that such reservation, accompanied by a power of distress and re-entry on non-payment, might make a good rent-charge; and in the United States, though unusual, it would undoubtedly be legal and valid.(a)

<sup>1</sup> Co. Lit. 143 b; 3 Cruise, 187; Lit. 252; *Dodds v. Thompson*, Law R. (Eng.) 1866, Mar. p. 132.

<sup>2</sup> *Cornell v. Lamb*, 2 Cow. 657; *People v. Haskins*, 7 Wend. 463.

(a) In Massachusetts, a rent of this description is sometimes known by the name of *quit-rent* or *rent-charge*, and in New Jersey and New York as a *rent-charge*. It is said (*Marshall v. Conrad*, 5 Call, 384.) that *quit-rents*, in England, were rents reserved to the king or a proprietor on an absolute grant of *waste land*, for which a price in gross was at first paid, and a merely nominal rent reserved as a feudal acknowledgment of tenure; and that, inasmuch as no rent of this description can exist in the United States, where a *quit-rent* is spoken of, some different interest must be intended. See *Sneed v. Ward*, 5 Dana, 187. In Pennsylvania it is termed a *ground-rent*, and is said to be a very common species

of inheritable estates. In that State, the statute *quia emptores* is not in force; and a ground-rent is therefore, as at common law, a *rent-service*, and not a rent-charge, as in England since the statute. 1 Whart. 337. It is said by the court, in their very learned and elaborate opinion, that, before the statute *quia emptores*, a rent-charge could exist only where one man granted to another and his heirs a yearly sum charged on the land, with the right of distress; but this statute made a fee-farm or ground-rent a rent-charge, by construing the reservation by the grantor into a promise or grant by the grantee. Where land, on which a perpetual rent has been reserved, is conveyed either by indenture or deed-poll.

§ 6. *Seisin* of a rent can be had only by receipt of the whole or a part of it, except in case of a conveyance to uses, which, by the operation of the statute of uses, gives a *seisin* immediately without any receipt.<sup>1</sup>

§ 7. A rent can issue only from corporeal hereditaments, or,

<sup>1</sup> 8 Cruise, 188.

to be held "under and subject to the payment of the said rent, as the same shall accrue," forever; the grantee is liable for the rent, only so long as the freehold remains in him, and not to indemnify his grantor for the payment of rent accruing after he has conveyed the premises. *Walker v. Physick*, 5 Barr, 193.

The payment, by an assignee of land, of a ground-rent which accrued while occupied by him, does not raise the presumption of payment of a judgment for the ground-rent against his assignor. *Wills v. Gibson*, 7 Barr, 154.

A purchaser of land sold on execution is not liable for a ground-rent accruing between the sale and the sheriff's deed. *Thomas v. Connell*, 5 Barr, 13.

A conveyance reserving a ground-rent to the grantor, with a covenant to convey in fee simple absolute on payment of a certain sum, is an executed contract. *Sahl v. Wright*, 6 Barr, 433.

In an action of covenant brought by the grantee of a ground-rent against the grantor, after the grantor has sold the land out of which it issues, it is not necessary to notify the vendee as tenant; and the sale of the whole lot on execution on the judgment divests the title of such vendee as well as of the defendant. *Charnley v. Hansbury*, 1 Harris, 16.

A took a lot on ground rent, and contracted with B to give him a deed on the performance of certain conditions; B was put in possession, subject to the ground-rent, and fulfilled the conditions; and A afterwards purchased the ground-rent. It seems, such purchase did not merge the ground-rent in fee, nor enure to the benefit of B. *Ib.*

Where tenants in common, one of whom held in trust, joined in a conveyance, reserving a ground-rent, the trustee having no power to make such conveyance, the grantee, who, at the time of the conveyance, knew all the facts relative to the title, although mistaking the legal effect of the deed creating the

trust, cannot, by tendering a reconveyance, recover back the ground-rent paid by him. *Kerr v. Kitchen*, 7 Barr, 486.

An action of covenant for ground-rent lies against the assignee of a lessee for arrears prior to the assignment, whether the premises be held by deed-poll or otherwise. *McQueesney v. Hiesler*, 33 Penn. 485.

Where a lot of the annual value of \$37.50, and an agreement by A, the owner, to advance \$375 to aid in erecting a house on the lot, constitute the consideration of a perpetual rent to issue out of the lot, and A conveys it subject to such rent, and B, the lessee, covenants to erect a house upon it sufficient to secure the rent, but suspends the erection in an unfinished state, after having received \$200 of the advance, and before he is entitled to any more, and then his title is sold out on a judgment of the lessor against him; the sheriff's vendee, not having completed the house, is not entitled to have the rent reduced by way of equitable set-off in proportion to the \$175 yet remaining to be advanced. *Mangle v. Stiles*, 31 Penn. 72.

In New York, the Pennsylvania view is not adopted; but every rent is a rent-charge, where the landlord has no reversion. See Co. Lit. 148 b., n. 5; *Adams v. Bucklin*, 7 Pick. 121; *Farley v. Craig*, 6 Halst. 262; 1 Whart. 860; *Ingersoll v. Sergeant*, 1 Whart. 337. (*Ingersoll v. Sergeant* "has been so often recognized and followed, as to have become a rule of property." Per Woodward. J. *Wallace v. Harmstad*, 44 Penn. 495;) Lit. 217, *Gilbertson v. Richards*, 4 H. & N. 277; *Marshall v. Conrad*, 5 Call, 384; *Cornell v. Lamb*, 2 Cow. 652; *Kenege v. Elliot*, 9 Watts, 262; Penn. St. 1840, 249; *Governors, &c. v. Harrild*, 2 Man. & G. 713 n.; *Flower v. Hartopp*, 5 Beav. 476; *Cook v. Brightly*, 46 Penn. 439. (In Ohio such a thing is hardly known as a rent-charge. Walk. 265.) A "sixth sale" or "quarter sale" reservation, contained in a lease in fee, is void; *aliter*, in a

as Lord Coke says, an inheritance that is *manurable* or *maynor able*; because these alone are subject to distress; and incorporeal rights, being always granted originally by the crown, are created for particular purposes, foreign from the payment of rent, which would therefore be contrary to the intention of the grant.<sup>1</sup> A rent cannot be reserved from a rent. Thus, if one lease lands for life, reserving rent, and then grant this rent, reserving rent, the latter reservation is void.<sup>2</sup> But rent may be reserved upon a lease of the vesture or herbage of land; because the beasts feeding there may be distrained. So upon a lease of a remainder or reversion; because, when become an estate in possession, it will be subject to distress, and it is a *tenement*.<sup>3</sup>

§ 8. Upon a lease to commence *in futuro*, rent may be reserved immediately; because, when the lessee takes possession, the lessor may distrain for the arrears.<sup>4</sup>

§ 9. The preceding remarks, as to the kinds of property from which a rent cannot legally be reserved, are to be received with some qualifications. As a mere matter of *contract*, the reservation of a return or compensation for the use of any kind of real estate is binding, and may be enforced by action. But, unless the property is of the description above pointed out—first, there can be no distress, and second, by a grant of the reversion, the rent will not pass, not being *incident* thereto.(a) It is said, however, that the rent reserved upon a lease of *tithes* will pass

<sup>1</sup> Co. Lit. 47 a; 142 a; Gilb. 20-22.

<sup>2</sup> 2 Rolle, Abr. 446.

<sup>3</sup> Co. Lit. 47 a.

<sup>4</sup> 2 Rolle, Abr. 446.

lease for years or lives. *Overbagh v. Patrie*, 8 Barb. 28.

Where the payment of such sixth sale or quarter sale is made a condition subsequent, the condition is void. *Ib.*

The relation of landlord and tenant exists, as between grantor and grantee, in a conveyance in fee of manor lands, reserving rents. A statute privity is created, enough to pass a covenant to pay rent to each subsequent assignee of the land. *Van Rensselaer v. Smith*, 27 Barb. 104.

The interest of a grantor or lessor in a grant or lease in fee, as well in his own hands as in those of his assignees, is, *pro hac vice*, equivalent to a reversion.

A rent-charge with a clause of distress, reserved out of a grant in fee, is valid, and descends to the heirs. *Van Rensselaer v. Hays*, 19 N. Y. 68.

The devisee of such rent-charge can maintain covenant therefor by force of the statute of 1805, whether he can or not at common law. *Ib.*

Such covenant runs with the land, and is binding on the heirs or assignees thereof. *Ib.*

(a) A stipulation in a lease, that the rent shall be applied to a specified purpose, does not change its character of rent. *Ryerson v. Quackenbush*, 2 Dutch 236.

with the reversion. At common law, a reservation of rent, upon a lease *for life* of incorporeal property, is for all purposes void; no action of debt will lie for it. And whether St. 8 Anne, 14, applies to this kind of property, seems doubtful.<sup>1</sup>

§ 10. Rent may be reserved upon every conveyance, which either passes or enlarges an estate. It is usually reserved upon a lease.<sup>2</sup>

§ 11. Where several lands are let by one conveyance, distinct rents reserved, and a right of re-entry upon the whole provided for non-payment of the rent of one; the reservations create several tenures, demises, reversions and rents, and an entry upon one parcel for non-payment of the rent of another is illegal and void.<sup>3</sup> And a third person may purchase the reversion of one of the parcels, and maintain ejectment for non-payment of the rent of that parcel.<sup>4</sup> But, if the rent be at first reserved *in gross* or entire for the whole of the lands leased, and the rent of each parcel afterwards designated separately—as, for instance, for A, B and C, £15, viz: £5 for A, £5 for B, and £5 for C; the latter sums will be regarded as mere valuations, and for non-payment of one the lessor may re-enter upon the whole.<sup>5</sup> Upon the same principle, if tenants in common join in making a lease upon condition; as they have several estates, the demise, the condition, and the rent will also be construed as several.<sup>6</sup>

§ 12. Where a statute provides for re-entry on the *land*, and a sale of the lessee's right in *such lease*, upon non-payment of rent; the entry must be made upon the whole land, without regard to any sub-leases of a part.<sup>7</sup>

§ 13. A *rent-service* can be reserved only to the owner of the land, or his legal representatives after his death, or to a party who is *privy* to the lease, as to one of two joint-tenants, who

<sup>1</sup> Windsor v. Gover, 2 Saun. 302; v. Hakewill, 8 Man. & G. 297; Paterson Co. Lit. 47 a; Ib. n. 8; 44 b, n. 8; 47 v. Lang, 6 Beav. 690.

a, n. 4.

<sup>2</sup> Co. Lit. 144, a; Gilb. 22.

<sup>3</sup> Winter's case, 2 Rolle, Abr. 448; Tanfield v. Rogers, Cro. Eliz. 840; Lee v. Arnold, 4 Leon. 27. See Wollaston

<sup>4</sup> Hill's case, 4 Leon. 187.

<sup>5</sup> Knight's case, 5 Rep. 54.

<sup>6</sup> Ib., Moo. 202.

<sup>7</sup> Hart v. Johnson, 6 Ohio, 88.



join in leasing by indenture; because it is a recompense for the use of the land, and should therefore belong to him from whom the land passes. If the lease is to commence after the death of the lessor, the rent may be legally reserved to his heirs, who will take it, not as purchasers, but by descent, as incident to the reversion. And hence the lessor may release the rent during his life.<sup>1</sup>(a) In such case, the law is strict in requiring the use of the word *heirs*. Thus, where a father, and his son and heir apparent, joined in making a lease, to commence from the father's death, and reserved the rent to *the son*; held, the reservation was void, and the son had no right to distrain for the rent, after the death of the father.<sup>2</sup> Upon the same principle, at common law, if a reversioner assigned over his estate, the assignee could not avail himself of any covenant or condition in the lease. The law upon this subject has already been considered, in treating of the assignment of estates for years. (See chap. 15.)

§ 14. Where the rent is reserved to no one in particular, it shall be payable to the lessor during his life, and after his death shall pass with the reversion; and any doubtful word shall be taken in that sense which will best answer the nature of the contract. Thus, if the lessor is a tenant in special tail, and reserves the rent to himself, his heirs and assigns; the rent, upon his death, shall pass to the heir in tail.<sup>3</sup> Lord Coke says, that, if a lessor reserve rent generally, without showing to whom it shall go, it shall go to his heirs. But, in the sentence immediately preceding, he says, that, if the rent be reserved to him,

<sup>1</sup> Lit. 846; Co. Lit. 47 a, 148 b; 214 a, n. 1; Gilb. Rents, 61; 2 Rolle, Abr. 447; Sacheverell v. Froggatt, 2 Saun.

870. See Gilbertson v. Richards, 4 H. & N. 277.

<sup>2</sup> Oates v. Frith, Hob. 180.

<sup>3</sup> Cother v. Merrick, Hard. 89.

(a) In an action for rent, it appeared that the defendant, a foreigner, occupied the premises, but not for what period; that an account had been presented to him and explained by A, which set forth a certain sum as due for rent for the term mentioned in the complaint, and the defendant promised to pay it. Held, *prima facie* sufficient to maintain a judg-

ment. Treadwell v. Bruder, 8 E. D. Smith, 506.

It is error to charge that it makes no difference from whom the tenant had hired, he having promised to pay A, for, if the hiring were from B, the promise would be without consideration, unless A was entitled to the rent on the contract of B. Broddie v. Johnson, 1 Sneed, 404.

and not to him and his heirs, the rent shall determine by his death.<sup>1</sup> It has been held, that, where rent is reserved generally to be paid quarterly during the term, the lease does not terminate on the death of the lessor; but the rent is payable to his heirs, if he dies intestate, who may maintain an action of debt on the lease to recover the same.<sup>2</sup>

§ 15. How far an express reservation may control the legal disposition of a rent, seems to be somewhat doubtful. It is said, that where the law particularizes the persons, the agreement of parties prevents the construction of law, and, if the reservation is special, and to improper persons, the law follows the words. But yet, a rent reserved to the lessor *and his assigns* will terminate with his death. So if the lessor, being owner of the inheritance, reserves the rent to himself and his executors; or if, having himself only a leasehold, he reserves the rent to his heirs; in either case, the rent will cease at his death; because the representatives to whom it is limited, having no reversion, cannot take the rent incident thereto, and the other class, to whom it is not limited, cannot take it, for the want of such limitation. But if, upon a lease made by the owner in fee, the rent is reserved to himself, his executors, administrators and assigns, yearly, *during the term*; inasmuch as the latter clause indicates a clear intent that the rent should not cease with his death, it will pass with the reversion to his heirs, or to a devisee.<sup>3</sup>

§ 16. Where the owner of a freehold estate, as for instance a tenant *pour autre vie*, to him and his heirs, assigns his whole estate, leaving no reversion in himself, and reserves a rent to himself, his executors, administrators and assigns, which the lessee covenants to pay accordingly; the rent, upon the lessor's death, will pass to his personal representatives, notwithstanding a provision that, on non-payment, he and *his heirs* might re-enter; for the heirs would be mere trustees for the executor.<sup>4</sup>

<sup>1</sup> Co. Lit. 47 a.

<sup>2</sup> Jaques v. Gould, 4 Cush. 384.

<sup>3</sup> Cothor v. Essex, Hard 95; Co. Lit. 47 a, and notes 8, 9; Wooton v. Edwin, 12 Rep. 36 (marginal note: "This case

will hardly be held for law at this day"); 1 Ventr. 161; Sacheverell v. Froggatt, 2 Saun. 367, and notes.

<sup>4</sup> Jenison v. Lexington, 1 P. Wms. 555.

§ 17. If a tenant for life and the reversioner join in a lease, reserving rent generally, it will go to the former during his life, and then to the latter.<sup>1</sup>

§ 18. Where a tenant for life, with subsequent limitations, leases, under a *power to lease*, reserving rent to those in reversion or remainder, it has been doubted what disposition the law would make of the rent after his death; because the lessee comes in under the original conveyance creating the power, and therefore a reservation of the rent to the heir of tenant for life, or the reversioner, or remainder-man, they not being the personal representatives of the tenant, would be void. But it has since been settled that such reservation is good, and that a remainder-man, being a privy in estate, may distrain for the rent. In such case, the most clear and sure way is to reserve the rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person.<sup>2</sup>

§ 19. With regard to the persons to whom rent may be reserved, substantially the same remark may be made that was made with reference to the property out of which rent may issue. A reservation to other persons than those above designated, though invalid as technically a *rent*, may be good as a *contract*. Thus, if the lessee covenant to pay the debts of the lessor, as rent, he becomes liable as a trustee, but no distress lies against him.<sup>3</sup>

§ 20. From what has been said, it appears that rent is *incident* to the reversion. Hence, by a general grant of the latter, the former will also pass; though not the converse. The rent may be separated from the reversion, but there must be a clear intention, or a necessary implication to that effect, in which case a subsequent grant of the reversion does not pass the rent. By a grant of the reversion, either absolute or conditional, the grantee becomes entitled to rents which fall due subsequently, and may maintain an action therefor (unless paid, before notice of the sale, to the vendor), in virtue of the assignee's privity of estate

<sup>1</sup> Co. Lit. 214 a.

<sup>2</sup> Chudleigh's case, 1 Rep. 139 a.; Harcourt v. Pole, 1 And. 278; 2 Saun. 369,

n 4. See Lock v. De Burgh, 6 Eng. L. & Eq. 65.

<sup>3</sup> Ege v. Ege, 5 Watts, 184.

with the tenant. The assignor cannot maintain such action. Otherwise, with rents already due; and, although these be expressly assigned, the grantee cannot sue for them in his own name. An assignee of the reversion will be entitled to the whole rent of the current quarter, notwithstanding a parol agreement for apportionment. (See *ante*, ch. 14, sec. 47.)(a)

§ 21. Rent in arrear (as has been stated, sec. 38,) is a *chose in action*, not by law assignable, and upon which an assignee cannot sue in his own name. In Delaware, a statute provides that such rent shall not be assignable *with the reversion*.<sup>1</sup>

§ 22. With regard to *the time when rents are payable*, it is said, if there is no express stipulation, they are payable at the end of a year.(b) But usage will control this presumption, and render

<sup>1</sup> Dela. St. 1829, 370; *Demarest v. Willard*, 8 Cow. 206.

(a) It is held that rent may be assigned without the reversion, and apportioned on different parts of the estate and among different parties, each of whom, if the tenant attorn, may sue in his own name. *Ryerson v. Quackenbush*, 2 Dutch. 236.

A. and B, his wife, lease land jointly owned by them, reserving rent. A dies, having devised the *reversion* to B. B marries C and dies, and then C dies. The heirs of C shall not have the rents accruing after his death, upon the ground of their being separated by the devise from the reversion, and therefore vesting absolutely in C. *Sampson v. Grimes*, 7 Blackf. 176. See *Peck v. Northrop*, 17 Conn. 217; *Burden v. Thayer*, 8 Met. 76; *Condit v. Neighbor*, 1 Green, 83; *Miller v. Stagner*, 3 B. Monr. 58; *Flinn v. Calow*, 1 Man. & G. 589; *Childers v. Smith*, 10 B. Mon 235; *Gibbons v. Dillingham*, 5 Eng. 9; *Beach v. Barons*, 18 Barb. 306.

Where the owner of lands leased them for years, and gave the lessee the right to make certain improvements, upon obtaining authority from the legislature or city council, and also reserved a right of entry and distress, and afterwards sold his reversion, and the purchaser recovered the premises for non-payment of rent; held, the right to enter and make and hold the improvements passed to the purchaser. *City of Baltimore v. White*, 2 Gill, 444.

A purchaser of land at sheriff's sale is

entitled to rent from the day of sale. *Stayton v. Morris*, 4 Harring. 224.

Where land thus sold is in possession of a tenant, the purchaser has a remedy by distress or attachment to recover rent against a person occupying by actual demise; and he may recover from any occupant a reasonable compensation in the action for use and occupation. *Ib.* Such purchaser is not liable for a *ground-rent* accruing between the time of sale and the time of taking the deed. *Thomas v. Connell*, 5 Barr, 18.

Where a lessor assigns all his real estate in trust for the payment of his debts, the trustee is the proper person to bring an action for rent accruing subsequent to the assignment. *Ryers v. Farwell*, 9 Barb. 615.

Where a surety of a lessee, by a separate covenant, guarantees the payment of the rent and the performance of the covenants of the lease, such separate covenant passes to the grantee of the reversion, and enables him to maintain an action against the surety in his own name for a breach of his covenant. *Allen v. Culver*, 8 Denio, 284; *Peck v. Northrop*, 17 Conn. 217.

(b) More especially in case of a lease for one year. *Menough*, 5 Watts & S. 432. Lease for three years, "at the rent of \$800 yearly," which was to be paid semi-annually. Held, an annual rent, and that the sum of \$400, paid after six months, must be considered as a portion

them payable semi-annually or quarterly. In the city of New York rents are made payable quarterly. And this legal implication will be controlled by any express agreement. If the rent is made payable *annually during the term*, the first payment to begin two years after, the latter clause shall prevail.<sup>1</sup>

§ 23. If rent is reserved to be paid at two certain periods, an equal portion of the whole shall be paid at each.<sup>2</sup>

§ 24. If rent is made payable at two certain times, or within thirteen weeks thereafter, the latter clause is for the benefit of the tenant, and the rent is not due till the end of the thirteen weeks. Hence, if the lessor were a tenant for life and die before this time, his executors cannot sue for the rent. But if it were merely provided that, unless the rent were paid within thirteen weeks from the time fixed, the lessor might re-enter; this would be only a dispensation of the entry, and the rent would be due at the appointed day. And the extension of time above mentioned is granted, only during the continuance of the contract, and for the instalments of rent prior to the last. The last instalment is payable on the day specified, upon which the lease itself terminates.<sup>3</sup>

<sup>1</sup> *Cole v. Sury*, Lat. 364; *Shuny v. Brown*, 3 Bulstr. 329; 3 Kent, 374; 3 Cruise, 194. See *Hopkins v. Helmore*, 8 Ad. & Ell 463; *Allen v. Culver*, 3 Denio, 284; *Boyd v. McCombs*, 4 Barr. 146; *Ridgley v. Stillwell*, 27 Mis. 128. As to the presumption of payment arising from former receipts, see *Patterson v. O'Hara*, 8 Smith, 58.

<sup>2</sup> *Clun's case*, 10 Rep. 127; *Glover v. Archer*, 4 Leon. 217; *Barwick v. Foster*, Cro. Jac. 283, 310; *Biggin v. Bridge*, 3 Leon. 211; *Morris v. Kiffin*, 3 Keb. 534.

<sup>3</sup> 2 Rolle's Abr. 450.

of such annual rent. *Irving v. Thomas*, 6 Shepl. 418.

Upon a lease for six months, the term beginning on Tuesday, and the rent payable weekly in advance, the lessee has the whole of Tuesday to make payment. *Sherlock v. Thayer*, 4 Mich. 355.

Where a lease contains a stipulation for a rent in kind, without specification of the day of payment, it is payable at the expiration of the year; and an assignment of the rent by an order on the tenant, accepted by him, will not pass the right to the rent as against the purchaser from the sheriff's vendee of the landlord's estate, under a judgment prior to the lease. *Boyd v. McCombs*, 4 Barr. 146.

Payments made by a tenant to his

landlord, on account of rent, generally, will, in the absence of any direction or agreement, be applied by law on the rent due at the time, and not on the rent then accruing. *Hunter v. Osterhoudt*, 11 Barb. 33.

Where, as between lessor and lessee, the right existed to quarry and take away granite stone, and a payment was made, under an agreement that the same should be applied to the quarry rents thereafter to become due, and the lessor retained the money; held, he could not set up, in opposition to the application of such payment of rent, another claim as for rubble stone, though connected with the quarry, due from the lessee to him. *Giles v. Comstock*, 4 Const. 270; *Emery v. Owings*, 6 Gill, 191.

§ 25. It has been stated that a rent, before it is due, is *incident to the reversion*, and, therefore, real estate. But after it is due, it is personal estate. In the former case, as has been seen, it passes to a grantee of the reversion. So, upon the death of the landlord, it goes to his heir. But in the latter case, it does not thus pass; and, upon the landlord's death, goes to his executor or administrator. It seems, at common law, neither the heir nor executor of a lessor could recover rent after his death, which was due in his lifetime; but statute 32, Henry 8, ch. 37 (3 Ruff. St. 297), provided otherwise.(a)

§ 26. Rent is said to pass *prima facie* to the heir, unless the

(a) Rent falling due after the lessor's death has been called a *chattel real*. *Green v. Massie*, 13 Illin. 368. In Pennsylvania, a tenant may bequeath, as personally, any rent or other periodical payment which is due. *Park & J.* 467. In New York, a purchaser of the land cannot claim rent for a year prior to the purchase; but only from the next preceding quarter-day; unless it be otherwise agreed. *Ruckman v. Astor*, 8 Edw. 373. It has been held in Maine, that all the rents and income of an estate, which have accumulated, and not so disconnected as to become personal property, pass by a conveyance of the land. *Winslow v. Rand*, 29 Maine. 362.

Where, by a lease in perpetuity, the lessee covenanted to pay all taxes that might be thereafter assessed upon the premises, or upon the lessor, his heirs, &c., by any act of the legislature, for and in respect of the said premises, or any part thereof; held, the tenant was not liable, under this covenant, to pay to the landlord the amount of a tax on the rents reserved in the lease, which the latter had been compelled to pay under an act passed May 13, 1846, entitled "An act to equalize taxation;" such tax being a tax on rents issuing out of the granted premises, properly declared by the act to be for the purpose of taxation of personal estate. *Van Rensselaer v. Dennison*, 8 Barb. 23.

An administrator cannot, by a bill in equity, procure a sum due for rent of land of the intestate, accruing, after his death, from a creditor, to be set off against a judgment obtained by such creditor against himself as administrator; for the administrator has nothing to do with the realty of his intestate, unless

his estate has been declared insolvent. *Bullock v. Sneed*, 18 S. & M. 293.

Where an administrator leases lands of the deceased, the tenant cannot resist payment of the rent on the ground that the premises were sold to pay a debt of the intestate, if the tenant occupied the premises until the end of the term. *Life v. Secrest*, 1 Smith, 819.

Where a testator left his estate to remain undivided until the death of his wife, and the income, in the meantime, to be divided between her and her son and daughter, equally, and at her death the estate to be divided between the son and daughter; held, before the death of the widow, the daughter's husband could not distrain for rent due the estate; and that the executor only could do so. *Reid v. Stoney*, 1 Strobb. 182.

A devisee of one who has granted land in fee, subject to rent, cannot maintain ejectment for rent in arrear, which became payable in the lifetime of the testator, but only for such as has accrued since the will took effect in his favor; and, if he bring ejectment, under the statute, in New York, for rent which became due since his title as devisee accrued, he must show that there was no sufficient distress to pay such rent at the time of bringing the action. It will not be sufficient to show that the property on the premises was inadequate to pay that rent, together with other rent in arrear, which accrued during the testator's lifetime. *Van Rensselaer v. Hayes*, 5 Denio, 477.

If the lessor leave more heirs than one, the rent is apportioned among them, and the tenant is bound to pay each his share. *Crosby v. Loop*, 18 Illin. 625; *Cole v. Patterson*, 25 Wend. 456.

lessor had a mere chattel interest. Hence, if the executor claims it, he is bound to prove his title.<sup>1(a)</sup>

§ 27. Rent, in general, is not due till the last minute of the natural day on which it is made payable. Therefore, if the lessor die during that day, the rent passes to his heir. This rule applies, however, only to leases by owners in fee, or under a power. Where a lease is made by a mere tenant for life, if he die at any time during the day when the rent is payable, it passes to his executors. Though, for the benefit of the lessee, he has till the last instant of the day to pay the rent, yet, it is said, as soon as that day begins, he is at his peril to take care that it be paid. And more especially does the principle apply, where the tenant for life dies after sunset of that day; because he is bound then to pay, under penalty of forfeiting his lease after demand.<sup>2(b)</sup>

§ 28. In case of a lease by tenant for life under a power, it has even been held, that, where the tenant had received the rent before sunset on the day when it was payable, his executors should pay it over to the remainder-man. This decision, however, has been doubted.<sup>3</sup>

§ 29. At common law, there could be no apportionment of rents *as to time*, either in law or equity. Hence, when a lessor, tenant for life, died before rent day, the rent was lost. But the Statute 11 Geo. 2, ch. 19, provides otherwise. (See ch. 17, s. 28, *supra*, s. 14.)(c)

<sup>1</sup> 1 Cruise, 185-7; 2 Ky. Rev. L. 1849; *Stratford v. Wentworth*, 1 P. Wms. 180; *Williamson v. Richardson*, 6 Mou. 596; *Prec. in Chan.* 585; *Dunn v. Di Nuovo*, *Burden v. Thayer*, 8 Met. 76. 8 Mann. & G. 105.

<sup>2</sup> *Duppa v. Mayo*, 1 Sann. 287, n. 17; *Rockingham v. Penrice*, 1 P. Williams, 178.

(a) In New York, one heir can sue alone for his part of the rent. *Jones v. Felch*, 8 Bosw. 63.

(b) If a lease for years, which terminates by the death of the lessor, contains a covenant on the part of the lessee, to pay the rent reserved, and for such further time as he may hold the premises, and he holds over after the death of the lessor; he will be liable to pay the rent subsequently accruing. *Jaques v. Gould*, 4 Cusb. 384.

(c) In New York, New Jersey, Michigan, Missouri and Delaware, statutes provide, that if a tenant for life, lessor, die on the rent day, his executors may recover the whole rent; if before, a proportional part of it. In Delaware, tenant for life, or upon any contingency. In this State, if rent have been paid in advance, so much as applied to that part of the term which is destroyed by the lessor's death shall be refunded. In Missouri, Kentucky, Delaware and New



§30. Rent, before the appointed day of payment, is not *debitum in presenti, solvendum in futuro*, but is a *contingent* claim, liable to be wholly defeated by many intervening acts or events.<sup>1</sup>

§31. For the recovery of rents, the law has provided several remedies.

§32. The first is a *distress*. At common law, this was applicable only to a *rent-service*; but it has been extended by statutes to the other kinds of rents; and also to the executors or administrators of the proprietors after the determination of their leases.<sup>2</sup>

§33. Distress is the seizure of a tenant's cattle or other personal property upon the land, for non-payment of rent, for the purpose and with the right of selling them to obtain payment.

§34. It is said there never has been a process of distress for rent in Massachusetts, and probably the right does not exist. The latter remark is true of the other New England States, and the States of Alabama, Mississippi, North Carolina and Ohio.<sup>3(a)</sup>

<sup>1</sup> Wood v. Partridge, 11 Mass. 498; Bank, &c. v. Wise, 3 Watts, 402.

<sup>2</sup> 3 Cruise, 197.

<sup>3</sup> 4 Dane, 128; Wait, &c. 7 Pick, 105; Aik. Dig. 357; 4 Griff. 1143; 3, 401;

Owen v. Boyle, 9 Shepl. 47; Mayor, &c. v. Pearl, 11 Humph. 249; Howard v. Dill, 7 Geo. 52. See Mitchell v. Coates, 47 Penn. 202; Ingram v. Hartz, 48 Ib. 380.

York, where one is entitled to rents depending on the life of another, he may recover them, notwithstanding the death of the latter. In Kentucky, another statute provides, that where a lessor, having a life estate or other uncertain interest dies before the rent is due, it shall be divided between his executor or administrator and the heir, devisee, reversioner or remainder-man. A similar provision in Virginia. 1 Ky. Rev. L. 668; 1 Virg. Rev. C. 166. In North Carolina, the common law rule is recognized. Gee v. Gee, 2 Dev. & B. 113. In Delaware, Virginia, Missouri and Kentucky, it is specially provided that a husband, after the death of his wife, may recover the rents of her lands. 3 Kent, 376; Misso. St. 376; 1 N. J. Rev. St. 186-7; 1 N. Y. Rev. Stat. 747; 1 Vir. Rev. C. 156; 2 Ky. Rev. L. 1351; Dela. St. 1829, 365. See *infra*, c. 17.

A similar statute to those above mentioned exists in Arkansas. Rev. St. 519. By St. 4 & 5 Wm. 4, ch. 22, where any

lease determines on the death of the lessor, though not strictly a tenant for life, or on expiration of the life or lives for which he was entitled, a proportion of the rent shall be recoverable by him or his representatives. 1 Steph. Comm. 244. The provision as to apportionment does not apply where the death of a party does not end his estate; or as between his heir and executor. Browne v. Amyot, 8 Hare, 178.

(a) In New York it has been expressly abolished. Sts. 1846, 389. This act does nothing more than change the *remedy*, leaving the obligation of the *contract* unimpaired, and a substantial remedy still existing; and is not liable to any constitutional objection. Guild v. Rogers, 8 Barb. 502. See Williams v. Potter, 2 Barb. 316.

In Kentucky a distress lies only for *pecuniary rent*, which is actually due. Under the Kentucky statute of 1748, giving damages in double the amount of the goods distrained, where a distress

## § 35. A lease, or grant of a rent-charge, or conveyance in fee,

is made before the rent falls due; to entitle the party to recover such damages, there must have been a sale under the distress before the rent becomes due. *Fry v. Breckinridge*, 7 B. Mon. 81.

A reversion is necessary to the remedy of distress. Hence, if a lessee assigns, reserving rent, he cannot distrain, unless it is so agreed. Otherwise, where he underlets. *Ego v. Ego*, 5 Watts, 184.

Numerous cases are found in the books relating to the remedy of distress; but, as it is in the United States to a great extent superseded by other forms of action, only a few of the later decisions need be cited.

The right of distress is not so inseparable an incident to a rent-service that it cannot be postponed. Therefore, where A, a mesne landlord, let premises to an under-tenant by a written agreement, which provided, among other things, that no distress should be made till after A had produced the receipt of the superior landlord, and A afterwards distrained for his rent without producing such receipt; held, in an action by the under-tenant against the broker who executed the distress, that A's right was postponed, and the defendant was a trespasser. *Giles v. Spencer*, 40 Eng. L. Eq. 383.

Taking security for the rent does not forfeit the remedy by distress; and taking the tenant's note for the rent, without an agreement that it should operate as satisfaction therefor, can only suspend the remedy by distress until it becomes due, after which the landlord may distrain, even though he has negotiated the note, provided he takes it up at maturity. *Giles v. Ebsworth*, 10 Md. 383.

Where a party applies for the benefit of the Maryland insolvent laws, his property comes under the custody of the law, for the benefit of his creditors, and cannot be distrained for rent due by the applicant at the time of his application. *Buckey v. Snouffer*, 10 Md. 149.

Rent is not, per se, a lien on goods found on the premises; it binds as a lien only when the goods are seized under a distress. *Ib.*

A claim for rent due at the time of the insolvent's application, without a previous levy, accompanied by a subsequent distress, is not a lien or incumbrance within the meaning of the 7th section of the act of 1806, ch. 110, and therefore does not follow the property as an incum-

brance or lien into the hands of the trustee. *Ib.*

A distress for rent does not lie, where the tenant's contract is to deliver a certain number of bushels of wheat, corn, oats, &c., for each acre of ground cultivated in those kinds of grain; nor can the landlord in such case claim rent out of the proceeds of a sale on another person's execution of the tenant's goods. *Bowser v. Scott*, 8 Blackf. 86.

An execution levy and sale upon the land constitutes a removal within the New Jersey statute (Nix. Dig. 418, § 4), as removing the goods beyond the reach of a distress, whether taken away or not. *Ryerson v. Quackenbush*, 2 Dutch. 236.

A tenant contracted to pay annually, for the rent of certain real estate, \$96, in Indiana scrip. Held, the remedy by distress did not lie on such contract. *Purcell v. Thomas*, 7 Blackf. 306.

Under the statutes of Mississippi, an equity of redemption, and any limited interest of the tenant, is liable to be distrained, and to be sold in satisfaction of the rent due from him. *Prewett v. Dobbs*, 18 S. & M. 481.

The goods of a stranger found on demised premises are liable to be distrained, unless specially exempted by the common law or by statute. *Stevens v. Lodge*, 7 Blackf. 594; *Giles v. Ebsworth*, 10 Md. 383.

Goods were mortgaged by a tenant, and left in the tenant's possession, by an agreement in the mortgage. Held, the facts that the mortgage was recorded, and that the landlord had made no objection to the goods remaining on the premises, were no evidence that the goods were on the premises with the landlord's consent. *Ib.*

It seems that, before the statute of New York abolishing distress for rent, a landlord might distrain for rent after administration granted on the estate of the tenant, although he could not before, and after the death of the tenant. *Hovey v. Smith*, 1 Barb. 372.

A landlord, by accepting administration of the tenant's estate, waives his right to distrain. *Ib.*

A distress for rent can be made only in the day time, between sunrise and sunset, that the tenant may have opportunity to tender the rent. *Ib.* *Fry v. Breckenridge*, 7 B. Mon. 81.

A landlord, in order to distrain, may open the outer door in the ordinary way.

Where, therefore, the door of a stable was kept closed by a padlock attached to a movable staple, and the owner and other persons usually opened the door by pulling out the staple; held, a distress upon goods in the stable was legal. *Ryan v. Shilcock*, 8 Eng. L. & Eq. 503. *Quære*, whether a distress is void when the outer door is improperly broken. *Ib.*

A landlord has no authority to break open forcibly a door which is barred or bolted, for the purpose of levying a distress, though the property be fraudulently deposited in the house to prevent a distress. *Dent v. Hancock*, 5 Gill, 120.

Where the relation of landlord and tenant existed to the end of the year 1843, the rent was in arrear, and the landlord, in 1844, had rented the premises to another person, but the first tenant had locked up a quantity of tobacco in a barn on the premises, which the landlord, by breaking into the barn, had taken as a distress; held, the fact, that the first tenant was not in possession when the distress was levied, would not make the entry for the purpose of a distress lawful. *Ib.*

Although, to levy a distress, a landlord, for the purpose of making it, and not acting in conformity to the statute, is not authorized to break open and enter the door of a barn which is barred or bolted, with a view to prevent from without an entry thereat; yet, if the door is simply shut or latched, with the ordinary means of raising the latch left on the outside, an entry is lawful; and, if a door so bolted or barred is forcibly broken open by a person not acting under the authority or sanction, or at the instance, of the landlord or his bailiff, the person required to make such distress is authorized to enter for that purpose at the door thus forcibly broken open. *Ib.*

The right of distraining is lost by a surrender of the term, although with the surrender there is a stipulation to pay rent. The Pennsylvania statute of 1836, secs. 83 and 84, relating to executions, does not protect a landlord in such case, and a surrender, after a levy of an execution against the tenant on his property found on the demised premises, destroys the right of the landlord to such property by distress, by the statute or otherwise. *Greider's Appeal*, 5 Barr, 422.

But a surrender of the premises after distress does not avoid such distress. *Nichols v. Dusenbury*, 2 Comst. 288. See *Webber v. Shearman*, 2 Denio, 362.

The Kentucky statute of 1842, concerning the action of replevin, does not

restrict a tenant who has been distrained upon to his remedy against the landlord; and he may sue the officer who served the distress warrant also. *Powell v. Triplett*, 6 B. Mon. 420.

A power of attorney, appointing an agent to rent out a house, "collect and receive the rents therefor," and to use all lawful remedies, actions, distress and other necessary proceedings, and generally to do, for and in the name of the party giving the power, whatever the agent "may deem necessary and proper for securing and recovering the same," authorizes the agent to levy a distress for rent due before its execution. *Giles v. Ebsworth*, 10 Md. 333.

In an avowry for rent, the tenant cannot offer in evidence a deed dated prior to the lease, "for the purpose of showing that at the time of making the distress the avowant had not the legal title to the premises, and therefore could not distrain." A tenant cannot dispute his landlord's title, though he may show that it has expired. *Ib.*

The proceedings by distress, authorized by the (Md.) act of 1834, chap. 192, are void, unless the provisions are complied with; and in an avowry for rent the warrant to distrain and the proceedings under it are facts to be found by the jury, and they must appear to be correct. *Ib.*

An officer, in making a distress for rent under a landlord's warrant, does not act in his official capacity, but merely as the bailiff of the landlord, and the landlord is in effect the distrainer. *Moulton v. Norton*, 5 Barb. 286.

A sheriff, therefore, is not responsible for the acts of his deputy. *Ib.*

The legislature of New York, in making it necessary to employ certain officers to serve such warrants, did not make the service of them an official act of such officers. *Ib.*

To justify in making a distress, the officer serving the warrant must go back of it, and show an actual demise and rent due. *Ib.*

A warrant of distress may be directed to a sheriff, and he may execute it by one of his sworn deputies. Since the Maryland act of 1834, ch. 192, a landlord cannot execute his own distress. *Giles v. Ebsworth*, 10 Md. 333.

In trespass against the sheriff, by one whose goods have been taken on a distress warrant, the landlord is incompetent to testify on behalf of the defendant, on account of interest; there being an implied contract on the part of the land-

reserving rent, usually contains a *condition*,<sup>(a)</sup> that, if the rent shall not be paid when due, the lessor or grantee may re-enter, and either determine the lease, or hold till he shall be satisfied,

lord, to indemnify the person to whom he directs his warrant, if he had no authority to distrain. *Lord v. Brown*, 5 Denio, 845.

In trespass, where the defendant justifies under a distress warrant, for rent in arrear, and the plaintiff held under a lease, such lease must be produced by the defendant; and it will not be sufficient for him to show that the plaintiff had recognized the person who issued the distress warrant, as assignee of the lessor, and had paid him rent prior to the accruing of that for which the distress was made. *Ib.*

See further *Ridgway v. Stafford*, 4 Eng. Law & Equ. 453; *Brocklehurst v. Lowe*, 40 Ib. 198; *Nichols v. Dusenbury*, 2 Comst. 283; *Moulton v. Norton*, 5 Barb. 286; *Stone v. Matthews*, 7 Hill, 428; *Butts v. Edwards*, 2 Denio, 164; Delaware Rev. Sts. ch. 120 (where distress lies for any rent which may be reduced to a certainty, but is limited to two years); New Jersey, Sts. 1851, 347.

(a) The right of re-entry by virtue of such condition is distinguished from any right founded upon *disloyalty*, or *disseisin* at common law. *Faley v. Craig*, 8 Green, 191.

In Georgia, a statute provides, that, when the rent becomes due and is unpaid, the lessor may re-enter. It seems, no condition in the lease is necessary. *Prince*, 687. The same rule would seem to prevail in Louisiana and California. See *Van Rensselaer v. Holbrook*, 1 La. An. 180; *Kron v. Watson*, 14 La. An. 482; *Treat v. Liddell*, 10 Cal. 302. But this is contrary to the general rule. *Kenege v. Elliott*, 9 Watts, 258. In Vermont, ejectment lies for non-payment of rent, without demand or re-entry. But the suit may be stopped by a payment into court. *Verm. Rev. St.* 216. In Maine it is held, that, in a suit by a lessee upon the covenants in the lease, the defendant cannot set up as a defence a process of forcible entry sued out by him, upon which no judgment has been rendered, to prove an entry for breach of condition. *Wheeler v. Hill*, 4 Shepl. 329. In New York, the landlord may re-enter after fifteen days' notice. Sts. 1846, 369. A suit lies without entry. *Lawrence v. Williams*, 1 Duer, 585.

By a late decision, the landlord's right to re-enter is not complete, without demand of the precise sum due, on the premises, on the day the rent falls due, at a convenient time before sundown. *Academy, &c. v. Hackett*, 2 Hilt. 217. And the tenant is entitled to the time until midnight to pay the rent. *Ib.*

In Massachusetts, it is held that the court has authority, by the common law, to stay proceedings in a writ of entry brought to enforce a forfeiture, designed to secure the payment of rent, and incurred, by accident or mistake, upon the tenant's bringing the amount of the rent, interest and costs into court, for the demandant. *Atkins v. Chilson*, 11 Met. 112.

A lessee incurred the forfeiture of his term, by tendering a quarter's rent, through mistake, a day or two before it was due, and omitting to pay it on the quarter day. The lessor had refused to receive the rent for several previous quarters, and had an action pending against the lessee, to recover the demised premises, on the ground of another alleged cause of forfeiture. After failing in that action, the lessor brought a writ of entry against the lessee to recover the premises, on the ground of the forfeiture by non-payment of the aforesaid quarter's rent. Held, the proceedings in this last action should be stayed, on the lessee's paying to the lessor, or bringing into court for his acceptance, the full amount of the rent in arrear, with interest thereon and costs. *Ib.*

(As to an injunction in equity, see *Duigan v. Hogan*, 1 Bosw. 645.)

In the same State, it is now enacted (Sts. 1847, 440), that, after fourteen days' notice, the landlord may bring a summary process for possession. But payment, or tender, before judgment, prevents a forfeiture. See *Gen. Sts.*

In Missouri, if, by the terms of a lease, rent is to be paid on a certain day, and, if not paid within ten days thereafter, the lease to be forfeited; a tender before the day the rent is due will not prevent a forfeiture. *Illingworth v. Miltenberger*, 11 Mis. 80.

In South Carolina, a court of magistrates and freeholders has jurisdiction to determine whether the forfeiture has

or receive the profits in satisfaction.(a) In the first case, the entry absolutely defeats and determines the lessee's estate; in the second, the lessor is entitled to the profits of the land for his own use, until the rent be paid—the object of such provision being merely to hasten payment; and in the last, the profits shall be applied in payment of the rent, and when paid, or after tender upon the land of what remains due, the lessee shall have the land restored to him. A court of equity, however, makes no distinction between the two last mentioned cases, but compels the lessor to account for the surplus received from the land, after paying the rent and charges. Where the lessor enters to take the profits, he acquires no freehold, but an interest in nature of a distress, which on his death passes to the executor, not the heir, though expressly reserved to the latter. And a proviso for such entry is not strictly a *condition*, which, as will be seen hereafter, must determine the *whole estate*; but a *limitation* to the lessor on failure of payment, and upon payment back again to the lessee.<sup>1</sup>

§ 86. While, for the purpose of distress, no previous demand of the rent is necessary, or, if expressly required, may be made after the day when the rent falls due;(b) an entry for breach

<sup>1</sup> Lit. 327; Co. Lit. 208 a; Ib. n. 2 & 8; Jemmot v. Cooley, 1 Lev. 170; T. Ray. 135, 158; Wartenby v. Moran, 8 Call, 424; Farley v. Craig, 6 Halst. 270-1. See Western, &c. v. Kyle, 6 Gill, 348;

Van Rensselaer, &c. v. Slingerland, 26 N. Y. (12 Smith) 580; Gould v. Bugbee, 6 Gray, 371; Brown v. Bragg, 22 Ind. 122; Keteltas v. Coleman, 2 E. D. Smith, 408.

been incurred, and award restitution. *Follin v. Coogan*, 12 Rich. 44.

In general, there will be no forfeiture without demand of the premises; otherwise, where repeated demands had been made, and the claim was not disputed. *Ib.*

(a) Where it is provided, first, that, in case of the non-payment of rent, the lease shall *cease and determine*, and afterwards that the landlord may *re-enter*; an entry is necessary to restore his title. *Stuyvesant v. Davis*, 9 Paige, 427.

There must be an entry to forfeit the estate. *Garner v. Hannah*, 6 Duer, 262.

(b) Taking a distress is a legal demand where the rent is reserved in money, and in many cases where it is payable in kind; but not in a case where tenants

had contracted to pay rent in iron, and were to furnish iron drawn according to order, and could not know when, nor how much, nor what size of iron to tender. *Hesler v. Pott*, 3 Barr, 179.

If a lease, in addition to the *reddendum* and a covenant to pay rent, provide, that, in case there is no sufficient distress, or any covenant is broken, the lessor may re-enter; he cannot thus re-enter, where there is a sufficient distress. *Van Rensselaer v. Jewett*, 5 Denio, 121. See 4 Dane, 127; *Farley v. Craig*, 8 Green, 191.

By a perpetual lease in fee, executed in 1794, reserving an annual rent, the lessee covenanted to pay the rent on the first day of January of every year, and it was provided, that, if such rent re-

of condition, if made before such demand, is tortious. It is said, that the condition is *in derogation of the grant*; and that the tenant is to be presumed to be residing on the premises in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it and actually making a demand, and by the tenant's wilful default.<sup>1</sup> But if the lease provides that the lessor may enter "without further notice or demand," when the rent is due, no demand is necessary.<sup>2(a)</sup>

§ 37. Upon general principles, re-entry for breach of condition must doubtless be *peaceable*.<sup>3</sup> And where a statute provided that entry must be made peaceably, and a lease contained the clause, that upon breach of any covenant the lessor might enter and expel the lessee by force if necessary; held, a legal provision, and that under it the lessor could not use such force as

<sup>1</sup> Co. Lit. 144 a; *M'Murphy v. Minot*, 4 N. H. 251; Gilb. 178. See 4 Dane. 127; *Denman v. Lopez*, 12 La. An. 823; *Chapman v. Wright*, 20 Ill. 120.

<sup>2</sup> *Fifty, &c. v. Howland*, 5 Cush. 214; *Jones v. Pereira*, 18 La. An. 102.

<sup>3</sup> *Com. v. Haley*, 4 Allen, 318.

maintained unpaid for twenty-eight days, the lessor might prosecute to recover the same, or collect it by distress and sale; and, if no sufficient distress could be found, or if either of the covenants should not be performed, then it should be lawful for the lessor to re-enter, &c. Held, the lease did not make distress a condition precedent to re-entering, nor was there an implied or express agreement, that the lessor should not re-enter, if there was a sufficient distress upon the premises. *Van Rensselaer v. Snyder*, 9 Barb. 302.

(a) If the yearly rent, or any part thereof, should remain unpaid, on any day of payment, for fifteen days, or if default should be made in the performance of any covenant, the lessor might re-enter and remove all persons. Held, an action for possession could be maintained, without giving the fifteen days' notice, prescribed by statute in certain cases. *Keeler v. Davis*, 6 Duer 507.

A lease contained a covenant, in the usual form, by the lessee, to pay all rates or taxes, and a proviso for re-entry upon a breach. Held, non-payment in reasonable time of a poor rate, duly assessed, allowed and published, justified

a re-entry, without showing previous demand or notice. Also, if the covenant was to pay on demand, a demand on the premises of the tenant's son was sufficient. *Davis v. Burnell*, 5 Eng. Law & Equ. 417.

Where, in a lease in fee, there was a reservation of rent, among other things, of one day's service with carriage and horses, payable at a particular day in each year; held, no demand of performance was necessary, before bringing an action for a default. *Van Rensselaer v. Gallup*, 5 Denio, 454.

Lease, conditioned, that, if the rent shall be in arrear, or upon the lessee's failure to perform and observe any covenant in the lease, the lessor may at any time, while the default continues, re-enter and re-possess the premises. The lease also contained a covenant, that the lessee should not occupy the buildings or suffer them to be occupied for dwellings or any unlawful purpose. Held, such covenant ran with the land, and bound the estate in the hands of sub-tenants, and an unlawful use by them worked a forfeiture. *Wheeler v. Earle*, 5 Cush. 81.

would constitute a breach of the peace, but only what would sustain the plea of *molliter manus*.<sup>1</sup>(a)

§ 38. In the creation of rent charges, it is usual to reserve a right of entry, *by way of use*, which, as incident to the rent, becomes executed by the statute of uses as a legal estate. Thus lands are conveyed to A, to the use, intent and purpose that B may receive out of them a certain annual sum or rent-charge; and to the further use, &c., that, if the rent be in arrear for a certain time, B or his assigns may enter and receive the profits till satisfied. When the rent becomes in arrear, the use springs up from the seizin of A, and ceases with the payment. If the rent-charge is assigned, the right of entry passes along with it. Gib. 37.

§ 39. The common law imposes very strict terms upon a lessor in regard to the demanding of rent, requiring that it be done upon the land, at the most public and notorious place, such as the front door, or, if there is no house, at the gate of the land, and before sunset of the day when the rent falls due, that the money may be counted.(b)

<sup>1</sup> Fifty, &c. v. Howland, 5 Cush. 214.

(a) See ch. 19. Although a tenancy has terminated, by expiration of the term or non-payment of rent, or there has been an agreement to surrender, the landlord has no right to enter by force and put out the family and goods of the tenant. *Flaherty v. Andrews*, 2 Smith, 529.

In an action for such ejection, a surrender must be set up in the answer. *Ib.* And it must be an actual delivery of the premises to the landlord. *Ib.* But where a landlord has gained peaceable possession in part, he may use all requisite force to obtain possession of the residue. *Mugford v. Richardson*, 6 Allen, 78.

And upon the expiration of a tenancy, the landlord may take possession by any means short of personal violence. *Todd v. Jackson*, 2 Dutch. 525.

(b) In New York, it is said these rules are in force unless dispensed with in certain cases by statute.

(By a grant made in 1818, a yearly rent of wheat, hens, and one day's service was reserved to the grantor, payable on the first day of February in each year; and the grantee covenanted to pay the

same "at the time and in the manner aforesaid." There was also a proviso that, if the rent remained unpaid for twenty-eight days, the grantor might prosecute or distrain for such rent; and a further proviso, that, if no sufficient distress could be found, or if either of the covenants should be broken, the grantor, his heirs, &c., might re-enter. Held, the grantor had a right to re-enter in two events: 1. If the rent remained unpaid for twenty-eight days, and no sufficient distress could be found; and 2. In case the grantor demanded the rent on the very day it became due, at a convenient time before sunset, and at the particular place where it was made payable, or, if no place was specified in the lease, then at the most notorious place on the premises demised, and the grantee failed to pay the same. Held, also, that a demand, made at the expiration of twenty-eight days from the day the rent became due, was insufficient. *Van Rensselaer v. Jewett*, 2 Comst. 141.)

So in Indiana and Ohio. In New Hampshire, it has been questioned



§ 39 a. Notwithstanding re-entry, an action still lies for the rent for non-payment of which the entry was made.<sup>1</sup>

§ 39 b. Acceptance of or suing or distraining for rent, accrued after knowledge of a breach of condition, is a waiver of the forfeiture.<sup>2</sup> And it cannot afterwards be revived.<sup>3</sup> But knowledge must be clearly proved; and upon that question a verdict in favor of the landlord, unless plainly against evidence, is conclusive.<sup>4</sup>(a)

<sup>1</sup> *Mattice v. Lord*, 80 Barb. 382.

<sup>2</sup> *Gomber v. Hackett*, 6 Wis. 328; 13 Gratt. 278; *Dendy v. Nicholl*, 4 C. B. N.

S. 376; *Price v. Worwood*, 4 Hurl. & N. 512.

<sup>3</sup> *M'Kildoe v. Darracott*, 13 Gratt. 278.

<sup>4</sup> *Keele v. Davis*, 6 Duer, 507.

whether they are adopted in all their strictness; but late cases decide that the demand must be at the day when the rent falls due, in the afternoon, a sufficient time before sunset to allow counting of the money, and upon the land.

A lease provided, that, if the rent should be unpaid for a year after it should become due, the lessor might re-enter, and all the right of the lessee should become extinguished. The rent was demanded on the day fixed, but was not paid. In the course of the year the arrears of rent were tendered to the lessor. Held, the lease was not forfeited. *Jones v. Read*, 15 N. H. 68.

In New Jersey they are held inapplicable, where the tenant denies his holding, or forbids and prepares to resist a distress; or where, by the condition of re-entry, the lessor is merely to hold till paid from the profits. The condition will be saved, either by a tender upon the land, that is, a readiness to make a tender, or a personal offer to the lessor, off the land. *Jackson v. Kipp*, 8 Wend. 280; *Coon v. Brickett*, 2 N. H. 164; *Farley v. Craig*, 6 Halst. 202; 8 Kent, 374; 1 Saun. 287, n. 16; *Boyd v. Talbert*, 12 Ohio, 212; *Sperry v. Sperry*, 8 N. H. 477; *De Lancey v. Garnier*, 12 Barb. 120.

It has been held in Vermont, that, where a rent is merely nominal, as, for instance, an ear of corn annually, non-payment is no ground of forfeiture. *People, &c. v. Socy, &c. Palus*, 652. So, also, that a tender may be made on the day on which the rent falls due, at a late hour in the evening. *Thomas v. Hayden*, (*Windsor Co. July term*, 1848, cited by *Kellogg, J.*) 19 Verm. 587. The strict rule as to a demand of rent has been

recognized by the Supreme Court of the United States. *Connor v. Bradley*, 1 How. 211. In Maine, a lease provided that the lessor might enter, and, without process or notice, expel the tenant if he should fail to pay rent. The lessor gave notice to one claiming under the tenant, but not on the land, nor when any rent was due, that he should look to him for the rent. Held, not sufficient to terminate the lease. *Gage v. Smith*, 2 Shepl. 466.

In California, sec. 13, of the act "concerning forcible entries and unlawful detainers," renders a term for years forfeited by non-payment of rent, but does not dispense with the necessity of demand on the day on which it falls due, and at a late hour of the day. *Chipman v. Emeric*, 3 Cal. 278; *Id.* 334.

Merely failure to pay rent cannot cause forfeiture, and a waiver of demand will never be implied to create a forfeiture of a leasehold estate. *Gaskill v. Trainer*, 3 Cal. 334.

In Missouri, under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of a town were authorized to insert a forfeiture in the lease of the common lands upon non-payment of rent for six months after it became due. Such forfeiture will not be set aside in equity, because no demand of the rent was made. *City v. Lannan*, 26 Mis. 461; *Huth v. City*, *Id.* 466.

(a) Mere standing by, and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry v. Davis*, 3 C. B. (N. S.) 789.

In Pennsylvania, a sheriff's sale of a lease of coal mines, wherein there is a reservation of the right to re-enter for

§ 40. An action of debt lies, upon a *lease for years*, for rent.(a) And leases usually contain a covenant, upon which the action of *covenant* may be brought. At common law, *debt* does not lie for rent, upon a *lease for life*. Otherwise, by St. 8 Anne, c. 14.(b) In addition to the remedies above named, there is the action of *assumpsit* for *use and occupation*, where the letting is not by deed.(c)

non-payment of rent, divests such right and discharges the landlord's lien for rent; and such rent is payable out of the proceeds, in preference to the claims of miners and mechanics. Wood's Appeal, 6 Cas. 274.

The landlord is entitled to a year's rent out of the proceeds of personal property sold on such execution, in preference to the claims of miners and laborers, under the act of 2d April, 1849. Id.

A general covenant to repair, and, further, one to repair within three months after notice from the lessor, are separate and independent covenants; and a right of re-entry attaches for a breach of the former, though no notice be given under the latter. Baylis v. Le Gros, 4 C. B. (N. S.) 587.

A lessor finding the premises out of repair, and intending to take advantage of a clause of forfeiture, entered into an agreement with an under-tenant to let them to him, and subsequently received rent from him. Held, a sufficient recitry. Ib.

(a) Where it is provided, that the rent, if not paid at the appointed time, is to be recovered in an action of debt, no forfeiture can be claimed for non-payment. De Lancy v. Ga Nun, 12 Barb. 128; 5 Seld. 9.

With reference to the nature of the claim for rent, as affected by an express promise or security, see Howell v. Webb, 2 Pike, 360.

An action for rent reserved by deed is not barred in less than twenty years, notwithstanding the limitation of six years prescribed by the Revised Statutes of Massachusetts, c. 120, sec. 1, for "all actions for arrears of rent." Buflum v. Deane, 4 Gray, 385.

(b) Similar acts have been passed in New York, Delaware, Virginia, Kentucky, Missouri and Illinois. In Illinois, in case of a lease for life, and an occupation without any special agreement for rent, the owner, his executors, &c., may recover the rent, or a fair satisfaction for

use and occupation, in *debt or assumpsit*. Co. Lit. 47 a, n. 4; 1 N. Y. Rev. St. 747; 1 N. J. St. 186; 1 Vir. Rev. C. 166; 2 Ky. Rev. L. 1854; Illin. Rev. L. 675; Misso. St. 376; Dela. Rev. Sts. 421.

(c) This action is specially provided in New York, New Jersey, Delaware, Indiana, Arkansas and Missouri, and any unsealed agreement for a certain rent may be used as evidence of the amount to be recovered. In Alabama, this action lies by statute even upon a lease by deed, if no certain rent is agreed upon. But in Massachusetts it is held, that *assumpsit* will not lie in case of a sealed lease, even upon an express parol promise to pay the rent; in Pennsylvania, that it will not lie against the assignee of a sealed lease; in Maine, upon any written lease. 1 N. Y. Rev. St. 748; 1 N. J. St. 187; Ind. Rev. L. 424; Ark. Rev. St. 520; Misso. St. 377; Dela. St. 1829, 865; Grant v. Gill, 2 Whart. 42; Gunn v. Scovil, 4 Day, 228; Aik. Dig. 857; Codman v. Jenkins, 14 Mass. 98; Stockett v. Watkins, 2 Gill & J. 826; Cornell v. Lamb, 20 John. 407; Lloyd v. Hough, 1 How. 168; Gage v. Smith, 2 Shepl. 466; Blume v. M'Clurker, 10 Watts. 380. See *Marseilles v. Kerr*, 6 Whart. 600; *Scott v. Hawesman*, 2 McL. 180; *Bailey v. Campbell*, 1 Scam. 112; *Whitney v. Cochran*, Ib. 210; *Brolasky v. Ferguson*, 48 Penn. 484; *Ballentine v. M'Dowell*, 2 Seam. 28; *Stephens v. Lynn*, 8 Carr & P. 889; *Green v. London*, &c., 9 6; *Drury, &c. v. Chapman*, 1 Carr. & K. 14; *Gibson v. Kirk*, 1 Ad. & El. N. S. 850; *Fuller v. Ruby*, 10 Gray, 285; *Warren v. Ferdinand*, 9 Allen, 857.

The action lies upon an implied, as well as express, permission; and the defendant cannot dispute the title. *Pierce v. Pierce*, 25 Barb. 248. The legality of the landlord's title is not in issue. *Sampson v. Schaeffer*, 3 Cal. 196.

This action does not lie, where the defendant entered as a trespasser, or where the possession is tortious or adverse. *Lloyd v. Hough*, 1 How. 168;

§ 41. Although a lessor may at his election sue or distrain for rent, or enter for non-payment of it by virtue of the condition, yet he cannot do both, and the bringing of a suit or making a distress will be held a waiver of the condition, because it affirmeth the rent to have a continuance. But, it is said, he may

*Hurd v. Miller*, 2 Hilt. 540; *Howard v. Terry*, 4 Sneed, 419; *Sampson v. Shaef-fer*, 8 Cal. 196; *Ramirez v. Murray*, 5 Cal. 222.

The action for mesne profits, subsequent to ejectment, is, in New York, trespass in the nature of use and occupation. *Campbell v. Renwick*, 2 Bradf. 80.

A, an executor, leases land of the deceased by parol, for one year. The will was afterwards set aside, and the plaintiff, an heir, having been appointed administrator, brings assumpsit against the lessee for rent. Held, the action would not lie; for if A was authorized by the will to lease, the contract was with him individually, and either he or his representative must enforce it; if not authorized, the lessee had made no contract with the plaintiff, but as to him was a trespasser. *Boyd v. Sloan*, 2 Bal. 811. See *Browning v. Haskell*, 22 Pick. 810; 1 How. 168; *Picket v. Breckenridge*, 1b. 297.

If, under color of a void sealed instrument, a party occupies with the owner's assent, an action for use and occupation lies; if without such assent, an action of trespass. *Anderson v. Critcher*, 11 Gill & J. 450.

It is held, that the action lies, though the tenant has quit the premises, if his contract still remains in force. *Westlake v. De Graw*, 25 Wend. 669. So, without actual occupancy. *Stier v. Surget*, 10 S. & M. 164. See *Gillholey v. Washington*, 4 Comst. 217; *Cleves v. Willoughby*, 7 Hill, 88.

In New York, (under 2 Rev. Sts. 148, sec. 26,) the landlord can only recover for an actual and continued occupation. *Seaman v. Ward*, 1 Hilt. 62.

Acceptance of the key of a house is sufficient to establish occupation, which will be presumed to be continued in accordance with the letting until the contrary appears. 1b.

There must be a contract, express or implied. *De Young v. Buchanan*, 10 Gill & J. 149; *Howe v. Russell*, 1 Adams, 445. See *Epping v. Devanny*, 28 Geo. 442. Thus the action does not lie, where the tenant considered the property as his

own. *Johnson v. Beauchamp*, 9 Dana, 128. A demise must be shown, or evidence offered of a tenancy. *Ward v. Bull*, 1 Bradf. 271; 2 Bradf. 80. The conventional relation of landlord and tenant must exist. *Sylvester v. Ralston*, 31 Barb. 286; *Hurd v. Miller*, 2 Hilt. 540.

The action is held to lie, where one has occupied under a contract of sale which has been rescinded. *Howard v. Shaw*, 8 Mees. & W. 118.

Where A is to make title to, and B pay the purchase-money for land, on a certain day, and B fails to pay at the time, but it is afterwards recovered in an action, A in the mean time occupying at intervals; A is liable for a fair rent for such occupation, and this rent is recoverable in equity, for the reason that it could not be recovered at law, for want of the legal title. *Fleming v. Chunn*, 4 Jones, Eq. 422.

The plaintiff, in a landlord and tenant process, cannot, after producing a written lease, the formal execution of which he fails to prove, maintain his action on parol proof of possession and payment of rent. *Barry v. Ryan*, 4 Gray, 528.

The defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an annual sum of £6 14s. 8d., expressed to be for rent for common lands. It was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and no evidence was given of their extent or value. The defendant would not produce his deeds. Held, that there was evidence on which a jury might find for the plaintiff on a count for use and occupation. *Hardon v. Hesketh*, 4 Hurl. & Nor. 176.

Where one goes into possession of land under a contract to purchase, and not as tenant, and, in consequence of the vendor's failure to perform the contract, abandons the premises, he will not be liable either for rent or for use and occupation. *Sylvester v. Ralston*, 31 Barb. 286. See *Victory v. Stroud*, 15 Tex. 378; *Couch v. McKellar*, 38 Ala. 478.

A misunderstanding as to the rent will not prevent the landlord from re-

receive the rent and acquit the same, and yet enter for condition broken. But if he accept a rent due at a day after, he shall not enter, (for the prior breach,) because the acquittance for this raises a presumption that all other instalments have been paid. Recovery upon a covenant for rent is no bar to a subsequent dis-

covering a reasonable rent as upon an implied agreement. *Scrantom v. Booth*, 29 Barb. 171.

The action does not lie for the use of premises sold on execution or at a trust sale, from the time of sale till redemption, except on a contract between the parties for rent. The only remedy is by ejectment and an action for mesne profits. *O'Donnell v. Murdie*, 6 Humph. 134.

The agreement, under which the party enters, may be invalid in part, and yet this action may be supported, and the agreement used to prove the measure of damages. Therefore, where one went into occupation of land, under a verbal agreement for its purchase, the agreement stipulating the payment of interest until the purchase should be completed, for the use of the premises; held, though the agreement was void, yet, being followed by an uninterrupted possession for a year, the occupant was bound to pay for the use of the premises, as a tenant, from year to year. *Pierce v. Pierce*, 25 Barb. 243.

Proof of occupation by the defendant of the premises during the time declared for, his acknowledgment of the lease, and an offer by him, on a certain discount being paid by the plaintiff, to have judgment entered for the balance, will support the action. *O'Connor v. Tynes*, 3 Rich. 276.

A leased premises to B for a year. Before the end of the year, A, with the consent of B, leased the same to C for the year following, and C rented a part of the same to B, who occupied a part of the year, and abandoned the premises. Held, B was liable to C for use and occupation of the portion rented by him, and, as he hired for no specific time, C might sue for such rent before the end of the year. *Cooke v. Norriss*, 7 Ired. 213.

Upon the ground that assumpsit for use and occupation will not lie, where the defendant has neither occupied nor held the premises during the time for which the recovery is sought; where the plaintiff demised to the defendant certain premises for a term, which the latter abandoned after occupying for a time,

and the plaintiff gave the defendant notice that he should let them for the best terms he could, and hold him responsible for any deficiency, and then leased to another, who occupied for the remainder of the term, but became bankrupt and failed to pay; held, the action would not lie against the defendant for the time during which such other person occupied. *Beach v. Gray*, 2 Denio, 84.

A lessor may maintain "debt for use and occupation" against the assignee of his lessee, under a demise by writing, not under seal. *McKeon v. Whitney*, 3 Denio, 452; *Moffatt v. Smith*, 4 Comst. 126.

So, it seems, a landlord may recover upon an *insinul computassent*, though the evidence be of an accounting concerning rent secured by deed. *Cartledge v. West*, 2 Denio, 377.

But, where the tenant is assignee of the lessee, under an assignment for benefit of creditors, and the promise, upon the accounting, was to pay the rent when the defendant should receive funds from the assigned property; there must be proof that he has received such funds. *Id.*

The common count in debt for use and occupation is good; and, in such count, it is not necessary to allege the character in which the plaintiff sues, whether as assignee of the reversion or otherwise. *Armstrong v. Clark*, 17 Ohio, 495.

In an action of debt for use and occupation, a plea that the plaintiff is grantee of the reversion, and that, before any part of the rent had accrued, the defendant, by deed, assigned the premises to A, and put him in possession, is bad on demurrer, as amounting to the general issue. *Id.*

In an action for rent, in a justice's court, a complaint, "one quarter's rent of crystal in Grand Street, May 1st, 1854, with interest, \$225," was held to be sufficient. *Hubbell v. Clark*, 1 Hilt. 67.

By an instrument, operating as an agreement for, and not as a lease, A agreed to take, and B to grant, a lease of a sugar estate in Jamaica, for a certain term of years at a certain rent. A died indebted to B, in respect of this rent. In a creditor's suit, instituted in the court of

tres.<sup>1</sup> And it is said that, though the lessor receive part of the rent, he may re-enter for the residue.<sup>2(a)</sup>

§ 42. In some cases, *Chancery* will lend its aid for the recovery of rent; but only where there is no effectual remedy at law.<sup>(b)</sup>

<sup>1</sup> Co. Lit. 211 b, 378 a; Jackson v. 8 Watts, 51; Prindle v. Anderson, 19 Sheldon, 5 Cow. 448; Newman v. Rutter, Wend. 391.

<sup>2</sup> Ib., n. 1.

Chancery in England for the administration of the estate of A; held, B was not a specialty creditor, the lands not being within the jurisdiction, and the doctrine relied upon being founded in *privity of estate*, which under the circumstances did not exist. *Vincent v. Godson*, 27 Eng. & Equ. 558. See *Howell v. Webb*, 2 Pike, 360.

Upon a common count for use and occupation, where land was leased in consideration of paying as rent a certain part of the crop, but no money value fixed, the plaintiff may recover the market value of this part at the time it should have been delivered. *Butler v. Baker*, 5 Ohio (N. S.) 584.

The third section of the New Jersey landlord and tenant act, providing that, in any suit under it, a parol demise or agreement may be used as an evidence of the quantum of damages, means that it shall be conclusive evidence. *Holmes v. Stockton*, 2 Dutch. 93.

(a) See *supra*, ch. 15. In New Hampshire, a condition of re-entry is waived, even after entry, by acceptance of the rent in arrear when the entry was made. *Coon v. Brickett*, 2 N. H. 163. Otherwise in New York, unless the rent not only was received, but accrued, after forfeiture. 3 Cow. 230. In this State, the distinction has been taken, that, where the tenant does an act, or is chargeable with an omission, which authorizes the landlord to re-enter merely, any affirmation by the latter will revive the lease; but it is otherwise where the lease has become absolutely void. *Smith v. Saratoga, &c.*, 8 Hill, 508. The receipt of rent accruing after forfeiture is a waiver. After a re-entry, an action lies for rent accruing before forfeiture. But, for subsequent rent, an action for mesne profits is the remedy. Where a lease reserves the right of re-entry, the lessor to have the land "as if the indenture had never been made;" held, covenant would still lie for the rent accrued before entry. *Hartshorne v. Watson*, 4 Bing. N. 178. See *Doe v. Rees*, 1b. 384.

The question of waiver by acceptance of rent is held to be a question of *intest*. *Manrice v. Miller*, 28 Barb. 41.

Statute 4 Geo. II provided, that a lessee should have restoration of his land, on paying the rent, &c., in six months from judgment against him; or, if he paid before judgment, that the proceedings should be stayed. See *Pennant's case*, 3 Rep. 64, 65; *Noy*, 7. It is said, in New Hampshire, though this statute is not expressly adopted, the principle of it is in force. *Coon v. Brickett*, 2 N. H. 163.

In Illinois, Missouri, New York and New Jersey, where a half year's rent is due, and there is a right of re-entry, an ejectment may be brought without demand; and, if execution be levied before the arrears and costs are paid, the lease is avoided, unless the judgment be reversed for error, or the tenant, or, in New York, any party interested, obtain relief in Chancery, by a bill filed in six months from judgment. But he may stay the suit by a tender, before final judgment. In Missouri, New Jersey and New York, a mortgagee of the lease, not in possession, may avoid the judgment within six months, by paying the rent, costs and charges, and performing the agreements of the lessee. Substantially the same provisions are made in Arkansas. In New York, the landlord shall account, on settlement, for all that he has made from the land, or might have made but for his wilful default. 2 N. Y. Rev. St. 505-7; Illin. Rev. L. 676; Miss. St. 377; 1 N. J. R. C. 189-90; Ark. Rev. St. 520. In Kentucky and Delaware, (2 Ky. Rev. L. 1853; Del. St. 1829, 365-6,) the law so far favors the claim of rent, that a landlord, upon making oath that his tenant is likely to leave the county before rent day, may have a process of attachment before the rent is due.

(b) Where trustees, by authority of an act of assembly, sold and conveyed land, reserving in the deed a ground-rent, to be paid to the proprietor of the land,

Nor will it change the nature of the rent, so as to create a liability, unless there is fraud in preventing a distress. Pending a suit against the tenant to enforce forfeiture of the lease, the landlord cannot maintain a bill in equity, as upon a subsisting lease.<sup>1</sup>

§ 43. With regard to the *estates* which may be had in a rent, they are, in general, the same with the estates in land already described. Thus a man may be tenant in fee, in tail, for life or for years, of a rent-charge. A rent-service, being incident or annexed to the land itself or the reversion therein, is of course subject to the same limitations and dispositions as the reversion; and a rent-charge, though not thus incident, may be held in the same ways as the lands themselves.

§ 44. In some cases, where a peculiar form of reservation has been adopted, the question has arisen whether the rent should be a fee-simple or only a chattel interest. Thus, where rent was reserved to the lessor, *his heirs and assigns*; one sum for a certain number of years, then a larger sum for another term of years, and a new valuation to be afterwards made at the end of successive long terms, and the rent fixed accordingly, *to be paid forever*: held, this last clause imported that the rent first fixed should be perpetual, being subject to increase, but not to diminution; and that the rent was a fee-simple, not a *succession* of chattel interests, passing to executors.<sup>2</sup>

§ 45. In case of an estate *pour autre vie* in a rent, there could

<sup>1</sup> *Stayvesant v. Davis*, 9 Paige, 427.

<sup>2</sup> *Farley v. Craig*, 6 Halst. 262.

when he should be ascertained; and the proprietor of the land afterwards filed a bill against the purchaser to recover the ground-rents; and the answer showed that they were unpaid: held, the statute of limitations was no bar. *Mulliday v. Machir*, 4 Gratt. 1.

A bill in equity to recover rent, brought by an assignee of a lessor against two separate grantees of different portions of the premises, conveyed to them by the lessor, to whom the rights of the lessee had been assigned; is multifarious. *Childs v. Clark*, 3 Barb. Ch. 52.

A lessee cannot maintain a bill, to compel his lessor and a claimant of the premises to litigate their rights to the rent, where the evidence tends strongly

to show that the lessee obtained possession by collusion with the claimant, and for his benefit, in order to prejudice the lessor. *Williams v. Halbert*, 7 B. Mon. 184.

In such case, the claimant cannot maintain a cross bill to try a purely legal right to the premises. *Ib.*

Lease in perpetuity, with a condition and covenant, that upon every sale the lessor's consent should be obtained, with the right of pre-emption to him; and, if afterwards sold to another, that one-tenth of the price should be paid to the lessor. A sale having taken place, and the purchaser having entered; held, the lessor had a claim *at law* for one-tenth of the price; and, as the transaction was

be no general occupancy after the owner's death, living the *cestui que vie*; because, from the nature of things, no entry could be made upon it, and the terms of the grant made no provision for such occupancy. Hence, at the death of the tenant for life, the rent terminated. But if the rent is limited to one *and his heirs*, for his life and the lives of others, his heirs shall hold upon his death, as special occupants, by nomination and by descent. So, if the limitation is to executors, it seems to be now settled, although anciently doubted, that the executors may take as special occupants. And it is presumed that the same rules upon this subject apply to rents, which have already been stated in regard to lands themselves.<sup>1</sup> (See ch. 4.)

§ 46. Rents are subject to *curtesy*. And *seisin in law* is sufficient to give curtesy in a rent-charge, being often the only possible seisin. And, it seems, there shall be curtesy, even though the rent were granted to the wife, the first payment to be made at a future time, which did not arrive before her death; because the grant was immediate, though the payment was future.<sup>2</sup> If a woman makes a gift in tail, reserving rent to her and her heirs, marries and has issue, and the donee dies without issue, and then the wife dies, the husband shall not have curtesy in the rent, because it has terminated by act of God, and no estate in it remains. But if a man be seised in fee of a rent, and make a gift in tail general to a woman, who marries and has issue, and the issue die, and the wife die without issue, the husband shall be tenant by the curtesy of the rent, because it remains.<sup>3</sup> So, if a rent *de novo* be granted in tail, and cease with failure of issue, it is still subject to curtesy.<sup>4</sup>

§ 47. Rents are subject to dower, as has been already stated, (ch. 8,) in reference to a rent-service. A rent-charge is also subject to dower. But a personal annuity is not. But if a

<sup>1</sup> *Salter v. Boteler*, Vaugh. 199; *Cheverton*, 2 Rolle Abr. 152. *Supra*, *Smartle v. Penhallow*, 1 Salk. 189; ch. 4.

*Bowles v. Poore*, Cro. Jac. 282; *Low v. Burron*, 8 P. Wms. 264, and n.; *Buller v.*

<sup>2</sup> Co. Lit. 29 a.

<sup>3</sup> Co. Lit. 30 a.

<sup>4</sup> Co. Lit. 30 a, n. 2.

a restraint and fine upon alienation, Chancery would not interfere for his relief. 8 Cruise, 199; *Livingston v. Stickles*,

8 Palge, 398. See *Prestons v. McCall* 7 Gratt, 121.



widow sue the heir for her dower in a rent-charge, he cannot defend, upon the ground that he claims the provision to be an annuity, since he can so elect only by bringing a *writ of annuity*.<sup>1</sup> In regard to dower, however, as well as curtesy, a distinction is made between a rent-charge *de novo* and one already *in esse*, in which an estate of inheritance is created.<sup>2</sup> Thus, where a rent *de novo* is granted to a man and the heirs of his body, and he dies without issue, his widow shall not be endowed—the rent being absolutely determined by his death. It is otherwise where a remainder is limited upon the estate tail. In such case, for the purpose of dower, the rent shall continue against the remainder-man. And if a rent already *in esse* be entailed, the widow shall be endowed, though the husband die without issue.

§ 48. A remainder in a rent-charge may be limited upon a life estate, or upon an estate tail, even though the rent be created *de novo*, and, therefore, without the remainder, there would be no reversion in the grantor.<sup>3</sup>

§ 49. A rent *de novo* may be created *in futuro*; because such grant of a new right has not the effect of putting a precedent estate in abeyance, which, it has been seen (ch. 4), is against the policy of the law. But a rent *in esse* is subject to the same rule in this respect with the land itself; because there was a precedent estate in it, and such grant, dividing the title, produces an uncertainty as to the legal owner.<sup>4</sup> A rent *de novo* may be limited to cease for a time, and then revive. Thus it may be limited to one and his heirs, and, if the grantee die leaving a minor heir, the rent to cease during his minority. In such case, if the widow sue the tenant for dower, she shall have execution when the heir comes of age.<sup>5</sup> So a rent may cease for a time, for reasons independent of the original limitation, and afterwards revive when these reasons cease to exist. Thus lands leased by trustees were, by an act of the legislature, confirmed in fee to the tenants, they paying a certain rent to the trustees, and all taxes upon the value of the land over and above the rent. By

<sup>1</sup> Co. Lit. 32 a; Ib. 144 b.

<sup>2</sup> Chaplin v. Chaplin, 8 P. Wms. 229.

<sup>3</sup> Cruise, 208.

<sup>4</sup> Glib. 60.

<sup>5</sup> Fitz. Abr. Dower, 148; Jenk. Cent. 1, ca. 6.

a subsequent act the lands were taxed like other lands, and the legislature assumed the payment of the rent to the trustees. Afterwards the lands ceased to be taxed. Held, the rent, originally payable by the tenants to the trustees, revived; that the true construction of the latter act was, that the rents should be paid from the taxes only while such taxes were laid; that the rents could not be discharged without the assent of the trustees, and their acquiescence in receiving them from the government was only an adoption of that mode of payment, not a waiver of any payment.<sup>1</sup>

§ 50. The Statute of Uses applies to rents. (See ch. 21.) Thus, if a rent-charge be limited to A in trust for B, the statute executes the use in B. And if there be also a clause of distress, and a covenant to pay the rent to A to the use of B, the right of distress will vest in B as incident to the rent; but the covenant will not, being merely collateral.\* But a use upon a use, in rents as well as lands, is not executed by the statute. Thus, where one conveyed lands to the use and intent that certain trustees should have a rent-charge in fee, and then the rent to be to the use of A in tail-male, remainder over; held, the widow of the issue of A was not dowable, he having only a trust.<sup>3</sup>

§ 51. Where a person is once seised of a rent, he cannot lose his right merely by *non-user* or failure to receive it, or even by an adverse claim and receipt of it by another man, and an attornment to him. Rent being a mere creature of the law and collateral to the land, the right always carries with it the possession. The maxim is, "*nemo redditum alterius, invito domino, percipere aut possidere potest.*" The owner of a rent may, however, consider himself disseised, and bring an action accordingly, at his election, for the purpose of more speedy and effectual redress.<sup>4</sup>

§ 52. A rent is not *forfeited* by an attempt to convey a greater interest in it than the owner possesses, because he can pass only his own title.<sup>5</sup> (See ch. 4.)

<sup>1</sup> *Adams v. Bucklin*, 7 Pick. 121.

<sup>2</sup> *Cook v. Herle*, 2 Mod. 188.

<sup>3</sup> *Chaplin v. Chaplin*, 8 P. Wms. 229.

<sup>4</sup> *Edward Seymour's case*, 10 Rep. 97.

a; Co. Lit. 828 b; Gilb. Ten. 104; Lit. 588-9, 237, 240.

<sup>5</sup> Co. Lit. 251 b.

## CHAPTER XVII.

### RENT—DISCHARGE AND APPORTIONMENT.

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|--|---|
| 1. General rule—no apportionment as to time.   | or partial loss; loss by fire; debt and covenant.                 |
| 2. Eviction by landlord or third persons; from the whole or a part of the premises; what is an eviction; what is not an eviction; constructive eviction; covenants in the lease, &c. | 14. Purchase of the land by landlord—effect upon a rent service.  |
| 10. Loss by the act of God, &c.—total  | 15. Apportionment by transfer of the land.                        |
|  | 16. Lease by tenant for life.                                     |
|  | 18. Rent-charge—when extinguished and when not; when apportioned. |

§ 1. RENT-SERVICE being a *retribution for the use* of land, the general principle is, that, if by any means the tenant is deprived of the land, as by quitting or assigning the premises, with the lessor's consent, or by *eviction* under a paramount title; his obligation to pay rent ceases.<sup>1</sup>(a) Eviction will not discharge

<sup>1</sup> Glib. 145: Shumway v. Collins, 6 Gray, 227; Wood v. Partridge, 11 Mass. 493; M'Elderry v. Flannagan, 1 Har. & G. 306; Giles v. Comstock, 4 Comst. 270. See Bordman v. Osborn, 23 Pick.

295; Lawrence v. Knight, 11 Cal. 298; Fuller v. Ruby, 10 Gray, 285; Tiley v. Moyers, 48 Penn. 404; Elliott v. Aiken, 45 N. H. 30; La Farge v. Halsey, 1 Bosw. 171.

(a) In an action for use and occupation, eviction before the rent fell due is a good defence under the general issue. Prentice v. Elliott, 5 Mees. & W. 606.

In covenant for rent, the plea of eviction by title paramount must allege, that it was by title existing before the demise, and that there was an actual entry by the evictor. Naglee v. Ingersoll, 7 Barr, 185.

It has been held that no action can be maintained upon the covenant to pay rent, unless the defendant was let into full possession of the premises. Holgate v. Kay, 1 Carr. & K. 341.

But, in covenant for rent against an assignee of the lessee, he cannot show, under a plea denying that the lease is the deed of the lessee, that the premises, at the date of the lease and assignment, were possessed adversely to the lessor; it being conceded that there was no title paramount to the plaintiff's. Nor can he offer such proof under a plea that the lessee's title did not pass to him as alleged. University, &c. v. Joslyn, 21 Verm. 52. If the defendant has been excluded by adverse possession existing at the time of the demise, and continuing afterwards, he must plead it spe-

the liability for rent previously due, even though payable in advance, and though, before the quarter for which it was payable in advance expires, a mortgage on the estate is foreclosed, a sale made, and the tenant attorns to the purchaser. But it has been doubted, whether rent could be recovered in such case for a period subsequent to eviction. If eviction take place at any time before the appointed day of payment, there will be no

dially. *Ib.* A plea alleging that, prior to the execution of the lease, certain persons entered and expelled the plaintiff, and continued their possession to the day of the demise, and then occurred adversely, but not alleging the eviction to be under a paramount title, or that the defendant, or any one under whom he claims, is connected with the adverse title, is bad. *Ib.*

A lessor of land engaged to put thereon stable room for three span of horses; to furnish sufficient crib and barn; to break the prairie sod that was unbroken on said land, in season to be planted in corn; to dig a stock well, and to have the farm fenced. Held, that these were conditions precedent, and must be performed before rent could be recovered. *Baird v. Evans*, 20 Ill. 29.

(Where an absolute purchaser of land is evicted from only a part of it, this is no ground for rescinding the whole contract. *Simpson v. Hawkins*, 1 Dana, 105.)

One who by fraudulent representations is induced to become lessee of an entire lot, of which the lessor owned only a part, may, after discovery of the fraud, enter and occupy during the term, and, in an action for the rent, recoup the damages sustained by the fraud. *Whitney v. Allaire*, 4 Denio, 554. See p. 349.

It has been held, that, to an action against a lessee upon his covenants to repair, not to assign or commit waste, it is a good plea, that the lessor allowed a stranger to enter upon and eject the tenant from a part of the premises. *Newson v. Allin*, 1 Ad. & Ell. N. 548.

The landlord cannot distrain for rent, where the tenant is kept out of one room in the building leased, by a prior lessee, although the tenant has occupied during the whole term. *French v. Lawrence*, 7 Hill, 519.

The possession of a stranger without title is no eviction. *Mechanics', &c. v. Scott*, 2 Hill, 550.

If a railroad company should enter into the possession of a part of the premises leased, by permission of the landlord, it would amount to an eviction of that part, although the company was not justified in taking the possession. *Halligan v. Wade*, 21 Ill. 470.

A voluntary surrender, made for a consideration to a third person claiming title, does not discharge the rent. *Emery*, 4 C. B. (N. S.) 423. As to injuries resulting from adjoining ownership, see *Kramer v. Cook*, 7 Gray, 560; *Pangond v. Tournes*, 13 La. An. 292; also s. 4.

If a tenant, evicted from a part of the premises, at the expiration of the term gives his note for the rent, the moral obligation will be a valid consideration. *Anderson v. Chicago Insurance Co.* 21 Ill. 501.

A was let into possession of premises as tenant to B, and paid him rent. C claiming title, A gave up possession to him in consideration of a sum for crops. In an action by B against A to recover arrears of rent, and also possession; held, that whether C's title could be set up or not, depended upon whether A had been evicted by title paramount, or had voluntarily yielded up possession. *Emery*, 4 C. B. (N. S.) 423.

Where one having a paramount title made an entry upon the lessor before he gave the lease, but he refused to deliver possession, and the former then brought a real action, and recovered judgment after the lease was made; held, such entry was no eviction to bar a suit for the rent. *Fletcher v. McFarlane*, 12 Mass. 48.

We shall hereafter (s. 11, n.) have occasion to consider the effect, upon the respective rights and liabilities of landlord and tenant, as falling under the head of eviction, of the loss sustained by a tenant in consequence of the taking of the leased property for public uses. Some of the reported cases refer

apportionment, but the whole rent will be discharged.<sup>1</sup> It has been intimated that, if the lessee has derived a substantial benefit from the use of the estate for a part of the term, he may be liable on a *quantum meruit*. The case is compared to that of a *charter-party*, where the whole contract of affreightment is not fulfilled, but the goods have been carried to an intermediate port.<sup>2</sup> Later cases, however, speak of these suggestions as mere *dicta*. And where a lessor, under a power, terminates the lease between the quarters, he cannot maintain either an action on the lease or of assumpsit for rent accruing since the last rent day.<sup>3</sup>

§ 1 a. Where a lessee covenants to pay rent *in advance*, it may be paid at any time during the day on which it is payable; and, if evicted by paramount title on that day, he is discharged.<sup>4</sup>(a)

<sup>1</sup> Gilb. 145; Wood v. Partridge, 11 Mass. 493; M'Elderry v. Flannigan, 1 Har. & G. 306; Giles v. Comst. 4 Comst. 270. See Bordman v. Osborn, 23 Pick. 295; also *ante*, ch. 15; Shumway v. Collins, 6 Gray, 237; La Farge v. Halsey, 1 Bosw. 170; Lawrence v. Knight, 11 Cal. 298;

Chatterton v. Fox 5 Duer, 64; Academy, &c. v. Hackett, 2 Hilt. 217.

<sup>2</sup> Fitchburg, &c. v. Melven. 15 Mass. 270.

<sup>3</sup> Nicholson v. Munigle, 6 Allen, 215. Acc. Fuller v. Swett. Ib. 219 n.

<sup>4</sup> Smith v. Shepard, 15 Pick. 147. (See p. 342.)

more especially to a partial eviction on the same ground.

The general rule seems to be, that, under these circumstances, the rent will not be apportioned, if, as is usually the case, the tenant is compensated by the town, city or other authority which thus appropriates the land.

The taking a portion of land, out of which certain ground-rent is reserved, by the public, for the purpose of a highway, does not work an apportionment of the rent. If the owners of the land receive the damages, they cannot set up the taking in defence to an action for rent. Workman v. Miffin, 80 Penn. 862. See Munigle v. Boston, 3 Allen, 230.

Where a statute authorized the widening of a street, providing compensation to land owners by application to a judicial tribunal; held, that one who took a lease of land subsequently to the statute, being evicted, had no remedy upon the covenant for quiet enjoyment. Frost v. Earnest, 4 Whart. 86.

Lessees of land on one side of a river, with the ferry privilege attached, ac-

quired the land on the opposite side, and the right of ferry from that side, according to law, by giving bonds to the commissioners. Held, no eviction. Huff v. Walker, 1 Smith, 184.

(a) Where rent is payable in advance, the right of the landlord, to recover for the period of the tenant's actual occupation after rent becomes payable, is not defeated by the summary dispossession of the tenant, under the statute, in the middle of the quarter. Davison v. Donalds, 2 E. D. Smith, 121.

Upon the execution of an agreement between landlord and tenant for one year from the first of May, for a certain rent, payable every two months in advance, the tenant deposited a sum of money as security for the performance of the contract on his part, agreeing that it should finally be applied on account of the rent, to accrue during the latter part of the year. On the 18th of May, the tenant was dispossessed by summary proceedings, under the statute, for non-payment of the rent due at the commencement of the tenancy. Held, the

§ 2. Eviction may be caused, either by the landlord himself without title, or by a third person under a paramount title. And where it applies to the whole land, an eviction in either of these modes has the same effect, of discharging the rent. But where the tenant is evicted from only a part of the land—if by a stranger, the rent shall be apportioned—if by the lessor himself, the whole will be discharged for the time the eviction continues.<sup>1</sup>(a)

<sup>1</sup> *Hegeman v. McArthur*, 1 Smith, 147; 3 Kent, 876; *Dyett v. Pendleton*, 8 Cow. 727; Co. Lit. 148 b; *Lewis v. Payn*, 4 Wend. 428; *Zule v. Zule*, 24

Wend. 76; *Vermilyea v. Austin*, 2 Smith, 208; *Blair v. Claxton*, 18 N. Y. 529; *Mulligan v. Wade*, 21 Ill. 470; *Ib.* 601.

right of the landlord to the first advance payment, being complete before the tenancy was terminated, was not taken away by the dispossession, and formed a legal set-off in an action by the tenant to recover the deposit. *Cushingham v. Phillips*, 1 Smith, 416.

When a tenant is evicted, he may recover the difference between the value of his lease for the unexpired term and the stipulated rent. *Chatterton v. Fox*, 5 Duer, 64.

If evicted at a season of the year when the expense of removing is greater than it would have been at the expiration of the term, he may recover such extra expense. *Id.*

But not, of course, any increased rent of other premises hired for the purposes of his business. *Id.*

(a) It is sometimes held, that, in case of eviction by the landlord, the tenant will not be liable for anything, though he continue to occupy a part of the premises to the end of the term. 2 Smith, 208. (See s. 8.)

If the tenant is in law evicted, before the rent day arrives, by a mortgagee claiming under a mortgage prior to the lease, he is discharged from the whole rent, notwithstanding, it seems, he afterwards continues to occupy; because, after the entry of the mortgagee, the tenant was accountable to him. *Fitchburgh, &c. v. Melven*, 15 Mass. 268. See *Hemphill v. Eckfeldt*, 5 Whar. 274; *Field v. Swan*, 10 Met. 112; *Giles v. Comstock*, 4 Comst. 470.

It is held, that, if the mortgagee enters for a breach of condition, and threatens to expel the lessee unless he pay the rent to him, which the lessee agrees to do, and

actually does; this is an eviction. So, in case of a claim under any other paramount title, and an *attornment*. And if the mortgagee demands rent, and threatens to "put the law in force," the lessee has a good defence on the ground of *payment*, without pleading eviction or *nil habuit*, to an action for rent by the lessor. *Smith v. Shepard*, 15 Pick. 147; *Johnston v. Jones*, 9 Ad. & Ell. 809. See, also, *Salmon v. Mathews*, 8 Mees. & W. 829; *Morse v. Goddard*, 13 Met. 177.

A mortgagee of leased lands, having a title paramount to that of B, the lessor, recovered a judgment for possession, and entered under an execution, but left the lessee in possession. Held, A might recover rent accruing subsequent to such entry, but not before. *Mass. &c. v. Wilson*, 10 Met. 126; see *Newall v. Wright*, 8 Mass. 158.

When the landlord suffers the premises to be recovered from his tenant, in ejectment, by an outstanding title, and, after the writ of possession, the tenant takes a lease or a contract of purchase, under the pressure thereof, and without fraud or collusion; the landlord's right to rent ceases. A recovery back does not subject the tenant to rent for the period between eviction and restitution. If still in possession, he must attorn again to his original landlord. *Ross v. Dysart*, 38 Penn. 452.

A sold land to B, with covenants against incumbrances, which were known to him, and also covenants for quiet enjoyment; for which B was to pay ground-rent; and A agreed to advance B money for building, for which the rent was to be increased. A granted the rent to C,

§3. As to the question what shall constitute a *part* of the premises with reference to an eviction; if the lessee retains merely certain articles appurtenant to a building from which he is turned out, as, for instance, the tools and machinery in a mill, this is held to be an eviction from the whole, though it seems he would be liable upon a *quantum meruit* for the use of the articles.<sup>1</sup>(a)

§4. It is laid down in general terms, that an eviction in fact or in effect, *which renders the premises useless*, may prevent a recovery of rent.<sup>2</sup>(b) What constitutes an eviction can best be illustrated by particular examples. A leases to B a portion of his land, afterwards conveys the whole land to C, reserving rent, and then, for non-payment of rent by B, accruing after the deed to C, enters and distrains. This is an eviction of C, which suspends his whole rent.<sup>3</sup> So the entry of the landlord on premises left by the tenant during the term, putting another in possession, and refusing to permit the assignee or agent of the tenant to occupy during the remainder of the term, constitutes an eviction, which suspends accruing rent, but not that which

<sup>1</sup> Fitchburg, &c. v. Melven, 15 Mass. 263. (See p. 344, n. a.)

<sup>2</sup> Halligan v. Wade, 21 Ill. 470.

<sup>3</sup> Lewis v. Payn, 4 Wend. 423.

and the grant was recorded; and, before the deed was delivered, B gave notice to C, that A had failed to advance the money. Held, in an action by C against B for the rent, as B had the above-mentioned covenants, he could not keep back the rent, which was in the nature of purchase-money, though the mortgages were not satisfied and the land was unproductive; that, as A had failed to advance, and C had notice, B could keep back the part of the rent which was the consideration for the advance; and that, if C had paid the whole purchase-money for the grant of the rent before notice, she would be protected for the whole, or *pro tanto* where part had been paid. *Juvenal v. Jackson*, 2 Harris, 519.

Where a judgment creditor levied his execution upon real estate, under lease and in the occupation of the lessee, and, before the rent became due, entered, claiming title, and threatened the tenant to put him out unless he would yield possession and attorn; whereupon the

tenant agreed, in writing, to hold under him: held, such entry and disturbance, although not an eviction, in a technical sense, were equivalent to an ouster, and the tenant was not afterwards liable to the lessor for the rent, and might dispute his title in an action of assumpsit therefor. *George v. Putney*, 4 Cush. 351. But see *Hickman v. Machin*, 4 Hurl. & N. 716.

(a) See *Winard v. Bunting*, 84 N. Y. (7 Tiff.) 153. Where mills and the machinery are leased, and the real estate sold on execution against the lessor, the lessee is liable to the purchaser for only a proportional part of the rent, if the machinery be personal property. *Buffum v. Deane*, 4 Gray, 385.

Whether the establishment of a *right of common* in the land is an eviction. see *Jew v. Thirdwell*, 1 Cha. Cas. 81.

(b) So where, by the act of the landlord before entry of the lessee, the house is rendered unfit for use, he is not liable for rent. *Cleves v. Willoughby*, 7 Hill, 88.



has fallen due before entry.<sup>1</sup> So where a landlord, during a lease, without the consent of the tenant, enters upon the premises, which have been vacated by the tenant, and holds a continuous possession, inconsistent with the possessory right of the tenant, such possession is an eviction, and precludes the recovery of rent while it continues. And this whether the entry be for condition broken or not. If for condition broken, it signifies an intention to terminate the lease entirely; if the landlord regard the lease as still continuing, the right to rent is suspended during the occupancy.<sup>2</sup> So A leased a house to B for one year. B endorsed to A the note of a third person as security for the rent; occupied for two quarters, for which he paid, and part of a third; at the end of which time he removed, delivering up the key. A then let the house to C, and delivered her the key; and afterwards sued the note in his own name, and obtained full satisfaction of the judgment. B brings assumpsit against A for money had and received. Held, he should recover the amount of the note and interest, deducting the balance due for a part of the third quarter's rent; that A might be considered as B's agent in procuring a new tenant, and thus responsible for the rent; or, if not, as having ousted B from the house, or consented to an assignment of the term to C, and accepted rent from her, which would discharge B.<sup>3</sup> So where a very gross and excessive nuisance occurred upon the premises by the breaking asunder of a privy therein, and the tenant quit as soon as he could find other accommodations; held, he was not liable afterwards for use and occupation.<sup>4</sup> So where a landlord himself occupied the room over the premises leased, as a grocery store, the drippings from which rendered them unfit for use, and thereupon the tenant abandoned them to the lessor; held, he was no longer liable to pay rent.<sup>5</sup>

§ 5. But there is another class of cases, which seem more favorable to the rights of the landlord.<sup>6</sup> Thus suffering a leakage in the waste-pipe to the lower floor occupied by the

<sup>1</sup> *Briggs v. Thompson*, 9 Barr, 338.

<sup>2</sup> *Day v. Watson*, 8 Mich. 535.

<sup>3</sup> *Randall v. Rich*, 11 Mass. 494.

<sup>4</sup> *Cowie v. Goodwin*, 9 C. & P. 378.

<sup>5</sup> *Jackson v. Eddy*, 12 Miss. 209.

<sup>6</sup> See *Edgerton v. Page*, 1 Hilt. 354.

tenant is no eviction.<sup>1</sup> Nor the use of a privy in a passage-way to the leased premises, which was in existence, though not in use, at the time of the lease.<sup>2</sup> And where landlord and tenant jointly occupy, the mere presence of the former on the part peculiarly pertaining to the latter, unless exclusive of the latter, is no eviction.<sup>3</sup> Nor an assault by the landlord upon the tenant, on the land.<sup>4</sup> So where a lessee was to have the use of a railroad, but the facts showed that he did not wish to use it, but had determined to abandon, and had abandoned it, and by his own acts made it useless; held, even if certain acts of the lessor in connection with the railroad constituted a trespass, there was no eviction, and the rent might be recovered.<sup>5</sup> So an interference by the chief landlord with the possession of a subtenant; as, in consenting to the removal of a wall standing upon his land, and essential to the use of a part of the demised premises, is a trespass, for which an action against him by the subtenant is maintainable, but, as between the lessee and the subtenant, does not operate as an eviction.<sup>6</sup> So it is said, the erecting by the landlord of a nuisance upon adjoining land will not have the effect of eviction as to the rent.<sup>7</sup> So the fact that the premises leased are in an unhealthy condition, if the tenant has entered, is no defence against a claim for rent. If he take measures speedily to remove the cause of complaint, he may claim a deduction for the expense. Otherwise, where he entered, knowing or having opportunity to know the facts.<sup>8</sup> So the accidental spreading of a poisonous substance over a pasture leased, whereby cattle died, was held not to discharge the rent.<sup>9</sup> And a landlord may erect a building on a lot adjoining him, though it darkens the windows of the building on the lot demised. Such erection is not an eviction, if it is a ground of damages.<sup>10</sup>(a) So A leased the lower part of a house to B and

<sup>1</sup> 1 Hilt. 320.

<sup>2</sup> Vatel v. Herner, 1 Hilt. 14v.

<sup>3</sup> Randall v. Alburtils, 1 Hilt. 285.

<sup>4</sup> Vatel v. Herner, 1 Hilt. 149.

<sup>5</sup> Peck v. Hiler, 81 Barb. 117.

<sup>6</sup> Luckey v. Frantzkee, 1 Smith, 47.

<sup>7</sup> 3 Kent, 871.

<sup>8</sup> Cohen v. Dupont, 1 Sandf. 260; Westlake v. De Grave, 25 Wend. 669.

<sup>9</sup> Sutton v. Temple, 12 M. & W. 52.

<sup>10</sup> Palmer v. Wetmore, 2 Sandf. 816.

(a) *A fortiori*, this is no eviction if done by an adjoining owner. Thus, A

afterwards the upper part to C. B used his part for purposes of prostitution, accompanied by drinking, noise and riot, of which C gave A notice. A denied all knowledge of such use. C having quit the premises leased to him; held, in an action for rent, the facts above stated were no defence; that it was no more the duty and right of the landlord than of any other person, to abate the nuisance of a bawdy house.<sup>1</sup> So the tenant is not released from liability to pay rent, because either himself or the landlord is legally, and with reasonable diligence, *making repairs*.<sup>2</sup> And, in general, the mere impairing of the beneficial enjoyment is no eviction, if the tenant remains in possession of the premises; nor is it the ground of a counter action.<sup>3</sup>

§ 6. We have already considered the subject of *covenants*, and their effect upon the mutual and respective liabilities of landlord and tenant.(a) The whole doctrine of eviction seems to rest in great measure upon the express or implied covenant on the part of the landlord for *quiet enjoyment*. In reference to this particular covenant, a mere entry upon the land by the landlord is simply a trespass, and not an eviction or breach of covenant for quiet enjoyment, which discharges the rent. So an action lies for the rent, though the landlord has offered to let and advertised the premises, and thereby pre-

<sup>1</sup> *Gilhooly v. Washington*, 3 Sandf. 880.

<sup>2</sup> *Edgerton v. Page*, 20 N. Y. (6 Smith)

<sup>3</sup> *Kellenberger v. Forseman*, 18 Ind. 475.

281; 1 Hilt. 320.

demised to B a building in which were sundry windows, opening on the ground of C. C erected a party-wall, by which the windows were closed up. Held, not an eviction. If A, at the time of the demise, knew of C's intention to build such wall, he was not bound to communicate such knowledge to B. As the vacant lot did not belong to A, there was no implied easement, of light and air; nor was there an implied warranty that the premises were fit for the purposes for which they were rented; nor that they should continue so, if there were no default on the part of the landlord. *Hazlett v. Powell*, 6 Cas. 293.

(a) A lease contained a proviso, that,

in case of the breach of any covenants, the landlord might enter and re-let, applying the avails of such re-letting to, first, the expense of re-entry; second, payment of the rent due under the lease; the residue to be paid the tenant, he agreeing to make up any loss arising during the remainder of the term. The landlord took possession and re-let. Held, in accounting to the first tenant for rent accruing from the second, he was not entitled to make any deduction for expenditures for permanent improvements, by which the premises were increased in value and a higher rent obtained. *Hackett v. Richards*, 8 E. D. Smith, 18.

vented applications for under-letting, and though they have been unoccupied.<sup>1</sup>

§ 7. The covenant to *repair* is also brought in question, in connection with the point of eviction.(a) Although a lease binds the landlord to repair, his neglect to do so will not authorize an abandonment of the premises, unless the repairs were expressly made a condition precedent of the obligation to occupy. The failure to repair is not an eviction, but a breach of covenant, more especially if the tenant continue his occupation for a long time.<sup>2</sup>(b) And where there is no covenant to repair, the tenant, finding the building untenable, cannot set up an eviction by the landlord, for suffering it to remain in that condition. So a subsequent parol agreement to repair, without any new consideration, is not binding. The continuance of the tenant in the occupation is not a sufficient consideration.<sup>3</sup> And a tenant is not exempted from paying rent after a loss by fire, by a clause which exempts him from restoring the property in case of such loss.<sup>4</sup> So where a lessor in fee covenanted that the lessee should have common of pasture and *estovers* from other lands of the lessor, and afterwards *approved* the lands, thereby destroying the common; held, this covenant could not be construed as a grant, and the breach was no defence to a suit for the rent.<sup>5</sup>

§ 8. Somewhat in the nature of eviction as a defence against the claim for rent, is some alleged *fraud* or *misrepresentation* on the part of the landlord in reference to the condition of the demised premises. Such defence, to be available, must be pre-

<sup>1</sup> *Levy v. Bend*, 1 Smith, 169; *Wilson v. Smith*, 5 Yerg. 379; *Ogilvie v. Hull*, 5 Hill, 52.

<sup>2</sup> *Speckels v. Sax*, 1 Smith, 258.

<sup>3</sup> *Cram v. Dresser*, 2 Sandf. 120.

<sup>4</sup> *Beach v. Farish*, 4 Cal. 389.

<sup>5</sup> *Watts v. Coffin*, 11 John. 495; *Etheridge v. Osborn*, 12 Wend. 529; *Bryan v. Fisher*, 8 Blackf. 320; *Hill v. Bishop*, 2 Ala. N. S. 320.

(a) There is no implied agreement in letting premises, that the landlord shall keep them tenantable. *Post v. Vetter*, 2 E. D. Smith, 248. (See p. 285.)

Nor that the land leased shall remain in the same condition; as where the city made new streets, whereby the land be-

came overflowed. *Banks v. White*, 1 Sneed, 518.

(b) On the other hand, the entry of the landlord to repair, for the tenant's benefit, is not an eviction. *Peterson v. Edmonson*, 5 Harring. 378.

cisely alleged and proved. Thus, in an action for rent, the answer alleged that the landlord falsely represented certain water pipes upon the premises to have been properly made. The time of the misrepresentation was not stated, nor whether it was wilful, or made as an inducement to the hiring, or relied upon by the tenant. Although the answer claimed a deduction from the rent, for repairs upon the house, and also averred that an agreement by him to keep the pipes in order was rendered void by the fraudulent representation, and that he was therefore entitled to re-payment of the moneys paid by him for that purpose, which he sought to set off and claim by way of recoupment; yet there was no specific allegation that he had actually made such repairs, nor paid any money therefor, and no damages were specified as sustained by him from the misrepresentation. Held, that sufficient foundation was not laid in the answer for evidence of the alleged misrepresentation and repairs.<sup>1</sup>

§ 9. A tenant cannot avoid the contract on the ground of fraud, and yet retain possession.<sup>2</sup> So, in case of interference by the landlord with the premises; if the tenant fails to abandon them within a reasonable time, or does any act inconsistent with the right, he waives it.<sup>3</sup>

§ 10. In the cases above mentioned, the tenant is deprived of his land by the fault of the lessor; consisting either in a wrongful entry made by himself, a wrongful use of other land, or in conveying a defective title, which is afterwards defeated by third persons. But there are other cases of a different sort; where the tenant loses his land or buildings, wholly or in part, by inevitable accident or irresistible force. Upon this point, the following distinctions seem to be established, though not with the perfect clearness that might be desired.

§ 11. Where the tenant is deprived of the use of the leased premises, he is discharged from any mere *legal liability* resulting from his lease and occupancy, such as *waste*. But if he has expressly covenanted or agreed to pay rent, he still remains

<sup>1</sup> *Levy v. Bond*, 1 Smith, 109.

<sup>2</sup> *McCarty v. Ely*, 4 E. D. Smith, 375.

<sup>3</sup> *Crommelin v. Thiess*, 31 Ala. 412.

liable, as before, to an action of *covenant*, or an action of *debt*.<sup>1</sup> Thus if an army enter and expel the tenant, he is still bound for the rent. (a) So, if a house is destroyed by tempest, or accidentally burned, (b) although the lessee covenanted to keep the

<sup>1</sup> *Gibson v. Perry*, 29 Mis. 245; *Padine v. Jane*, 1 Rolfe's Abr. 946; *Alleyn*, 26; Sty. 47. See *Bigelow v. Collamore*, 5 Cush. 226.

(a) One of the earliest cases upon this subject arose from a tenant's being driven from his land, in the reign of Charles I, by Prince Rupert and his soldiers. And the action was not *covenant*, but *debt*. The reservation was held to make a *covenant in law*. *Paradine v. Jane*, *Alleyn*, 26.

In South Carolina, a loss by the dangers of war has been held a good defence. *Bayly v. Lawrence*, 1 Bay, 499. (So it has been held, that, under the plea of *no rent in arrear*, a lessee may prove that the house has been rendered almost untenable by a storm, and that the landlord had notice to repair. And, in such case, it seems the rent may be apportioned. *Ripley v. Wightman*, 4 McC. 447.)

In Pennsylvania, seizure and eviction by public enemies is no defence to an action for rent, though it discharges the obligation to give up the premises in repair. *Pollard v. Shaffer*, 1 Dall. 210.

Where a building is torn down by public authority, if the act is unauthorized, it is a trespass; if authorized, the authority was equally well known to both parties. In either case, only the balance of rent accruing subsequently can be deducted on this account, as for failure of consideration. *Noyes v. Anderson*, 1 Duer, 342.

The complainant hired a store in Boston for three years, covenanting to pay the rent, and leave the premises in good repair at the end of the term, and the lessor reserving a right to enter and make improvements. The front part of the land was taken, and the front wall of the building cut off, by the city, in order to widen the street. Held, the term was not thereby ended, nor the tenant discharged from his covenants to pay rent. *Patterson v. Boston*, 20 Pick. 159.

Where a statute authorized the widening of a street, providing compensation to land owners by application to a judicial tribunal; held, that a party who took a lease of land subsequently to the statute, being evicted, had no remedy upon the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whar. 86. See p. 348.

(b) Partial injury of a building by fire, so as to render part of it uninhabitable until repaired, does not authorize the tenant to terminate a lease thereof, which provides that, "if the premises shall be destroyed by fire, the payment of rent and the relation of landlord and tenant shall cease at the election of either party." *Wall v. Hinds*, 4 Gray, 256.

Lease of three rooms and a landing upon a canal with a front of 200 feet, and a covenant to pay rent while permitted to occupy. The rooms being burned, held, there was no discharge, but only a proportional abatement of the rent, unless the rest of the property was surrendered. *Willard v. Tuiman*, 19 Wend. 858.

A leased store was burned, the whole rent having been paid in advance; and the lessor rebuilt and leased to others. Held, the lessee might recover so much of the rent as applied to the period since the new lease. *Ward v. Bull*, 1 Branch, 271.

Where a lessor, in a lease of several buildings, covenanted to repair in case of damage by fire, and the lease provided, that, in case of such damage, the rent for the buildings thereby rendered untenable should cease while they remained untenable; held, the covenants were independent, and the neglect of the lessor to rebuild did not excuse the non-payment of rent for the buildings which were uninjured. *Allen v. Culver*, 8 Denio, 284.

The destruction of leased premises by fire, as would naturally be expected, has given rise to more questions and distinctions than any other form of accidental or providential loss. The general rule is, undoubtedly, as stated in the text; but not adopted without doubt and discussion, and often qualified or modified by the circumstances of particular cases. The practical importance of the subject is much diminished by the almost universal custom of expressly excepting loss by fire from the covenant in leases

premises in repair, casualties by fire only excepted; his covenant to pay rent will bind him during the term.<sup>1</sup> (See ch. 15.) The rule is founded upon the consideration that a lease for years is a *sale* for the term, and, unless there are express stipulations, the lessor does not insure against inevitable accidents, or any other deterioration; and that losses by fire generally arise from the carelessness of tenants, which it is the policy of the law to restrain.<sup>2</sup>

<sup>1</sup> *Peterson v. Edmonson*, 5 Harring. 378; *Monk v. Cooper*, 2 Ld. Ray. 1477; *Hallett v. Wylie*, 3 John. 44; *Lamott v. Sterett*, 1 Harr. & J. 42; *Taverner, Dyer*, 56 a; *Carter v. Cummins*, 1 Cha. Cas. 84; *White v. Molyneux*, 2 Kelly, 124.

<sup>2</sup> *Fowler v. Bott*, 6 Mass. 87; 8 Kent, 378-4; *Cline v. Black*, 4 McC. 481. (which case treats the English rule on the subject as doubtful. And see *Brown v. Quilter*, Ambler 621).

to pay rent. See *Graves v. Berdan*, 26 N. Y. 498.

It has been held that an agreement to give a lease generally does not bind the party to give a lease, providing that, if the premises shall be burned or rendered untenable, the rent shall cease till they are rebuilt or repaired. *Eaton v. Whitaker*, 18 Conn. 222. (See p. 282.)

Where, after a destruction by fire, the lessor entered, took away certain articles and made various uses of the property; held, the tenant was still bound for the rent. *Belfour v. Weston*, 1 T. R. 810.

An upper floor of a house was occupied, at a rent payable quarterly. Pending a quarter, the house was burnt and rendered untenable. Held, the landlord might still recover, in an action for use and occupation, at least the amount of rent up to the time of the fire, from the preceding quarter day. *Parker v. Gibbins*, 1 Gale & Dav. 10.

So it has been held, that a tenant from year to year is liable for use and occupation, though the premises be burned. *Igon v. Gurton*, 5 Bing N. 501; *Voluntine v. Godfrey*, 9 Verm. 186. It seems, if the house is rebuilt the tenant might claim it. *Ib.* But where the third story of a house was leased for a term, the house burnt and rebuilt, and a tender made to the tenant of his part, who refused to take it; it was left to the jury to decide, in an action for rent, whether "the old law was too severe," and whether the facts showed an eviction. *Law Rep. Feb. 1841*, p. 890.

And where, a long time after a loss by fire, the tenant brought ejectment against the landlord for the house, re-

built where the former one stood, upon the ground of lapse of time, and that the landlord, though not bound to rebuild, and legally entitled to the rent, had not enforced his claim; it was left to the jury to consider whether the plaintiff had not waived his right to the premises at the time of the fire; and they found for the defendant. *Doe v. Sandham*, 1 T. R. 710; *Baker v. Holtz-koffel*, 4 Taun. 45.

In a suit for rent of premises destroyed by fire, evidence that the property was insured, and the landlord received the insurance money, or that he received money, for loss of the property, out of a general relief fund, is not a defence. *Magaw v. Lambert*, 3 Barr, 444.

But if a landlord take possession of the ruins of his premises destroyed by fire, for the purpose of rebuilding, if without the consent of his tenant, it is an eviction; if with his assent, it is a rescission of the lease; and in either case the rent is suspended. *Ib.*

Where certain rooms and passages in the basement, the ground story, and on the second floor of a building, were leased, the lessees covenanting to pay rent, but not to rebuild, and the building was accidentally destroyed by fire, and no erection was substituted for it by the lessor, of a height equal to the second floor of the former edifice, or upon that part of the ground which was covered by the stores occupied by the lessee; held, the lease was a lease of apartments only, and with the destruction of these the obligation to pay rent for them was at an end. *Graves v. Berdan*, 29 Barb. 100.



§ 12. *In equity* it has been held, that a loss by fire as effectually discharges the rent, as an eviction by title; and, although the landlord may maintain an action at law, that equity will restrain it by injunction, until the house is rebuilt; especially where he was *insured*. Though neither landlord nor tenant is bound to rebuild, unless it is so expressly agreed.<sup>1</sup> But it is further said, that there is no general rule in a court of equity to relieve in such a case. It will afford relief only under particular circumstances. In late English cases, Chancery has refused to interfere; and Chancellor Kent regards this as the settled doctrine.<sup>2</sup> So, where there is a covenant to pay rent and repair, with express exception of casualties by fire, the lessee is liable for rent, though the premises be burned and not rebuilt after notice; nor will equity restrain a suit therefor.<sup>3</sup>

§ 13. The further question arises, where a tenant is deprived, by act of God or inevitable accident, of a *part* only of the premises leased, whether there shall be an *apportionment* of the rent. The earliest case upon this point was one in which a man hired land and a flock of sheep together. The whole flock having died, it was contended that the rent should be apportioned; but the question was not decided.<sup>4</sup> Where a mill was carried away by ice, it was held, that the tenant was still bound to pay rent, partly on the ground, that this was only a partial destruction of the property leased—a fishery and other valuable rights being still left.<sup>5</sup> If a part of the land is surrounded by water, or swept by wild fire, there shall be no apportionment. But if a part of it be covered or surrounded by the sea, the rent shall be apportioned, because the tenant loses the use of the land, with very slight chance of regaining it.<sup>6(a)</sup>

<sup>1</sup> Treat. of Equ. lib. 1, ch. 5, sec. 8; Brown v. Quilter, Amb. 619; Steele v. Wright, 1 T. R. 708; Gates v. Green, 4 Paige, 855.

<sup>2</sup> 1 T. R. 710; Fowler v. Bott, 6 Mass. 68; Hare v. Groves, 8 Anst. 687; Holt-

pzaffell v. Baker, 18 Ves. 115; White v. Molyneux, 2 Kelly, 124.

<sup>3</sup> Ward v. Bull, 1 Branch, 271.

<sup>4</sup> Taverner's case, Dyer, 55 b; Hart v. Windsor, 12 Mees. & W. 68.

<sup>5</sup> Ross v. Overton, 8 Call. 268.

<sup>6</sup> 1 Rolle's Abr. 286.

(a) In a lease for years of a mill driven by water, it was stipulated, that if the premises, or any part thereof, should be destroyed or damaged, during

the term, by fire or other unavoidable casualty, so as to be rendered unfit for use and habitation, the rent reserved or a part thereof, according to the nature

§ 14. A purchase, by the landlord from the tenant, of his whole interest, will discharge or extinguish the rent. But a purchase on condition, or of a part only of the tenant's interest, will not extinguish, but merely suspend, the rent; which, upon the termination of the particular estate purchased, or performance of the condition, and the restoration of the land to the tenant, will revive. So, if the landlord purchase only a part of the lands, the rent will be extinguished proportionably for these only, but still continue for such part of the lands as are retained by the tenant. So a landlord may release a part of the rent, and the rest will remain.<sup>1</sup> But if the rent be payable in some indivisible thing, as a horse or a hawk, a purchase by the landlord of part of the land extinguishes the whole rent. On the other hand, if the return to be made is some act for the public benefit—as to repair a road, or keep a beacon—such a purchase will not extinguish the rent, even in part. A descent of part of the tenancy to the owner of the rent will not extinguish it, though indivisible.<sup>2</sup>

§ 15. Although formerly doubted, it is now settled that a rent-service, being incident to the reversion, may be apportioned by transferring a part of the latter, with which the rent will pass, without any express mention of it. So the rent itself may be apportioned by devise.<sup>3</sup> Thus one having a rent of £10 may devise £6, part thereof, to A, B and C severally, to each a third. In such case each devisee (and, it seems, the heir-at-law also) may have a separate remedy for his rent.<sup>4</sup> A rent-service may

<sup>1</sup> 8 Cruise, 206-7; *Gourdine v. Davis*, 1 Bal. 469; Lit. 222; 18 Vin. Abr. 504.

<sup>2</sup> Gilb. 165; 1 Inst. 149 a; Gilb. 166.

<sup>3</sup> 8 Cruise, 211.

<sup>4</sup> *Collins v. Harding*, 13 Rep. 57; Gilb.

178; *Ards v. Watkins*, Cro. Eliz. 687, 651; *Daniels v. Richardson*, 22 Pick. 566. See *Salmon v. Mathews*, 8 Mees. & W. 827; *Crosby v. Loop*, 18 Illin. 625.

and extent of the injury, should be suspended or abated, until the premises should be put in a proper condition for use by the lessor. In an action for rent, the lessee offered to show that the water-wheel had been in use for several years previous to the lease, and had frequently been out of order and repaired; that, during the term, it broke down, when going at its ordinary rate of speed; and that upon examination it was found to

be so rotten, old, out of repair, and worn out, as to be almost worthless, and not worth repairing; but no evidence was offered to show that the condition of the wheel was owing to any special cause, or sudden event, or any accident other than as above mentioned. Held, the facts stated would not entitle the lessee to suspension or abatement of the rent. *Bigelow v. Collamore*, 5 Cush. 226.

also be apportioned by an assignment by act of law; as where a legal process is levied upon a part of the reversion, or where the widow of the landlord recovers one-third of the reversion for her dower. So in case of the death of a landlord, each of several heirs may sue separately for his portion of the rent.<sup>1</sup>

§ 16. At common law, if a tenant for life, having underlet, died before the rent fell due, neither his executor, nor the reversioner nor remainder-man, could recover a proportional part of it. (See p. 275.) The former could not, because his only claim would be for use and occupation, which would not lie upon a sealed lease; nor the latter, because the rent did not accrue in his time. St. 11 Geo. II, ch. 19, s. 15, provides that in such case the executors, &c., may recover rent for the time that the tenant occupied, *pro rata*; and, if he died upon the rent-day, the whole amount. But this act applies only where the lease ends with the death of tenant for life. If it does not thus terminate, the rent goes to the person in reversion or remainder.<sup>2(a)</sup> In equity this statute has been held to extend to a tenant in tail dying without issue. Thus where such tenant, having leased for years, died without issue a short time before rent-day, and the whole rent was paid to the remainder-man; held, the executor of tenant in tail might maintain a bill against the remainder-man for such part of the rent as accrued before the tenant's death, upon the grounds, that the case was within the equity, though not the words of the act; and, where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases; and also (and chiefly) that, the tenant not having been legally

<sup>1</sup> Campbell's case, 1 Rolle's Abr. 237; Montague v. Gay, 17 Mass. 439; Cole v. Patterson, 25 Wend. 456.

<sup>2</sup> Jenner v. Morgan, 1 P. Wms. 392; 8 Cruise, 218; Perry v. Aldrich, 13 N. H. 343.

(a) The statute of apportionment, (4 Wm. IV, c. 22,) does not apply as between the executor and heir of a tenant in fee. Beer v. Beer, 9 Eng. Law & Equ. 468. See Lock v. De Burgh, 15 Jur. 961.

In Delaware. rent may be apportioned between tenant for life and remainder-man. Rev. Sts. ch. 120. So in Iowa. Code 1851, ch. 82.

The plaintiff, a tenant *pour autre vie*, leased the land during the life of the *cestui*, at an annual rent, payable on the 1st of April in each year. The *cestui* died October 15th. Held, the lessee was not liable for rent to the plaintiff from April to October; the statute of Geo. II not authorizing an action by the plaintiff. Perry v. Aldrich, 13 N. H. 343

bound to pay the rent to any one, the payment should be applied to the benefit of those equitably entitled to the respective proportions.<sup>1</sup>(a)

§ 17. In case of a *rent-charge*, if the owner of the rent purchase any part of the land from which it issues, the whole rent is extinguished. The reason of this distinction between a *rent-service* and a *rent-charge* is, that while the former, consisting originally in feudal services, was favored by the law, and not allowed to be detached from any lands held by tenants; the latter is against common right, of no public benefit, and issuing out of every part of the land, so that the law will enforce it

<sup>1</sup> *Paget v. Gee*, Ambler, 198.

<sup>2</sup> *Vernon v. Vernon*, 2 Bro. R. 659; *Hawkins v. Kelly*, 8 Ves. 306.

(b) It has been said of the foregoing case, that it seems rather to be a decision what the statute ought to have done, than what it has done. But it was at the same time held, that, where one occupied *from year to year*, under the guardian of an infant tenant in tail, inasmuch as the lessee was in under no lease or covenant, but merely an implied contract, he could not raise an implication that he was to occupy rent free, and, the whole amount having been paid to the receiver, the portion accruing before the infant's death was awarded to his executors. *Vernon v. Vernon*, 2 Bro. R. 659; *Hawkins v. Kelly*, 8 Ves. 306.

Held, in a late case, that the act providing for an apportionment of rent does not apply to unwritten leases from year to year. *Markley*, 4 My. & C. 484.

It is held in New York, that the principle of apportionment may be applied to the tenant, as well as the landlord. Where a lessee assigns part of his interest, the rent may be apportioned, and the lessor may sue the assignee in covenant for his proportion. *Van Rensselaer v. Bradley*, 8 Denio, 185.

In an action against the assignee of a part of the demised premises for rent, the plaintiff may declare against him as assignee of a specified part, in which case his recovery will be limited to that part; or he may declare for the whole, and leave the defendant to take issue on the assignment by plea or evidence. *Van Rensselaer v. Jones*, 2 Barb. 643.

The rent must be apportioned accord-

ing to the value of the part held by him compared with the whole. And, if there is no proof of the relative value, the premises will be presumed to be of equal value, and the rent should be apportioned according to quantity. *Ib.*

But, generally, the apportionment of rent among several assignees must be according to value, and not quantity, or number of acres. *Van Rensselaer v. Gallup*, 5 Denio, 454.

A severance of the occupation of demised premises, the rent being paid to the lessor by the respective tenants, is not a severance of the conditions of the lease, and a breach by one works a forfeiture of the whole lease. *Clarke v. Cummings*, 5 Barb. 339.

In Michigan (Rev. Sts. 265), one in possession of land, from which a rent is due, is liable for a proportional part, though he has only a portion of the land charged.

With regard to the principle on which rent is to be apportioned as to time, the following case occurred in Pennsylvania:

The Bedford Springs were leased for a term, commencing April 1, at an annual rent, payable September 1, which was the conclusion of the watering season. In applying the proceeds of the tenant's goods, sold on execution, to the lien of the landlord; held, the rent should be apportioned according to the interval between the commencement of the current year and the day of payment, not on the basis of the whole year. *Ander-son, &c.*, 3 Barr, 218.

only according to the original contract.<sup>1</sup> But if the grantor of the rent, after such purchase, make a deed to the grantee, reciting the purchase, and authorizing the grantee to distrain for the rent upon the remaining land; this amounts to a new grant.<sup>2</sup> And if a part of the land come by *descent* to the owner of the rent, the latter shall be apportioned according to the value of the remaining land.<sup>3</sup> If the owner of a rent-charge, issuing out of three acres of land, release one of them from it, the whole is discharged. But if, being entitled to a certain sum, he release a part of that sum, the balance remains. It is said that in the latter case he deals with the rent, which is his own; and in the former with the land, which is another's.<sup>4</sup>(a)

§ 18. A rent-charge may be apportioned, either by act of parties or act of law. Thus, if the owner assign a portion of it to another, each shall hold his respective share and be entitled to his remedy. The reason of the rule is, that the whole land remains liable as before, and that the policy of the law, having allowed this kind of rent, will not prevent a distribution of it among children. Anciently, to effect such apportionment, the tenant was obliged to attorn to the assignee; after which he could not complain of being subjected to two suits instead of one. And, although the practice of attornment is now for the most part done away, yet, as the tenant may avoid any suit by punctual payment, the rule still prevails. So a part of a rent-

<sup>1</sup> Co. Lit. 147 b; Gilb. 152.

<sup>2</sup> Co. Lit. 147 b.

<sup>3</sup> Lit. 224; Gilb. 156.

<sup>4</sup> 18 Vin. Abr. 504; Gilb. 168; Co. Lit. 148 a; 3 Vin. Abr. 10, 11; Farley v. Craig, 6 Halst. 262.

(a) In Pennsylvania, as has been stated (ch. 16), a *ground-rent*, reserved upon a conveyance in fee, is a *rent-service*. Hence, if the owner release a part of the land from it, the remaining land shall be still proportionably chargeable; more especially if the release has an express saving of such liability. (See p. 314; *Ingersoll v. Sergeant*, 1 Whart. 337.

It is said to be a common practice in England, for the owner of a rent-charge to join in conveying that part of the

land, which it is agreed to discharge from the rent, with a proviso in the deed, that the rest of the land shall still remain liable. But since this operates as a new grant, the rent will be postponed to any prior incumbrance on the land. Sometimes, where the owner of the lands conveys a part of them, the grantee of the rent-charge covenants not to distrain or enter upon the part conveyed. But it seems, this might discharge the whole rent. 8 Cruise, 209; *Butler v. Monnings*, Noy, 5.

charge may be taken by legal process, which will effect an apportionment.<sup>1</sup>

§ 19. If a part of the lands, from which the rent issues, descend to the owner of the rent, the latter shall be apportioned, inasmuch as the party acquires the land by act of law, and not by his own act.<sup>2</sup> If the feoffee of a husband grants a rent-charge to the wife, the husband dies, and one-third of the land charged is assigned for dower, the rent shall be apportioned, and not issue wholly from the residue.<sup>3</sup>

<sup>1</sup> Gilb. 168; 18 Vin. Abr. 504; Farley v. Craig, 6 Halst. 262-273; Riving v. Watson, 6 Mees. & W. 255.

<sup>2</sup> Lit. 224; Gilb. 166.  
<sup>3</sup> Co. Lit. 82 b, m. 8.

## CHAPTER XVIII.

## WASTE.

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| 1. Importance of the subject.   | 27. Ecclesiastical persons.  |
| 2. American doctrine.   | 28. American doctrine.   |
| 3. Definition.  | 28 a. Who may sue and be sued for.   |
| 4. Voluntary or permissive.   | 35. Waste by third persons.  |
| 6. Felling timber; American law.  | 36. Action on the case for.  |
| 10. Waste of buildings.   | 38. Injunction and other equity proceedings.   |
| 15. Loss by fire.   | 40. Property in timber cut, &c.—who has; contingent remainders. &c.  |
| 16. Disturbance of the soil—mines, &c.                                  | 43. Cutting of timber by order of Court.   |
| 17. Conversion of the land.   | 44. Lease <i>without impeachment of waste</i> , &c.; special proceedings as to waste in the United States. |
| 19. Heir-looms—destruction of.  |  |
| 20. Permissive waste—repairs.   |  |
| 23. Act of God.   |  |
| 24. Amount of waste.  |  |
| 25. Who punishable for—tenant for life, &c.—Statutes of Marlbridge, &c. |  |

§ 1. In treating of estates for life and for years, many incidents or qualities have been noticed which are common to both estates. It remains to consider another subject, of much importance, the principles of law pertaining to which are for the most part alike applicable to tenant for life and tenant for years. This is the subject of *waste*. Lord Coke says, "it is most necessary to be known of all men."<sup>1</sup>

§ 2. Chancellor Kent remarks,<sup>2</sup> that the American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country. So it is said, in this country, no act of a tenant amounts to waste, unless it is or may be prejudicial to the inheritance, or to those who are entitled to the reversion or remainder.<sup>3</sup> But, inasmuch as the English doc-

<sup>1</sup> Co. Lit. 54 b.

<sup>2</sup> *Pyneben v. Stearns*, 11 Met. 304.

<sup>3</sup> 4 Kent, 76; *Kidd v. Dennison*, 6 Barb. 9.



rine remains wholly applicable in some of the States, and in the rest has undergone very partial change, this doctrine will be first stated, and then qualified by an account of such alterations as the statutes or judicial decisions of the respective States have introduced.

§ 3. Waste is defined as the destruction of such things on the land, by a tenant for life or for years,<sup>(a)</sup> as are not included in its *temporary profits*. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.<sup>1(b)</sup>

§ 4. Waste is either *voluntary* or *permissive*; the former consisting in some positive act; the latter in mere neglect or omission.<sup>(c)</sup>

§ 5. Of voluntary waste there are various kinds.

§ 6. The first and perhaps principal kind is the *felling of*

<sup>1</sup> 1 Swift, 517-8; *Proffit v. Henderson*, 29 Mis. 325.

(a) In some cases the term is applied to other tenants than for life or years; as, for instance, to an adverse claimant in possession. Thus it is held, that where a defendant in an ejectment suit has been in possession for many years, claiming in fee, in his own right, and in hostility to the plaintiff, he should until legally evicted, be permitted to remain in the full enjoyment of the land, to the extent that he would be were no adverse claim set up; subject to the restriction that he shall not commit a permanent and lasting injury to the inheritance; and the cutting down of such trees as it is necessary to cut down for the regular clearing up and improvement of the lot, so as to put it in proper farming condition, according to the rules of good husbandry, is not waste; but, should the defendant continue to cut down timber or other wood, so as to encroach upon what should be left and preserved, as necessary for repairs of fences and other erections, and for firewood, it seems he would be guilty of waste, and, upon application, would be restrained and punished. *The People v. Davison*, 4 Barb. 109.

So, under a *contract of sale*, giving time for payment of the purchase-money, the purchaser to have possession in the mean time, and the privilege of converting the timber into lumber for the purpose of payment; the court will

not grant an injunction to prevent him from cutting timber, there being no allegation nor proof that the land would not be an adequate security for the money, without the timber. *Van Wyck v. Alliger*, 6 Barb. 507. But where A and B entered into a contract for an exchange of lands, and subsequently passed the deeds of conveyance and delivered possession, before which time, and after the contract of sale, A committed waste on the land sold by him; held, B might maintain an action on the case against him. *Marsh v. Current*, 6 B. Mon. 493.

(b) According to this definition, the term *waste* does not *per se* import anything wrong or unlawful; because it may, under certain circumstances, be lawfully committed. Thus, as will be seen, a particular tenant may hold the land "without impeachment of waste;" that is, with the privilege of committing waste. The word, however, is more generally used in the different sense of an *unauthorized* or *illegal* destruction of timber, &c. According to the latter meaning, we should say, "for a tenant to cut timber, &c., is waste;" according to the former, "a tenant cannot lawfully commit waste by cutting timber." &c. (See ch. 1, sec 31, n.)

(c) As to the distinction between them, see *Martin v. Gilham*, 7 Ad. & Ell. 540.

*timber trees*; which, although the tenant has a qualified property in them for shade and shelter, and for the masts and fruit, he has no right to cut down, more especially if it is bad husbandry to do so, and no pretence of its being done for *estovers*. But he may cut coppices and underwoods, according to custom, and at seasonable times. So the *thinnings* of fir trees less than twenty years old belong to the tenant for life. He has, however, no property in the underwood before it is cut, and therefore cannot have an account of what was wrongfully cut by a preceding tenant.<sup>1</sup>

§ 7. Where the timber is included in a lease, the lessee may have trespass against the lessor for felling the trees, and the lessor *waste* against the lessee. And, if a stranger fell them, each may have his own appropriate action. The landlord cannot have *trespass*. When the trees are expressly excepted, the lessor has an implied power of going on the land to fell them, and may sue the lessee for any injury done to them. So he may maintain trespass against a stranger. Where the timber is neither expressly included nor excluded, it would seem that the tenant has the right to have it continued, but no right to cut it down, unless waste is expressly authorized.<sup>2(a)</sup>

§ 8. Timber trees are those *used for building*, and the question is one of *local usage*. Thus, where *birch* trees were used

<sup>1</sup> Co. Lit. 53 a; Rich. Liford's case, 11 Rep. 48 b; Pigot v. Bullock, 1 Ves. jun. 479; 7 N. H. 171; Ridgeley v. Rawling, 2 Coll. 275; Edge v. Pemberton, 12 Mees. & W. 187. See 5 Mees. & W. 11.

<sup>2</sup> 11 Rep. 48 a; Pomfret v. Ricroft, 1 Saun. 822. n. 5; Foster v. Spooner, Cro. Eliz. 18; Heydon v. Smith, Godb. 178; Jackson v. Cator, 5 Ves. 686.

(a) A lessor covenanted that the lessee should have as much firewood as she should desire from a certain tract of land, and then cut most of the wood thereon, and converted it to his own use. Held, a breach of the covenant. *Lovering v. Lovering*, 13 N. H. 518.

A lease contained the following clause: "All the timber in the south-east corner of about five acres, suitable and proper for fuel, to be left, and not cleared." Held, the corner land specified was not excepted from the lease, but the clause amounted to an agreement not to cut the timber thereon; and, therefore, although the lessor could not maintain trespass for

injury to the real estate in cutting the timber, he could maintain trespass *de bonis asportatis* for carrying away the wood after it had been severed. *Schormerhorn v. Buell*, 4 Denio, 422.

While the general rules relating to waste are controlled by previous formal agreements of the parties, the reversioner cannot claim a forfeiture if he has assented to the act either before or after it was committed. *Clemence v. Steere*, 1 R. I. 272.

So the receipt of rent, after the tenant has incurred a forfeiture by cutting timber, is a waiver of the forfeiture. *Camp v. Pulver*, 5 Barb. 91.

in a certain county for buildings of a mean kind, it was held waste to fell them. So horse-chestnuts and pines. But it is also waste, to cut those standing in defence of a house, though not timber, as, for instance, willows, beech, maple, &c., or to cut trees for fuel, where there is sufficient dead wood; or to stub up a quickset thorn fence. So it is waste, to lop timber trees, and thereby cause them to decay; or to destroy or stub up the young germains or shoots; or to cut down fruit trees growing in the garden or orchard; but not those growing elsewhere.<sup>1(a)</sup>

§ 9. It is said, in places where timber is *scant*, it may be waste to cut such trees, as are not commonly reckoned to be timber. On the other hand, upon a similar principle, it has been held not to be waste, in Massachusetts, to cut oaks for fire-wood, these trees being very abundant, and commonly used for this purpose. But it is waste, to cut timber trees and exchange them for fire-wood, especially if the latter might be otherwise obtained.<sup>2</sup> So cutting timber trees on woodland by the tenant for life, not for the use of the estate, is waste, although done with the intention of restoring the land to the condition of pasture land, in which it was when the estate for life commenced; and although it would be good husbandry in an owner in fee so to restore it.<sup>3</sup> So where a tenant for life wrongfully cuts trees, he is liable for their value, with interest, and cannot claim any deduction on the grounds of the expense of procuring other necessary fuel, or that the new growth is as valuable as the increased growth

<sup>1</sup> Dyer, 65 a; Co. Lit. 58 a; Cumberland's case, Moore, 812; Jackson v. Brownson, 7 John. 234; Chandos v. Talbot, 2 P. Wms. 606; Rex v. Minchin, 3 Burr. 1808.

<sup>2</sup> Padelford v. Padelford, 7 Pick. 152;

Richardson v. York, 2 Shepl. 216; Sarles v. Sarles, 3 Sandf. Ch. 601; Simpson v. Bowden, 38 Maine, 549; Greber v. Kleckner, 2 Barr, 209.

<sup>3</sup> Clark v. Holden, 7 Gray, 8.

(a) So, where it is the custom of husbandry in the vicinity to sell off hay from farms, it is not waste to do so. But the removal of bog-grass from a farm, where it has usually been foddered on the farm, is waste. Sarles v. Sarles, 3 Sandf. Ch. 601.

The question of waste is said to depend on the custom of farmers, the con-

dition of the land, the demands of good husbandry, the situation of the country, and the value of the timber. McCullough v. Irvine, 1 Harr. 489; Morehouse v. Cothel, 2 N. J. 521.

Cutting hoop-poles is waste, unless this is the ordinary mode of managing the farm. Clemence v. Steere, 1 R. I. 272.

of the trees cut.<sup>1</sup> So the cutting of timber may be waste, although necessary to the profitable enjoyment of the land; or, although the land is valuable for timber only.<sup>2</sup> So, in a bill against a tenant for waste of timber, it is no justification, that firewood and timber were furnished by him for the farm, from other premises; though it has been held that, in account decreed against him for such waste, he may be allowed in mitigation for what he so furnished. More especially where a lease contains the express condition, that the tenant shall not cut off wood and timber, except for firewood and fencing, and he cuts off timber for other purposes, he cannot escape forfeiture, by showing that he has not cut off more than would have sufficed for his firewood and fencing timber, and that he obtained the latter from other land.<sup>3</sup> Nor can he set up as a defence, that he has farmed the land more beneficially than the lease required.<sup>4</sup> And the clearing of woodland by a tenant for years, on a farm let as a dairy farm, and under a covenant against waste, is in itself an act of waste.<sup>5</sup> So, where trees are cut for no purpose connected with the immediate improvement of the land, and sold off the land, without intending to apply the proceeds to such improvement, waste is always committed, and the defendant has no right to *recoupe* for improvements which he might have made at some other time.<sup>6</sup> So, in North Carolina, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would, and sell the timber that grew on that part of the land, yet it is waste to cut down valuable trees, not for the purpose of improving the land, but for the purpose of sale.<sup>7(a)</sup>

<sup>1</sup> Phillips v. Allen, 7 Allen, 115.

<sup>2</sup> Proffit v. Henderson, 29 Mis. 325.

<sup>3</sup> Clark v. Cummings, 5 Barb. 339.

<sup>4</sup> Ballitt v. Musgrave, 3 Gill, 81.

<sup>5</sup> McGregor v. Brown, 10 N. Y. (6 Seld.) 114.

<sup>6</sup> 3 Gill, 81.

<sup>7</sup> Davis v. Gilliam, 5 Ired. Eq. 308.

(a) With regard to the cutting down of timber, in several of the States, (*supra*, s. 2,) the strict rules of the English law are not adopted. Thus, in Massachusetts, (Statutes of 1854, 72, 73,) where a widow, there being no issue, elects to take half the real estate, consisting of wild or woodland, she may

clear and improve it. In Vermont, New York, and Ohio, if the land is wholly wild and uncultivated, the tenant may clear a part of it for cultivation, leaving, however, enough for the permanent use of the farm, which is a point of fact for the jury; and consistently with good husbandry.

§ 10. In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot. But, unless they do rot, the latter act does not constitute waste. If uncovered before he came in, the tenant does not commit waste by suffering them to fall; but he has no right to pull them down. If he have done or suffered waste, but repaired before action brought, this is a good defence, but must be pleaded specially, not proved under the plea "*quod non fecit vastum*."<sup>1</sup>

§ 11. The right to cut timber for repairs does not depend upon the obligation to repair. Thus, if a house be ruinous when leased, the tenant may, though he is not bound to, cut timber for repairs. So, even where the lessor has covenanted to repair, or where the lease is without impeachment of waste, for the house only.<sup>2</sup>

<sup>1</sup> Co. Lit. 53 a, and n. 3.

<sup>2</sup> Co. Lit. 54 b.

(In Vermont, it is laid down generally, that cutting wood to fit the land for cultivation is not waste, if good husbandry require it, and the inheritance be not injured; even though the timber be sold and consumed elsewhere. *Hough v. Birge*, 11 Verm. 190.)

So, in North Carolina, the tenant may clear sufficient land to furnish support for his family; and a dowress may cut timber to make into staves and shingles, if this is the common and only beneficial use of the land. So, in New Hampshire, the consumption of necessary fuel at the residence of the widow, cut from the dower-land, she not residing thereon, is not waste. So, in Maine, it is not waste to cut wood for necessary fuel and repairs. So, in Pennsylvania, Virginia and Tennessee, tenants in dower have been allowed to clear wild lands, not exceeding (in the former State) a just proportion of the whole tract.

(In Pennsylvania, the court remark upon the distinction between the condition of things in England, where "every part of every tree will bring cash," and in the United States, where lands are in great measure valueless, till cleared; and they come to the conclusion, that, if a prudent owner would clear off the timber, and if such clearing raises the value of the land, it is no waste. *Givens*

*v. McCalmont*, 4 Watts, 463; *Owen v. Hyde*, 6 Yerg. 834.)

It has already been stated, that in several of the States a widow is not dowerable of wild lands, for the reason that they would be of no benefit to her, as the clearing of them would be waste. *Walk. Intro.* 278; *Jackson v. Brownson*, 7 John. 227; *Parkins v. Coxe*, 2 Hayw. 389; *Ballentine v. Poyner*, 2 Hayw. 110; *Hastings v. Crumckleton*, 3 Yeates, 261; N. H. Rev. St. 329; *Pur. Dig.* 221; *Findlay v. Smith*, 6 Munf. 184; *Crouch v. Puryear*, 1 Rand. 258; *Owen v. Hyde*, 6 Yerg. 834; *Hickman v. Irvine*, 8 Dana, 123; 26 Wend. 115; Me. Rev. St. 393; *Allen v. McCoy*, 8 Ohio, 418; *Childs v. Smith*, 1 Md. Ch. 488. See ch. 9. s. 5.

In Tennessee, the lessee of a mine, with liberty to smelt ore, may cut timber sufficient for this purpose. And a widow may cut timber on one part of the land to fence another, though the reversions of the respective parcels belong to different heirs. Her rights are not to be affected by any arrangement among third persons, to which she is not a party. This last point has also been decided in Massachusetts. *Wilson v. Smith*, 5 Yerg. 379; *Owen v. Hyde*, 6, 834; *Padelford v. Padelford*, 7 Pick. 152. See *infra*, sec. 16.

§ 12. Lord Coke says, it is waste to build a new house (meaning, probably, *with timber cut upon the land*); and to suffer it to be wasted is a new waste: And, if the tenant suffer the house to be wasted, and then fell timber to repair it, this is *double waste*.<sup>1</sup> (See sec. 44 and sequ.)

§ 13. It is waste to convert a dwelling-house into a store or warehouse, because the safety and permanency of the building are thereby endangered. So, to convert two chambers into one, or the converse; or a hand-mill into a horse-mill.<sup>2</sup> So it is waste to pull down a house, though a new one be built, if the latter is smaller than the former. Otherwise, if the former house fall down, and a smaller one is built. To build a larger one, in this case, with timber from the land, is waste. But not to abate a new house, which has never been covered.<sup>3</sup> So the removal of a building erected by the tenant, and not affixed to the freehold, is not waste; nor tearing down a barn so dilapidated that there is danger of its falling upon the cattle.<sup>4</sup> Nor the erection of a new outhouse, with timber from the farm, in place of one which had become ruinous.<sup>5</sup>

§ 14. It is waste to remove anything attached to the premises, either by the lessor or the lessee, unless removable upon the principles of the law of fixtures, which have been already explained.<sup>6</sup> (*Supra*, ch. 1.) It is said, with particular reference to the alteration of buildings, that the strictness of the law in relation to waste has been carried to an unwarrantable extent; and that the cases are very discordant. In a modern case in England, the opening of a new door in a building was held to be no waste, unless it impaired the evidence of title. In a recent case in this country, where the lessee of "a store and cellar" raised the store from one to two feet, and finished off a victualing cellar, for which purpose the cellar had never before been used; held, this, of itself, would be waste, but, as the lessor had

<sup>1</sup> Co. Lit. 58 a, b.

<sup>2</sup> *Douglas v. Wiggins*, 1 John. Ch. 435; Co. Lit. 58 a. n. 8.

<sup>3</sup> Bro. Abr. *Waste*, 98; Co. Lit. 58 a, and n. 4.

<sup>4</sup> *Clemence v. Steere*, 1 R. I. 27.

<sup>5</sup> *Sarles v. Sarles*, 3 Sandf. Ch. 601

<sup>6</sup> Co. Lit. 58 a.

covenanted that the lessee might "repair, alter and improve," this was a permission to make the alterations.<sup>1</sup>(a)

§ 15. At common law, a tenant for life was not liable for loss by fire, whether accidental or negligent. But such loss was held to be waste, under the Statute of Gloucester. A later statute, however, 6 Anne, c. 31, secs. 6, 7, exempts all tenants from liability for accidental fire, unless it arises from some contract with the landlord.(b) A general covenant to repair binds the tenant to rebuild in case of fire. Hence, it has become usual specially to except such loss.<sup>2</sup> (See *supra*, ch. 17.)

§ 16. It is waste to dig for clay, gravel, lime, stone, &c., except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or clay-pit; but not to work one already opened, or to open new pits or shafts for working the old veins; because they could not otherwise be wrought.(c) If mines are expressly included in the lease, and there are open ones, these only are embraced. But

<sup>1</sup> Young v. Spencer, 10 Barn. & Cr. 145; Hasty v. Wheeler, 3 Fairf. 436-7; Doe v. Jones, 4 Barn. & Ad. 128.

<sup>2</sup> 1 Cruise, 187; Chesterfield v. Bolton,

2 Com. R. 626; Pasteur v. Jones, Cam. & Nor. 194; Bullock v. Dommitt, 6 T. R. 651; 1 Bibb, 536. See Cornish v. Strutton, 8 B. Mon. 586.

(a) As to a covenant against alterations, see Perry v. Davis, 8 C. B. (N. S.) 769.

The opinion of a witness, that the cutting of timber on a cleared farm by a tenant for years was a benefit to the inheritance, is not admissible in evidence in an action of waste. Parol evidence of a license, on condition of the performance by tenant of certain subsequent acts. In a recent case it is held that a tenant is not liable, in the absence of an express agreement, for the accidental destruction by fire of the buildings occupied. Wainscott v. Silvers, 13 Ind. 497.

(b) A testator devised to A, for life, a house and other real estate, "he committing no manner of waste, and keeping the premises in good and tenantable repair." In July, 1837, A entered into possession, and in November, 1844, the house was totally destroyed by an accidental fire. In 1845, A was found lunatic by inquisition, and the lunacy was dated from the first of October, 1843. Upon

petition in lunacy of the remainder-men, who were also committees of the person and estate; held, the lunatic's estate was liable, under the terms of the condition, to reinstate the house; and a reference was directed, as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid, with liberty to the next of kin to take a case to law, upon the construction of the condition. Skingley, 8 Eng. Law and Eq. 91.

Where a tenant in common took the fixtures and implements belonging to a mill, which was out of use for the want of repairs, and used them temporarily in a mill of his own, and burnt some useless rotten timber pertaining to the mill dam, which was in his way; held, he was not guilty of destructive waste. Dodd v. Watson, 4 Jones, Equ. 48.

(c) Whether this can be done after they have been abandoned is doubted. See Viner v. Vaughan, 2 Beav. 466.



if there are no open ones, those unopened will pass.<sup>1</sup>(a) But, it is said, the tenant cannot take timber, to use even in mines that are open.<sup>2</sup>

§ 17. Anciently, *the conversion of one kind of land into another*, as, for instance, of pasture into arable, was waste, because it not only changed the course of husbandry, but tended to obscure the title. And in late cases the impoverishment of fields, by constant tillage from year to year, is held to be waste.<sup>3</sup> So, suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence.<sup>4</sup> But, it has been said, that the pasture must have been such immemorially, and not merely *long before*; and, in the improved state of agriculture in modern times, the old rule may be considered as greatly relaxed, if not wholly obsolete. Thus, converting meadows into pasture is not waste, unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry. So, a tenant does not commit waste, by opening a way over meadow-land, for his convenience, digging drains by the side thereof, and carrying on earth for the purpose of making the way passable; or by erecting houses on such land, where there were none before, and digging cellars for them, and raising the ground about them; or by carrying quantities of earth upon the low and wet parts of such land: if the occasional breaking up of land is a judicious and suitable mode of cultivating it, the cost of levelling small, and if, after deducting such cost, the land over which the way was made, and on which the houses were built, would, in case of their removal, be equally (or more)

<sup>1</sup> Co. Lit. 58 b, 54 b; Saunders' case, 5 Rep. 12. See Whitfield v. Bewitt, 2 P. Wms. 240; Raine v. Alderson, 4 Bing. N. R. 702; U. S. v. Gear, 8 How. 120;

Ferrand v. Wilson, 4 Hare, 888; Owings v. Emery, 6 Gill, 286.

<sup>2</sup> Co. Lit. 58 b, n. 1.

<sup>3</sup> Sarles v. Sarles, 3 Sandf. Ch. 601.

<sup>4</sup> Clemence v. Steere, 1 R. I. 272.

(a) Where certain salt works were devised for life, subject to the payment of large legacies; held, the devisees might, to any extent, use the salt, and the woodland used by the testator for fuel, in carrying on the works. Findlay v. Smith, 6 Mumf. 184. (See *supra*, sec. 9, n.)

Where certain land was held by copy-

hold tenure, and, from time to time before the tenant came in possession, there being no proof at what periods, large masses of stone fell from cliffs above, and had become partially imbedded; held, they belonged to the lord, with the soil, and the copyholder had no right to remove them. Dearden v. Evans, 5 Mees. & W. 11.

valuable for agricultural purposes, including plowing and laying it down to grass, as if it had not thus been changed and built upon. But where, in the creation of the estate, there was an express prohibition against plowing land unfit to be plowed, Chancery will interpose by injunction to prevent it.<sup>1</sup>

§ 18. If a tenant, by an act of good husbandry, produces consequences of injury which could not reasonably be foreseen, he shall not be held guilty of waste. Thus, where a tenant diverted a creek into a swamp, whereby the trees were killed, and the lessor lay by twenty years, during which a new and better growth sprung up; held, no forfeiture of the lease for waste.<sup>2</sup>

§ 19. It is waste, in England, to destroy *heir-looms*; as, for instance, to destroy so many deer, fish, &c., as not to leave enough for the *stores*.<sup>3</sup>

§ 20. *Permissive waste* consists chiefly in suffering buildings to decay. If they were ruinous when leased, the tenant is not bound to repair, though justified in cutting timber for that purpose; because the law favors the maintenance of houses. But it is waste to tear them down, and he is liable, even if torn down after he leaves them, and without his consent.<sup>4</sup> In Massachusetts, he may cut timber trees, and sell them to procure boards for repairs, if this course be economical and beneficial to the estate.<sup>5</sup>

§ 21. Chancery will not decree that a tenant for life repair, nor appoint a receiver for that purpose; for this would be productive of harassing suits and expensive depositions.<sup>6</sup>

§ 22. If a tenant covenants to repair, and does not, waste will not lie.<sup>7(a)</sup>

§ 23. For waste caused by act of God, or enemies, the tenant is

<sup>1</sup> Co. Lit. 53 b; Dyer, 37 a; Gunning v. Gunning, 2 Show. 8; 1 Swift, 517-8; Keepers, &c. v. Alderton, 2 Bos. & P. 86; Worsley v. Stewart, 4 Bro. Pa. Ca. 377; Clemence v. Steere, 1 R. I. 272; Pyncheon v. Stearns, 11 Met. 304.

<sup>2</sup> Jackson v. Andrew, 18 John. 481.

<sup>3</sup> Co. Lit. 53 a.

<sup>4</sup> Clemence v. Steere, 1 R. I. 272.

<sup>5</sup> Co. Lit. 53 a, 54 b; Loomis v. Wilbur, 5 Mas. 18.

<sup>6</sup> Wood v. Gaynon, Amb. 395.

<sup>7</sup> Co. Lit. 54 b, n. 1.

(a) It has been held in South Carolina, that a tenant for life is liable for one-fourth the expense of repairs, to be

estimated by commissioners. Smith v. Poyas, 2 Des. 65.

not in general responsible; as where a house falls by a tempest. But, if merely unroofed, he is bound to re-cover it before the timbers rot. So it is not waste, to remove timber thrown down upon pasture land by a tempest, especially where it is valueless. And, where the timber is of value, if its prostration upon pasture land prevents the full enjoyment of the life-estate, the tenant should be permitted to remove it upon such terms as may be deemed by the court equitable.<sup>1</sup> Where the bank of a river, or a wall of the sea, is destroyed by a sudden flood, the tenant is not liable. Otherwise, where the current is so moderate that he might, by due diligence, preserve the bank, or where the injury happens by the ordinary flowing and reflowing of the tide.<sup>2</sup>

§ 24. It seems, waste may be of so small value, as not to be a proper subject of legal inquisition. But Lord Coke says, trees to the value of three shillings and four pence hath been adjudged waste, and many things together may make waste to a value. It is said, it ought to be to the value of 40d. at least.<sup>3(a)</sup>

§ 25. With respect to the persons who are liable for the commission of waste, there seems to be no little confusion in the books. Lord Coke says, that at common law a tenant for life was not *prohibited* from waste, unless expressly restrained from committing it. Mr. Cruise limits this remark to the case where lands were *granted* to a person for life, and assigns as the reason,

<sup>1</sup> 2 Rolle's Abr. 820; Co. Lit. 58 a; Houghton v. Cooper, 6 B. Mon. 281.

<sup>2</sup> Co. Lit. 58 b; Dyer, 88 a; Griffith's case, Moo. 69.

<sup>3</sup> Co. Lit. 58 a; Ib. n. 10.

(a) Where the lessee of a meadow, containing three lots, plowed it into a garden, and built upon it, and a verdict was rendered against him for three farthings damage, one farthing for each lot; judgment was given for the defendant. 2 B. & P. 86.

Where a man is found guilty of waste as to part of the premises on which he is charged, it amounts to a verdict of acquittal as to the residue. Morehouse v. Cotheal, 2 N. J. 521.

The verdict in an action of waste is good, if it do not specify the exact extent of the premises wasted. A mere

designation of each place wasted, where there are several, will not be sufficient. Ib.

Where an action is brought for damages for cutting down timber, the plaintiff is entitled to recover the amount by which the value of the estate is diminished, and not merely the value of the trees. Achey v. Hull, 7 Mich. 423.

Where a verdict finds waste by the removal of a stone wall not inclosing land, it is not sufficiently certain to involve a judgment for forfeiture of any land. Thacher v. Phinney, 7 Allen, 146.

that the grantor had power to impose such terms as he thought proper. Chancellor Kent says, that, at common law, a *prohibition* against waste would lie only against a tenant holding *by act of law*. It is said, the *Register* contains five several writs of waste; two at the common law, for waste done by a dowress or a guardian; and three by statute, for waste done by tenant for life, for years, and by the curtesy. But it is added, *some have thought* that, at common law, waste did not lie against tenant by the curtesy. In Connecticut, it is held, that, at common law, waste would lie only against a dowress, guardian, or tenant by the curtesy. But Lord Coke says, waste does not lie against a *guardian* in socage.<sup>1(a)</sup>

§ 26. Two early English statutes make provision for the punishment of waste committed *by any tenants* for life or for years. Statute of Marlbridge, 52 Hen. III, c. 24, authorized the action of waste, and gave full damages; and the statute of Gloucester, 6 Edw. I, c. 5, extended the penalty to a forfeiture of the place wasted, and treble damages.<sup>2</sup>

§ 27. Ecclesiastical persons, bishops, parsons, &c., seised of lands *jure ecclesiæ*, although having a fee simple qualified, are placed, in respect to waste, under the restrictions of tenants for life. They may cut timber or dig stones for repairs of the church or parsonage, or sell them to raise money for this purpose; but for anything beyond this they are liable, in England, to a writ of prohibition, or ecclesiastical censure, or injunction in Chancery, and to the last named process in the United States. So also an injunction lies against the widow of a deceased rector; and an action on the case against one who has resigned, or the representative of one deceased, by the successor, for dilapidation or even a neglect to repair.<sup>3(b)</sup>

<sup>1</sup> 1 Cruise. 123; 4 Kent, 77, 79, 81; Ackland v. Atwell, 2 Rolle, Abr. 813; Jefferson v. Durham, 1 Bos. & P. 120-1; Co. Lit. 54 a, and n. 11; 1 Swift, 519. Strachy v. Francis, 2 Atk. 217. But see 1 B. & P. 105; Hoskins v. Featherstone, 2 Bro. R. 552; Radcliffe v. D'Oyly, 2 T. R. 680; Jones v. Hill, Carth. 224; 3 Lev. 268.

<sup>2</sup> 3 Bl. Comm. 14. By St. 3 & 4 Wm. 4, ch. 27, the writ of waste is abolished.

<sup>3</sup> Rich. Liford's case, 11 Rep. 49 a; Stockman v. Whither, Rolle's R. 86;

(a) At common law, a guardian, by committing waste, forfeited his trust; a widow had a keeper set over her. 2 Inst. 300.

(b) Where a rector was cutting down timber on the glebe lands, and had sold some, and applied the money for necessary repairs of the rectory and other

§ 27 a. Chancellor Kent observes, that the provisions of the Statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing and applicable to our local circumstances.<sup>1</sup>(a)

<sup>1</sup> 4 Kent, 80.

houses on the lands, he was restrained, at the suit of the patron of the rectory, from cutting any timber, except to be used for the purpose of repairs, and from selling or disposing of any timber then or hereafter to be cut. The Duke of Marlborough v. St. John, 10 Eng. L. & Eq. 146.

It seems, it is only by way of indulgence, under special circumstances, as, for instance, where there is timber on an outlying part of the glebe, so far distant as to make it not worth while to bring the timber to the place where repairs are to be done, that a rector would be allowed to sell timber, even for the purpose of defraying the expense of necessary repairs with the proceeds. Ib.

In Maryland, if a rector commit waste, he forfeits treble damages to the vestry. 2 Md. L. 428.

(a) It has been expressly re-enacted in New Jersey. New York and Virginia, and adopted in North Carolina, Pennsylvania, Maryland, Massachusetts, and probably other States. (Chancellor Kent says, the *writ of waste*, as a real action, is essentially abolished; but an *action of waste* substituted, with the same penalty.) In Ohio, a tenant in dower, for voluntary or permissive waste, forfeits the place wasted, but the statute does not give treble damages. Tenant by the curtesy does not forfeit. In Delaware, the action of waste is limited to three years. Double damages are recovered. It lies for waste committed without written license.

In Massachusetts, Maine and Michigan, the penalty is in general forfeiture, with damages. But in Massachusetts, a tenant, against whom an action is pending for recovery of land, and who commits waste thereon, is liable to treble damages. In Maine, the Statute of Gloucester has been held not to be in force, nor does the action of waste lie against a dowress. Perhaps, for actual waste, an action on the case would lie. Tenant by the curtesy is liable for waste. 4 Kent, 80-1; 1 N. J. L. 209; 1 Virg. 227; 1 N. C. Rev. St. 609; Bright v. Wilson, Cam. & N. 26; Carver v. Miller,

4 Mass. 568; White v. Wagner, 4 Har. & J. 391; Padelford v. Padelford, 7 Pick. 152; Sackett v. Sackett, 8, 809; Penn. St. 1840, 217; Ohio R. C. ch. 88; 2 Chase, 1816; Walk. Intro. 326, 329; Dela. Rev. Sts. 441, 298. See 8 Harring. 9; Mass. Rev. St. 630; See St. 1841, 187; Mich. Rev. St. 265; Me. Ib. 893; Mich. Comp. L. ch. 186, secs. 1-5; Smith v. Follansbee, 18 Maine, 278; Me. Rev. Sts. 567.

(Whether, in Massachusetts, the English law of forfeiture, with treble damages, was ever in force; see Dane ch. 78, art. 11, sec. 2; art. 13, secs. 3, 4, 5; art. 14; Jackson, 340; Padelford v. Padelford, 7 Pick. 152; Sackett v. Sackett, 8, 809.

But such damages can be recovered only in the manner provided by the statute. They cannot be made an item of charge by a mortgagor against a mortgagee, in an account stated between them by a master, upon a bill to redeem. Boston, &c. v. King, 2 Cush. 400.

The provision of the Revised Statutes, giving damages for waste, to be recovered in a real action for the land itself, supersedes the common law remedy; and the claim need not be specifically set forth. Raymond v. Andrews, 6 Cush. 265.)

In Michigan, double damages are recovered. In Minnesota forfeiture is incurred, where the injury equals the value of the tenant's estate, or was done maliciously. Comp. Sts. c. 64, s. 15.

So in Oregon. Ore. C. s. 334.

In California, treble damages are recovered, but not the place wasted. Chipman v. Emeric, 8 Cal. 238.

In Rhode Island, the action of waste is still in use for recovery of the freehold estate wasted, with double damages; in case of dower, single damages. Loomis v. Wilbur, 5 Mas. 18; R. I. Rev. Sts. c. 204, s. 1; c. 202, s. 20.

In Indiana, (Ind. Rev. L. 210-11; 2 Rev. Sts. 174,) a widow forfeits the place wasted to the immediate reversioner or remainder-man. But, for negligent waste, she is merely liable in damages, unless the injury equals the value of the tenant's estate. A statute

§ 28 a. A landlord, in whom the reversion in fee is vested, may bring an action against the tenant during the term, for an injury committed by the tenant to the freehold.<sup>1</sup> But only the immediate reversioner in fee(a) of an estate for life can maintain an action of waste. Hence, during the continuance of an intermediate life-estate between such reversioner and the party who commits waste, the latter is not liable, and, if he die before the intermediate tenant, the action is forever gone.(b)

<sup>1</sup> Ray v. Ayers, 5 Duer, 494.

requires her to keep the estate in repair. In New Hampshire and Vermont, a widow is made liable to an action for strip or waste done or suffered.

(In Mississippi the law is as in New Hampshire. Miss. Rev. C. 469.)

In Maryland, suit may be brought by a devisee or his guardian.

In Wisconsin, double damages are recovered. A widow is required not to do or suffer waste, and to keep the premises in repair, and is liable to damages to the next owner of the inheritance for breach of this requirement. So, in general, a remainder-man may sue for waste by a particular tenant. 1 Verm. L. 159; N. H. L. 189; Verm. Rev. St. 291; Md. L. 407; Wisc. Rev. St. 335; ch. 62; sec. 37.

In Illinois, (Illin. Rev. L. 237, 625; Comp. Sts. 156,) the penalty is forfeiture with damages. A widow forfeits to the immediate reversioner, having a freehold or inheritance, where she wantonly or designedly commits or suffers waste. But for negligent or inadvertent waste, the claim is for damages only. In both cases, the remedy is an action of waste. If she marry again, the husband is liable with her for waste done by her before, or by him after marriage.

In Connecticut, until a recent period, there was no statute against waste by a tenant for years, and it is said few actions of waste are brought. A tenant for life, holding *by act of party*, might commit waste or authorize another to do it, without incurring any liability. But, by a late act, all particular tenants for life or for years, though holding *by act of party*, are forbidden to commit waste, and made liable to an action on the case, with a saving of vested rights. The Statutes of Marlbridge and of Gloucester are not in force; but the provisions of the former are adopted as to tenants

in dower and by the curtesy, upon the ground of general reasonableness, 1 Swift, 89, 519; Moore v. Ellsworth, 3 Conn. 487; Crocker v. Fox, 1 Root, 323; Rose v. Hayes, 1b. 244; Conn. St. June 6, 1840, p. 23; Comp. Sts. 150.

Where a widow suffers the estate assigned for her dower to need repairs, the court will order it into possession of the next owner, for a sufficient time to make the repairs, unless she gives security. Conn. Sts. 189.

In Kentucky, (2 Ky. Rev. L. 1590; Robinson v. Miller, 2 B. Monr. 287,) the Statute of Marlbridge is re-enacted—"farmers shall not make waste, nor sale, nor exile of house, woods and men," &c., without license. For such waste, they shall yield *full damages*, and be punished by *amercement grievously*. But a subsequent chapter of the Revised Laws provides an action of waste, giving forfeiture and treble damages, according to the Statute of Gloucester. It has been held that a reversioner cannot recover the land from a tenant in dower, for waste, by ejectment.

(a) In an action of waste, where the title of the plaintiff was set forth as a devise of a remainder, and the proof was that he was entitled to a reversion by descent, subject to a power of sale; held, the variance was fatal. *Southerland v. Jones*, 6 Jones, 821.

(b) In New York this rule has been changed by statute; but the reversioner recovers without prejudice to the intervening estate. 4 Kent, 78 n.

So in Kentucky; and an action may be brought by a reversioner for life or years. If wanton, treble damages are recovered. Ky. Rev. Sts. c. 56, art. 8, sec. 8.

In Missouri, case may be brought, though there is an intervening estate. Mis. Rev. Sts. c. 94, sec. 48.

But tenant for life is liable to an action for waste committed by him, though he have since assigned his estate.<sup>1(a)</sup>

§ 29. Lord Coke says, that *an heir* cannot have an action of waste for waste done in the life of his ancestor, nor a parson, &c., in the time of the predecessor. So if tenant for years, having committed waste, die, an action of waste does not lie against the executor, &c.(b)

§ 30. In order to sustain the action of waste, the reversion must continue in the same state as when the waste was done; for if the reversioner grant it away, or lease it for years, unless it be "in futuro," the waste is dispunishable, even though he take the whole estate back again. The same effect is produced, though he grant the reversion to the use of himself and his wife, and of his heirs. The action of waste *consists in privity*.<sup>2</sup>

§ 31. If tenant by the curtesy or tenant in dower assign his or her estate, and waste be done by the assignee, the heir may have an action of waste against either of such tenants, and recover the land from the assignee.(c) And if the heir have also assigned, the action lies in favor of his assignee, against the assignee of the tenant, because the privity is destroyed. In

<sup>1</sup> 1 Cruise, 90.

<sup>2</sup> Co. Lit. 53 b, 54 a.

In Massachusetts there may be an action for waste, though there is an intermediate estate. Mass. Gen. Sts. c. 188, secs. 1-6.

In North Carolina, an action lies at the instance of him *in whom the right is*, against all tenants committing the waste. Co. Lit. 53 b, 218 b. n. 2; Paget's case, 5 Rep. 76 b; Bray v. Tracy, Cro. Jac. 688; 1 N. Y. Rev. St. 750; 1 N. C. Ib. 609; Woodman v. Good, 6 M. & S. 169.

(a) In several States this is affirmed by statute. 2 N. Y. Rev. Sts. 592; N. C. Rev. C. ch. 116. sec. 2; Nix. Dig. N. J. 868; Wisc. Rev. Sts. c. 148, s. 2; Virg. C. c. 187, s. 1; Mich. Comp. L., ch. 186, sec. 2.

(b) But in Virginia, Kentucky, North Carolina, Delaware, New Jersey, New York, Wisconsin, Michigan, Maine, and Massachusetts, statutes provide, that the heir may sue for waste done in the time of his ancestor.

(A *feme sole* claimed certain land by virtue of a location thereof, made to her by the proprietors; and, after her inter-

marriage with A, he entered upon the land, under the location, and continued in possession thereof, after her decease, as tenant by the curtesy. Her heirs conveyed their reversionary interest to B, who sued A in an action of waste. Held. A could not defeat the action, by showing that the location of the land was so defective, that it would not bar the proprietors, nor persons claiming under them; but that he was estopped to deny the title under which he entered. Morgan v. Larned, 10 Met. 50.)

And in Massachusetts, Maine and Michigan, an action for waste survives against executors, &c. Mass. Rev. St. 630; 1 Vir. Rev. C. 277; 2 Ky. Rev. L. 1680-1; 1 N. C. Rev. St. 610; 1 N. J. Rev. C. 209; 2 N. Y. Rev. St. 384; Mich. Rev. St. 496-7; Me. Ib. 568; Dela. Ib. 293.

(c) In New York, it is provided, that the action may be brought against the assignee. In Delaware, the assignee of a tenant is liable. N. Y. Rev. Sts. 324; Dela. Ib. 293.



other cases, the action will be brought against him who did the waste, for it is in nature of a trespass.<sup>1</sup> Thus, neither an action of waste, nor an action on the case in the nature of waste, lies in favor of an assignee of the reversion against a tenant in dower for waste done by her assignee.<sup>2</sup> If a tenant, after assignment, continue to take the profits, he is liable for waste.<sup>3</sup>

§ 32. An action of waste, for waste to the land of a married woman, must be brought by husband and wife jointly.<sup>4</sup>

§ 33. Lord Coke says, a wife, holding an estate by survivorship, shall be punished for waste done by the husband in his life, if she agree to the estate, though there hath been variety of opinions in our books.<sup>5</sup> But an action of waste does not lie against the husband of a woman, tenant for life, after her death, the former having committed waste during her life, for he was seised only in her right, and she was tenant of the freehold. Otherwise, if she was tenant for years, because the term vested in him. So the assignee of the estate of the husband is liable for waste, because his seisin and possession are several, and he is strictly a tenant for the life of the husband.<sup>6(a)</sup>

§ 34. If tenant for life assign on condition; and the grantee do waste, and the former re-enter for condition broken, the action of waste lies against the grantee, and the place shall be recovered.<sup>7</sup>

§ 35. Although the Statute of Marlbridge prohibits only *farmers* from committing waste, yet a tenant is responsible for the waste, by whomsoever done, the law regarding him as hav-

<sup>1</sup> Co. Lit. 54 a; Bates v. Shraeder, 18 John. 260.

<sup>2</sup> Foot v. Dickinson, 2 Met. 611.

<sup>3</sup> Co. Lit. 54 a; 1 Virg. R. C. 277; 1 N. J. Ib. 209-10; 2 Ky. R. L. 1580-1; 1 N. C. Rev. St. 609.

<sup>4</sup> Thacher v. Phinney, 7 Allen, 146.

<sup>5</sup> Co. Lit. 54 a.

<sup>6</sup> Co. Lit. 54 a; Davis v. Gilliam, 5 Ired. Equ. 808.

<sup>7</sup> Ib.

(a) A, and B. his wife, being seised for their joint lives and that of the survivor, C took A's estate, and, living A, permitted waste. A having died, held, B could not have an action on the case against C. Bacon v. Smith, 1 Ad. & Ell. (N. S.) 845. Actions for waste may be brought by, as well as against, husband and wife. In an action of waste by a husband and wife, against the

alienee of the husband's interest in his wife's land, the declaration alleged that the reversion in fee was in the wife. Held, if this declaration was defective, in not alleging that the reversion was in the husband and wife, the defect was cured, after verdict, by the statute of jeofails. Dejarnette v. Allen, 5 Gratt. 499.

ing power to prevent it, while the landlord has no such power, not being on the land. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrong-doer himself. Only the act of God, of the public enemy, or of the lessor himself, will excuse the lessee. He is like a common carrier.<sup>1</sup> Lord Coke says, even an infant, and *baron* and *feme*, shall be punished for waste done by a stranger. But, although the reversioner *may* hold the tenant liable for waste done by a stranger, he may also, at his election, bring an action on the case against such stranger, for any injury in its nature permanent—as, for instance, digging up the soil. The action of waste lies against a lessee only.<sup>2</sup>

§ 36. The action of *estrepement* or waste is said to be in great degree superseded by an action on the case in nature of waste, which has the advantage of being maintainable by any other reversioner, as well as the owner in fee. The measure of damages is the injury to the inheritance.(a)

§ 37. It is said that, except under special circumstances, there is no remedy for *permissive* waste, after the tenant's death, either in law or in equity. It has also been held, that the action on the case would not lie for permissive waste. But this decision has been doubted.<sup>3</sup>

§ 38. Chancery will interpose, by *injunction*,(b) to prevent

<sup>1</sup> 1 Cruise, 124; 4 Kent, 77; *White v. Wagner*, 4 Har. & J. 373. 328. (See *Wilford v. Rose*, 2 Root, 20.)

<sup>2</sup> Co. Lit. 54 a; *Ross v. Gill*, 4 Call, 252; *Randall v. Cleaveland*, 6 Conn. 78. <sup>3</sup> *Turner v. Buck*, 22 Vin. 523; 4 Kent, 78.

(a) In England the writ of waste is abolished by St. 8 and 4 Wm. 4, ch. 27, sec. 36. The Revised Statutes of Massachusetts, Maine and Michigan, provide an action on the case, at the election of the party. In Maine, the demandant in a writ of entry may recover for waste in such action. 1 Cruise, 124; 4 Kent, 81. (See 6 Conn. 328; Mass. Rev. St. 680; Mich. Rev. St. 496; Me. Ib. 610-11, 568.)

(b) In a bill for waste; a single clear instance of waste, committed intentionally, is sufficient to entitle the complainant to a continuance of the injunction, and to a decree for an account. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

Where there is a privity of title, as

between tenants for life or years, and the reversioner, it is not necessary to show irreparable injury or destruction to the estate. *George's, &c. v. Detmold*, 1 Maryland Ch. Decis. 371.

But, as between strangers or parties claiming adversely, both in trespass and waste, the injury must be shown to be irreparable. *Ib.*

The mere allegation that the defendant is selling timber of the complainant, without further averment as to some peculiar value of the timber for some particular purpose, has been held not sufficient to warrant an injunction. *Hatcher v. Hampton*, 7 Geo. 49.

It is not necessary for a landlord to

waste or require security against it, upon application of the owner in fee, notwithstanding there is an intermediate reversion. So, also, upon application of a remainder-man for life, though there are intermediate limitations in tail, and to trustees to preserve contingent remainders; because, although the plaintiff, even when his estate vested, would have no interest in the timber, yet he would have the benefit of the mast and shade. So an injunction lies by the landlord against a sub-tenant or in favor of an unborn child. In a suit against a tenant for life and her under-tenant, where a decree is made for an account against both; the master may, if the tenant for life request it, ascertain what amount shall be made up to her by the under-tenant.<sup>1</sup>

<sup>1</sup> 1 Rolle Abr. 377, pl. 18; Moor, 554; 1 Hov. on Frauds, 226, ch. 7; Perrot v. Perrot, 8 Atk. 94; Worsley v. Stewart, 4 Bro. Parl. Co. 377; Livingston v. Reynolds, 2 Hill, 157; Langworthy v. Chad-

wick, 18 Conn. 42. See Hilton v. Granville, 1 Cr. & Ph. 288; Sarles v. Sarles, 8 Sandf. Ch. 607; Briggs v. Earl, &c., 8 Eng. L. & Equ. 194.

prove his title to the premises, to sustain an injunction against his tenant for cutting and carrying away timber. Parker v. Raymond, 14 Mis. 585.

Where the chief object is an injunction against future waste, it is of purely equitable cognizance, and the court, to prevent multiplicity of suits, when waste has been committed, will direct an account and satisfaction for past injuries. Ib. Rodgers v. Rodgers, 11 Barb. 595.

A bill in equity was filed by tenants in fee, alleging that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same; and that they have instituted actions of trespass *quare clausum fregit* for the said acts, which are now depending; but not that the trespass was to the destruction of the inheritance, or the mischief irreparable, nor stating such facts as would show that the apprehension of further acts of trespass was well founded; nor charging insolvency in the defendants. Held, an injunction would not be granted upon such a bill to restrain further acts of trespass or waste. Hamilton v. Ely, 4 Gill, 34.

A bill charged with particularity that A, who was insolvent, claimed certain lands, as the purchaser, at an irregular sale of a tax collector, whose deed he had; that A was threatening to commit

trespasses and waste; that he and others, acting avowedly under his authority, were making preparations with a view to their commission; that the complainants had been disturbed in the enjoyment of their property, and were likely to be more seriously interrupted; and that they were thus prevented from making the profit from their estate which otherwise they would. Held, chancery might grant an injunction to stay trespass and waste, and might remove the cloud from the complainant's title, and direct the cancellation of the deed, especially as the deed in form was *prima facie* valid. Lyon v. Hunt, 11 Ala. 295.

Instances of the interference of chancery for the purpose of enjoining waste, are as follows: Where a mere trespasser digs into and works a mine. So, where a trespasser, in collusion with the tenant, attempts to cut timber. So where there is a dispute concerning boundaries, and one party is about to cut ornamental or timber trees. So where one in possession under articles is proceeding to cut timber. So where lessees are taking from a manor, bordering on the sea, stones of peculiar value. In short, in all cases of timber, coals, ores and quarries, where the party is a mere trespasser, or exceeds his limited rights; upon the ground that the acts are or may be an irreparable damage. 2 Story (Equ.) 244-5, sec. 929.

§ 39. Chancery will interpose to prevent waste, *pendente lite*, before any act committed, if a party manifests his intention and asserts a right to commit waste.(a) So, after a decree for the sale of mortgaged property. The remedy in Chancery is limited to cases in which the title is clear and undisputed.<sup>1</sup>(b)

§ 40. Although an owner in fee cannot sue for waste, if there

<sup>1</sup> Gibson v. Smith, 2 Atk. 182; Kane v. Vandenburg, 1 John. Cha. 11; Smith v. Poyas, 2 Dess. 66; Storm v. Mann, 4 John. Cha. 21; Tessier v. Wise, 8 Bland,

60; Williams, Ib. 215. See Stewart v. Chew, Ib. 441; Murdock, 2, 461; Hough v. Martin, 2 Dev. & B. 379.

(a) In Virginia and Kentucky, if a tenant commit waste after a suit brought against him, the sheriff shall keep the land. In Maine and Massachusetts, such tenant forfeits treble damages. In New Jersey, the court will not grant rules to stay waste, in trespass *qu. claus.* 1 Vir. Rev. C. 277; 1 Smith, 188; Leeds v. Doughty, 6 Halst. 198; Mass. Rev. St. 630; 2 Ky Rev. L. 1531. Similar provisions in New York to those in Virginia, &c. 2 Rev. Sts. 336. In Wisconsin, waste may be stayed pending a suit. Rev. St. 581.

In these States, as also in Delaware and Minnesota, special provisions are made in case of land taken on execution. N. Y. Rev. Sts. 593; Wis. Rev. Sts., c. 148, s. 8; Min. Comp. Sts. 2859; Maine Rev. Sts., c. 95, s. 8; Mass. Gen. Sts., c. 188, s. 9.

Where land is sold on execution, the purchaser takes possession, and such land is redeemed; the owner is not entitled to rent or damages for waste before the redemption, but is entitled to rent for the time he was wrongfully kept out of possession after redemption. Kannon v. Pillow, 7 Humph. 281.

Where a party claims a right to land, by virtue of his adverse possession, without deed or an execution, he may maintain an action of waste, or trover, or an action on the case in the nature of waste, against the execution defendant, for cutting timber during the fifteen months subsequent to the sale, while he remains in possession; but not trespass, or replevin in the *capit.* Rich v. Baker, 3 Denio, 79.

(b) In Rhode Island, a writ of *estrepement*, being in the nature of an injunction, it seems, may be issued by the court or a judge, after notice to the adverse party, and the giving of a bond by the applicant. In Delaware, one having a lien upon land may have an

injunction or writ of *estrepement*. So this writ lies, pending an ejectment. In Pennsylvania, a writ lies to restrain waste by tenant for life. R. I. Sts. 1836, 910; Dela. St. 1843. 547-8; Dela. Rev. Sts. 293; Penn. Sts. 1849, 472.

In Maryland, provision is made by statute for the interference of Chancery in case of waste. (It is no objection to the jurisdiction of the Court of Chancery of Maryland, to stay waste, by a dowress, that the remedy should be sought on the equity side of the county court. Childs v. Smith, 1 Md. Ch. Dec. 483.) In Virginia, this is the only remedy. The action of waste is never brought. 1 Md. L. 599; Rob. Prac. 560.

In New Jersey (1 N. J. Laws, 209), a statute provides for a writ of waste out of Chancery, against a tenant for life or other term. The judgment is forfeiture, and treble damages. In Massachusetts, equity jurisdiction of waste is given to the Supreme Court; and they may stay waste by an injunction.

(This jurisdiction applies only to cases of technical waste; not to trespasses which a court with full Chancery powers might enjoin. Attaquin v. Fish, 5 Met. 140. So in Maine. The jurisdiction there attaches, only where there is privity of estate. Leighton v. Leighton, 32 Me. 399.)

The same process is provided against an owner of land who commits, or threatens, or prepares to commit, waste, after the land has been attached. A similar provision in Maine. In New York, the Supreme Court has Chancery jurisdiction to enjoin against waste, where it is actually commenced or threatened. The injunction may be granted against one who colludes with the tenant to commit waste. Mass. Rev. St. 631-2; Me. Rev. St. 569; Wilbur v. Wilbur, 7 Met. 249; Rodgers v. Rodgers, 11 Barb. 595.

is an intermediate estate, yet, where timber is cut down by the tenant, the property in it vests immediately in the owner of the inheritance at that time, and he may seize or maintain trover or replevin for it, or compel an account of its proceeds, if sold. The tenant has an interest in the timber while it remains standing—it is a part of the inheritance; but this interest is immediately forfeited by the wrongful act of severing it.<sup>1</sup> Thus land was conveyed to the use of A, for life, remainder to the use of his first and other sons in tail; remainder to B for life, with like remainder to his sons. B has a son living. A has none, and A severs timber from the land. Held, the son of B should have trover for the timber, although he could not have waste, on account of the intermediate estates; and the chance of A's having a son, who would take the inheritance before the son of B, was a mere possibility, liable to be defeated by a feoffment of A, and which did not interfere with this action.<sup>2</sup>

§ 41. Where there are intermediate limitations of the kind above-mentioned, and the immediate owner of the fee brings a bill in Chancery, for an account of timber cut down and sold; the court will not turn the plaintiff round to an action at law, the case being one which peculiarly calls for a discovery; nor will it order the money, paid into court, to be put out for the benefit of unborn heirs, who may afterwards have a title paramount to that of the plaintiff.<sup>3</sup>

§ 42. The same rule applies, (*ante*, sec. 40,) where the timber is severed by accident; as, for instance, by a storm.<sup>4</sup> But where there are trustees to preserve contingent remainders, Chancery will not allow a severance of the timber, by collusion between the tenant and the immediate owner in fee, to the injury of unborn heirs.<sup>5</sup> Nor will it allow a tenant for life, who also has the first vested estate of inheritance, to take advantage of his own wrong in committing waste, to the prejudice of intermediate

<sup>1</sup> *Mores v. Wait*, 8 Wend. 104; *Bulkley v. Dolbeare*, 7 Conn. 232; *Bewick v. Whitfield*, 8 P. Wms. 287; *Richardson v. York*, 2 Shepl. 216; *Railroad v. Kidd*, 7 Dana, 250.

<sup>2</sup> *Uvedale v. Uvedale*, 2 Rolle, Abr. 119.

<sup>3</sup> *Whitfield v. Bewitt*, 2 P. Wms. 240; *Lee v. Alston*, 1 Bro. Rep. 194; *Ib.* 8, 87.

<sup>4</sup> *Newcastle v. Vane*, 2 P. Wms. 241.

<sup>5</sup> *1 Cruise*, 128.

contingent remainders, although at law he would undoubtedly have power to do it. Thus A was tenant for life, remainder to his first and other sons in tail, remainder to B for life, with like remainder to her sons, estates to trustees to preserve, &c., remainder to A in fee. A had no son; B had one, who died very young. A commits waste, after which, B has another son. Held, A could not have the timber, cut down; nor the administrator of B's son, deceased, because he was dead at the time the waste was done; nor the other son of B, because his estate was liable to be defeated by A's having a son;(a) and therefore, that the money received for the timber should be paid into court.<sup>1</sup> This having been done, upon the subsequent death of A, and a hearing of the respective parties who claimed the money, viz., the administrator of B's son, B's second son, and the executor of A; held, that, inasmuch as the settlement had been wrongfully disturbed by A, the money should be restored to the same course which it would have followed had no such act been done; that B should have an interest for life, remainders in tail, and a reversion in A, according to the settlement.<sup>2</sup>

§ 43. The words, in a lease, "without impeachment of any action of waste" would merely exempt from *liability or suit*, not pass a title. The phrase "with full liberty to commit waste" is sometimes used. And *voluntary waste* is often expressly excepted; in which case it has been held, that wilful waste is not excused. It has been suggested, that the exception applies only to houses, and not to timber; but a late case has decided, that, where decaying timber is cut by order of court, this clause entitles the tenant only to the interest of the purchase-money. So, where there is a remainder-man for life without impeachment of waste, timber cut during a prior estate vests, not in him, but in the owner of the fee.<sup>3</sup>

<sup>1</sup> Williams v. Duke of Bolton, 8 P. Wms. 288. Dolbeare, 7 Conn 282; Pyne v. Dor, 1 T. R. 56; Aston v. Aston, 1 Ves. 265; 1

<sup>2</sup> Powlett v. Duchess of Bolton, 8 Ves. jun. 374; Williams v. Duke, &c., 1 Cox, 72; (Dare v. Hopkins. 2 Cox, 110). Cruise, 181; Wickham v. Wickham, 19 Ves. 419; Pigot v. Bullock, 1 Ves. jun. 479. See Tollemache v. Tollemache, 1

<sup>3</sup> 4 Kent, 77; Co. Lit. 220 a; Lewis Bowles' case, 1 Rep. 82 b; Bulkley v. Hare, 466; Briggs v. Earl, &c. 8 Eng. L. & Equ. 194.

(a) A better reason seems to have been, that he was born after the waste was committed.

§ 44. A lessee for years, holding under tenant for life without impeachment of waste, may lawfully commit waste.

§ 45. But the tenant for life cannot transfer his power, so that it may be exercised after his own death; nor, where his estate is in remainder, subject to a prior life estate, without the power, will any agreement between the two tenants for life be sustained, for committing waste before the former estate terminates.<sup>1</sup>

§ 46. A tenant for life, without impeachment of waste, is not permitted to commit malicious waste, to the destruction of the estate. This is sometimes called *equitable waste*; and a court of chancery will not only prevent it by injunction, but compel restitution after it is committed.(a) Where a tenant covenants

<sup>1</sup> *Bray v. Tracy*, W. Jones, 51; 1 Cruise, 183; *Robinson v. Litton*, 3 Atk. 210; *Garth v. Cotton*, Dick. 186.

(a) A, upon the marriage of his son, settled an estate upon himself for life, without impeachment of waste, remainder to his son for life, &c. Afterwards, having taken a dislike to his son, A caused the house to be injured by tearing off fixtures of various kinds, to the value of £3,000. The court ordered an injunction, and also that the damage be repaired. *Vane v. Barnard*, 2 Vern. 788. See *Kidd v. Dennison*, 6 Barb. 9.

The power is considered inequitable, and therefore Chancery controls it; but still with reference to the presumed intent of the party creating it. *Marker v. Marker*, 4 Eng. L. & Equ. 95.

Relief is granted where a tenant cuts down timber for the sake of the profit to be derived from a sale, upon the same principles on which an injunction is granted to stay what is called *equitable waste*. *Kidd v. Dennison*, 6 Barb. 9.

Where the whole of a farm, when leased for a rent, is in a wild and unsettled state, with the exception of a few acres, the parties will be held to have intended that the lessee should be at liberty to sell part of the timber in order to fit the land for cultivation; but this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value; nor to cut trees for the profit to be derived from a sale; nor, just before the expiration of his lease, to cut down timber, upon the pretext of gradually clearing up the land and preparing it for cultivation. *Ib.*

So, where a widow has dower assigned to her in land, the reversion of which is divided among several, she has, in general, a discretionary right to get wood for repairs, firewood, &c., from what part of the land she pleases; but, it seems, that in an extreme case, when she acts out of mere caprice and partiality, with a view to favor one at the expense of another, equity might interfere. *Dalton v. Dalton*, 7 Ired. Eq. 197.

Tenant for life, dispunishable for waste, had power to lease, for 21 years, certain ancient pasture lands, which she afterwards, before any lease, had converted into garden allotments, in a manner amounting to waste. The leasing power provided against "any fine, premium or foregift being taken for the making thereof," and that "none of the lessees should be, by any clause, or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease reciting this power, the tenant for life demised, December 18th, 1845, for 21 years from the 1st of July last, reserving a rent payable half-yearly, January 1st and July 1st, 1846. The lessee covenanted not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the tenant for life. Held, such reservation of rent did not amount to a fine, premium or foregift. Also, that the exception in the covenant did not amount to a license or authority to the lessee to commit waste by carrying out the allotment sys-



not to cut down, destroy, or carry away any more wood or timber than should be actually used on the farm, it will be waste for him to cut wood to be used in burning bricks for sale.<sup>1</sup>(a)

<sup>1</sup> Livingston v. Reynolds, 28 Wend. 115.

tem; and, if any implication could be made so as to construe that exception, as implying a permission by the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise. *Hopkinson v. Ferrand*, 6 Eng. Law & Equ. 404.

(a) In most of the States special provision is made by statute against wanton injuries to land, buildings, trees, &c., by persons without title; and, more particularly in the Western States, against the act of firing woods and prairies belonging either to the party himself or to another.

## CHAPTER XIX.

## ESTATE AT WILL AND AT SUFFERANCE.

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|---|---|
| 1. Estate at will—definition.   | 7. How terminated.  |
| 3. Incidents.   | 14. Notice to quit, and summary process to eject.         |
| 4. Estate from year to year—notice to quit; laws of the several States. | 28. Estate at will—how affected by the statute of frauds. |
| 6. Estate at will—whether assignable, &c.                               | 80. Tenant at sufferance.                                 |

§ 1. An *estate at will*, is where one man lets land to another, to hold at the will of the lessor.<sup>1(a)</sup>

§ 2. The right to enter, use and possess the land of one at the pleasure of another, is a lease at will, even though no rent is reserved, if the case shows some other adequate consid-

<sup>1</sup> Lit. s. 68; 4 Kent, 109. See *Austin v. Thomson*, 45 N. H. 118.

(a) In Iowa, (Code 1851, ch. 78, sec. 1208,) possession of the tenant is *presumed* to be at will.

An estate at the will of the lessee is at the will of the lessor also; and *vice versa*. *Cheever v. Pearson*, 16 Pick. 271; 1 Cruise, 190. See *infra*, sec. 3, n.; *Hall v. Wadsworth*, 2 Wms. 410.

A, the defendant, occupied the premises of B, the plaintiff, under an express agreement to pay rent; but neither the amount of it nor the time of occupation was agreed upon. B having notified A to quit immediately, which he did; held, an action for use and occupation would lie, without demand. *Spaulding v. M'Oske*, 7 Met. 8.

A lease made by an agent in his own name being void a tenant entering under such a lease is a tenant at will, and as such is entitled to notice to quit before ejectment will lie against him. *Murray v. Armstrong*, 11 Mis. 209.

A parol agreement that one party

should enter on the land of the other, dig ore, erect buildings, &c., and pay fifty cents a ton for all ore removed, amounts to a lease; but its duration is to be determined by the jury, who are to say whether, upon all the evidence, it was at will or from year to year, under the instructions of the court as to what constituted a lease for a year, and what a tenancy at will. *Mooney v. Miller*, 8 Barr, 272.

A joined his fence to B's in several places, part of B's fence being on A's land, and the fence so joined was permitted to stand for seven years; then B, without notice to A, threw down the fence. Held, in an action of trespass, that A was to be considered as tenant, and entitled to notice after so long an acquiescence, and that B had no right to enter upon A's land, or from his own land to throw down A's fence. *Shean v. Withers*, 12 B. Mon. 441.

eration.<sup>1</sup> So, it is said, one placed on land without any terms prescribed or rent reserved, and as a mere occupier, is strictly a tenant at will.<sup>2</sup> So a person, entering and holding land under an agreement to buy it, is held at least a tenant at will.<sup>3</sup> Or one occupying under an agreement for a future sale or lease.<sup>4</sup>(a)

§ 3. At common law, such estate was at the will of both parties, but neither could determine it wantonly and to the injury of the other. Thus the lessee was entitled to *emblements*, notwithstanding a determination by the lessor, though not after a determination by himself; and the lessor to rent, though the lessee quit before rent-day. A tenant at will is also entitled to *estovers*. So it has been held that the *manure* made upon the land belongs to him, and may be taken by his creditors.<sup>5</sup>(b)

<sup>1</sup> Cheever v. Pearson, 16 Pick. 271.

<sup>2</sup> 4 Kent, 112.

<sup>3</sup> Jones v. Jones, 2 Rich. 542; Manchester v. Doddridge, 3 Ind. 360. But see Kratemayer v. Brink, 17 Ind. 509.

<sup>4</sup> Love v. Edmondson, 1 Ired. 152.

<sup>5</sup> Chandler v. Thurston, 10 Pick. 209-10; 4 Kent, 109-10; Staples v. Emery, 7 Greenf. 201.

(a) Where one took possession of land under an agreement to purchase, and thus became a tenant at will, and upon his death his widow and devisee entered; held, she did not become a tenant at will, but her possession was adverse, and, being continued twenty years, gave a legal title. Doe v. Rock, 1 C. & Mar. 549.

In Vermont, where one enters upon land under an agreement to buy it, which fails without his fault, no action lies for use and occupation. Hough v. Berge, 11 Verm. 190. Nor is he entitled to notice to quit. Wright v. Moore, 21 Wend. 280.

After a verbal agreement by A to purchase the house of B, payment of the price and possession taken, but before a deed was given; the house was burned. A thereupon quit the land, refused a deed tendered by B immediately after the fire, and brought a suit to recover back the price, in which he prevailed. Held, A, while occupying the house, was a tenant at will, and liable for use and occupation, but not after refusing the deed. Gould v. Thompson, 4 Met. 224. Ejectment may be brought against a grantee, as landlord, where the grantor has remained in possession since the deed was made. Hodges v. Gates, 9 Verm. 178.

It has been held, that a deed of land in fee, with a clause that the grantor should retain possession until a certain time, does not constitute the relation of landlord and tenant, so as to give jurisdiction by summary process for recovering possession after the time has elapsed. Sims v. Humphrey, 4 Denio, 185.

Where one whose land has been sold on execution remains in possession an uncertain time, by consent of the purchaser, he is tenant at will. Nichols v. Williams, 8 Cow. 18. See 1 Swift, 91; Watkins v. Holman, 16 Pet. 25; Stansbury v. Taggart, 8 McL. 457.

A judgment debtor, continuing in possession after such a sale, is a *tenant* within the meaning of the statute of summary proceedings to recover possession, (2 Rev. Sts. 512,) and has a right to deny the facts stated in the complaint, to have a trial by jury, and to stay the issuing of a warrant to remove him, on complying with the provisions of the statute. (Laws N. Y. 1849, 292, sec. 5.) Spraker v. Cook, 16 N. Y. (2 Smith) 567.

In such trial, the word "rent," as used in Sts. 1849, c. 193, is to be construed a compensation for use and occupation. Ib.

(a) In England, it seems, an outgoing tenant may sell or remove the manure. Roberts v. Barker, 1 Cr. & Mees. 809

§ 4. Estates at will, in the strict sense, have become almost extinguished under the operation of express statutes and judicial decisions. At first, a lease for no certain time, reserving an annual rent, was construed as for *one year*. By the modern English doctrine, the old estates at will are treated as tenancies *from year to year*,<sup>(a)</sup> unless there is an express grant or agree-

So in North Carolina, at any time before he quits. *Smithwick v. Ellison*, 2 Ired. 328. See *Goodrich v. Jones*, 2 Hill, 142; *Rinehart v. Olwine*, 5 W. & S. 157; *Law Rep.* (Jan. 1864) 481. But it is held in Massachusetts, that an outgoing tenant at will of a farm has no right to remove the manure made thereon in the ordinary course of husbandry, and consisting of the collections from the stable and barn-yard, or of composts caused by the admixture of these with other substances taken from the farm; and, if he sell such manure, to be removed, to one having notice of the landlord's title, the purchaser gains no property, but is liable in trespass to the landlord for removing the manure. Otherwise, with manure made in a livery stable, or in any manner not connected with agriculture, or in a course of husbandry. *Daniels v. Pond*, 21 Pick. 867. The tenant has a qualified possession of the manure, for the purpose of using it on the farm; but a sale by him vests the right of possession in the landlord. *Ib.* *Acc. Lassell v. Reed*, 5 Greenl. 222; *Midlebrook v. Corwin*, 15 Wend. 169.

(a) It was formerly held, that a lease "from year to year, so long as both parties please," created a tenancy for at least two years. But it has been recently decided, that a tenancy from year to year lasts only so long as both parties please, and is determinable by either at the end of any year by notice. *Ring v. Argand*, *Cro. Eliz.* 776; *Doe v. Smarridge*, 9 Jur. 781. See *Doe v. Green*, 9 Ad. & Ell. 658. *Supra*, s. 1, n.

The reservation of an annual rent is said to be the leading circumstance that turns leases for uncertain terms into leases from year to year. 4 Kent, 112; *Pope v. Garland*, 4 You. & Coll. 894.

The English rule of a tenancy from year to year is said to be, or to have been, in force in New York, but not in other States. 4 Kent, 111. Thus, where one occupied eighteen years, and made improvements, but paid no rent, he was tenant from year to year. *Jackson v.*

*Bryan*, 1 John. 822. See *Greton v. Smith*, 33 N. Y. (6 Tiff.) 245.

In Massachusetts it was at first held, that a tenant at will was not entitled to six months' notice, but only to reasonable notice. The point was afterwards left doubtful, whether he could claim any notice; but reasonable notice was finally held necessary. In one case, it was held, that, though the tenancy was determined by the will of the lessor without notice, yet the lessee still should have a reasonable time to remove his family and effects. 4 Kent, 211; *Rising v. Stannard*, 17 Mass. 287; *Coffin v. Lunt*, 2 Pick. 70; *Ib.* 71 n.; *Ellis v. Paige*, 1 Pick. 49; *acc. Folsom v. Moore*, 1 Appl. 252.

In Maine, the statute of frauds is construed to make a parol lease strictly a tenancy at will. *Little v. Palister*, 8 Greenl. 15. So, notwithstanding an annual rent. *Withers v. Larrabee*, 48 Maine, 570.

An estate created without writing, in New Hampshire, is only at will. *Whitney v. Lovett*, 2 Fost. 10. So, though receipts for rent indicate a tenancy from year to year, or month to month. *Ib.*

In Vermont, a tenancy by a parol lease for a term of years, which, under the Revised Statutes, (ch. 60, sec. 21,) is at first an estate at will only, by the continuance of possession and payment of rent by the lessee for several years, (in this case three years,) becomes a tenancy from year to year. *Barlow v. Wainwright*, 22 Vt. 88.

In such case the tenant cannot, at any time during the year, surrender the premises against the will of the landlord, and thus excuse himself from the payment of rent. *Ib.*

Nor is it any defence in assumpsit for use and occupation, that he abandoned the possession. *Ib.*

Nor that the tenant, after having been in possession a few months, associated with him a partner in the business carried on by him on the premises, no new

ment to the contrary. With the same qualifications, a tenant from year to year has been held entitled to six months' notice to quit, and the landlord to the same. The notice must end at the end of the year; and it has been held that, even though the premises be burned during the year, the rent does not cease without legal notice.<sup>1</sup>

§ 5. But the rule of a half year's notice is not an inflexible one. Justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate. Hence, where lodgings(a) are hired, for instance,

<sup>1</sup> *Ellis v. Page*, 1 Pick. 46; *Izon v. Gorton*, 5 Bing. N. 601; 4 Kent, 110-11; *Webber v. Shearman*, 8 Hill, 547; *Kingsbury v. Collins*, 4 Bingh. 202. See *Alford v. Vickery*, 1 C. & Mar. 280; *Doe v. Mizem*, 2 Car. & K. 56; *Doe v. Gold-*

*win*, 2 Ad. & El. N. S. 148; *Doe v. Green*, 9 Ad. & Ell. 658; *Atherstone v. Bostock*, 2 Scott, N. 637; *Swinfer v. Bacon*, 6 H. & N. 184, 846; *Walker v. Gode*, Ib. 594.

agreement being made with the landlord. Ib.

The parol agreement will still determine the amount of rent and the time of payment. Ib.

In Pennsylvania, it seems, if a tenant at will occupy more than a year, he becomes a tenant from year to year, and is entitled to three months' notice. *McDowell v. Simpson*, 8 Watts, 129. See *Cook v. Neilson*, 10 Barr, 41.

A landlord may treat a tenant holding over after a term, as tenant from year to year, or as a trespasser, at his election. *Hemphill v. Flynn*, 2 Barr, 144.

In South Carolina, the court of magistrates and freeholders have exclusive and final jurisdiction of all cases of the holding over of tenants, and their judgment is final upon the tenancy, the identity of the premises, and the expiration of the term and holding over of the tenant. The failure of the tenant to make a valid defence, such as tenancy in common, gives the tenant no ground for an injunction to restrain the execution of a judgment of that court. *Leonard v. McCool*, 3 Strobb. Eq. 44.

A tenant from year to year, holding over after the expiration of his lease at an annual rent, is entitled to three months' notice to quit, ending at the expiration of the year. *Godard v. Railroad Co.*, 2 Rich. 846.

The acts of 1808 and 1817 have not altered the common law in relation to tenancies from year to year, in respect to notices to quit. Ib.

Lease to A and B, partners, for one year. During the year, B left the firm, and C came in. The firm paid the rent reserved, and occupied for two years and three months after the lease expired. Held, they became tenants from year to year, and were liable for the rent of the whole year on which they had entered. *Hart v. Finney*, 1 Strobb. 250.

Lease for one year, the tenant giving his note for the rent. He occupied about two years, when the landlord demanded his note for the year's rent. The tenant refused to give it, or pay the rent. Held, a tenancy from year to year, determinable by notice to quit, but that the tenant had denied the tenancy by his refusal, and was liable to an ejectment without notice. *The State v. Stewart*, 5 Strobb. 29.

In North Carolina, it is held, that, where one takes possession of land by license of the owner, for an indeterminate period, without reservation of rent, he is not a tenant from year to year, but strictly a tenant at will, and not entitled to notice to quit. *Doe v. Barker*, 4 Dev. 220. See *Brown v. King*, 5 Met. 178; *supra*, p. 71.

In Tennessee it has been held, that a parol lease for six years could not be construed into a tenancy from year to year. *Porter v. Gordon*, 5 Yerg. 100.

(a) *Lodgings* are defined, in reference to letting and hiring, as *part of a tenement*. They are held to require a written contract, as in any other case of agreement relating to *lands*. *Edge v.*

by the month, the time of notice is proportionably reduced. And where a lessor had previously brought a suit for rent against the tenant, charging him by the month, and prevailed; this was held to be evidence of an understanding that he held by the month, and to regulate the time of notice.<sup>1</sup>

§ 6. Tenant at will cannot *assign*, though he may take a *release*; but a tenant from year to year, it is said, may assign. So a sale *on execution* of the title of a debtor, who has only an estate at will, will pass no title to the purchaser upon which he can maintain ejectment. In New York and Missouri, estates at will and at sufferance are declared to be *chattel interests*, but not liable to be taken in execution.<sup>2</sup>

§ 7. A tenant at will has an estate, which must be terminated before he will cease to have a right of possession, begin to hold unlawfully, or be liable under the statute to a process of ejectment as a wrong-doer.<sup>3</sup> An estate at will may be *terminated*, either by the lessor or the lessee. The former may determine the tenancy: 1. By an express declaration to that effect, either made on the land, or of which the lessee has notice. (a) So by a demand of possession. 2. By any act of ownership inconsistent with the tenancy, such as entering (b) and cutting wood,

<sup>1</sup> 4 Kent, 111-12; Coffin v. Lunt, 2 Pick. 70; Prindle v. Anderson, 19 Wend. 391.

<sup>2</sup> Colvin v. Baker, 2 Barb. 206; 4 Kent, 112; N. Y. Rev. Sts. 722; Wisc.

Rev. Sts. 314; Braythwaite v. Hitchcock, 10 Mees. & W. 494; Bigelow v. Finch, 11 Barb. 498.

<sup>3</sup> Wheeler v. Wood, 25 Maine, 287; Jones v. Jones, 2 Rich. 542

Stafford, 1 Cr. & J. 391. So, where one took a house, partly furnished, at a certain rent, and the owner agreed to send in all other necessary furniture; held, this agreement related to an *interest in land*, and must be in writing. Meehelen v. Wallace, 7 Ad. & Ell. 49. But a contract with the keeper of a hotel or boarding-house, for board and lodging, paying separate prices for each, creates no *tenancy*, and gives the lodger no interest in real estate. Wilson v. Martin, 1 Denio, 602. But lodgers have the rights of tenants, such as the use of the door-bell, knocker, skylight of the staircase, and water-closet. Underwood v. Burrows, 7 Car. & P. 26. So, it has been held, they cannot quit without notice. Rickett v. Tullick, 6 Car. & P. 66.

(a) The tenancy terminates *instantly*.

But perhaps the tenant may enter to remove his goods without being a trespasser. Doe v. McKay, 10 B. & C. 721.

(b) When a landlord, having a right of entry upon a house which his tenant has just left, finds the doors open and the house vacant, he may lawfully enter and keep possession, remove the furniture carefully, and store it safely at hand for his use. Rollins v. Mooers, 25 Maine, 192.

To determine a tenancy at will by the landlord's entering on the land, and there by words declaring it at an end, it is necessary that the tenant should have notice of such words. Cook v. Cook, 28 Ala. 660.

In case of a lease strictly at will, an entry by the landlord, and notice to quit given to the tenant, will terminate the

carrying away stone, or making another immediate conveyance.(a) In the case last named, the lessee is said to become a tenant at will or at sufferance to the landlord's grantee, who cannot treat him as a trespasser before entry or notice to quit.<sup>1</sup>(b)

§ 8. The old doctrine, as to terminating the estate by the *acts* of the lessor, is still held to be in force, and not superseded by the statutory provisions in relation to *notice*.(c) Thus, a sale and conveyance by the lessor terminates the estate at will, and makes it a tenancy at sufferance, not subject to the statutory provision as to notice to quit.<sup>2</sup> So where A leased to B at will, and, the rent, payable quarterly, being in arrear, gave written notice to quit, and leased to C for years, not notifying B of such lease; held, C might immediately bring the landlord and tenant process against B. And if the tenant at will, having notice of such lease, enter and remove the crops, he is liable in trespass to a purchaser from the lessee.<sup>3</sup> So if a mortgagee enter, and notify the tenant of the mortgagor to pay rent to him or quit, the tenancy is terminated.<sup>4</sup> So if a lessor at will becomes insolvent, the vesting order, and notice thereof to the tenant, terminate the estate.<sup>5</sup>

<sup>1</sup> M'Farland v. Chase, 7 Gray, 462; 1 Cruise, 190-1; Keay v. Goodwin, 16 Mass. 1; Rising v. Stannard, 17, 288; Howell v. Howell, 7 Ired. 496; Turner v. Doe, 9 Mees. & W. 648. See Dorrell v. Johnson, 17 Pick. 268; Davis v. Thomas, 6 Eng. L. & Equ. 487.

<sup>2</sup> Benedict v. Morse, 10 Met. 228.

<sup>3</sup> Hildreth v. Conant, 10 Met. 298; Kelly v. Waite, 12, 800.

<sup>4</sup> Hill v. Jordan, 80 Maine, 867.

<sup>5</sup> Davies v. Thomas, 6 Eng. L. & Equ. 487.

lease and revest possession in the landlord, though the tenant be not actually turned out. Curl v. Lowell, 19 Pick. 25.

(a) A deed from the landlord terminates an estate at will, though the landlord gave the tenant a bond to convey to him. Rooney v. Gillespie, 6 Allen. 74.

(b) But where A conveys to B, and B to C, and A remains in possession, C may have ejectment against him without notice, though B has received rent since the conveyance to C. Jackson v. Aldrich, 13 John. 106. A grantor, remaining in possession, is, like other tenants at will, entitled to the *crops*. Sherburne v. Jones, 2 Appl. 70.

(c) It is said, tenancy at will seems

still to retain its original character, except for the purpose of *notice*; and, with regard to this, it will be seen, that, in most of the United States, specific statutory provisions have established a definite rule, which leaves no room for construction or uncertainty. See Hollingsworth v. Snyder, 2 Clarke, 435; Farson v. Goodale, 8 Allen. 202; Nicholson v. Munigle, 6 Ib. 215; Fuller v. Swett, Ib. 219, n.; Hultain v. Munigle, Ib. 220; Ashley v. Warner, 11 Gray, 43; Johnson v. Stewart, Ib. 181; Mizner v. Munroe, 10 Ib. 290; Secor v. Pestana, 37 Ill. 525; Jackson v. Warner, 32 Ib. 831; Brown v. Keller, Ib. 152; Burns v. Bryant, 31 N. Y. (4 Tiff.) 453; Pickard v. Perley, 45 N. H. 188.



§ 9. On the other hand, the *lessee* may determine an estate at will, by any act of desertion, or any act inconsistent with the tenancy; as by attempting to convey in fee, assigning, or committing waste. If he assign, or make a lease, this amounts to a disseisin of the lessor, at his election; but it is held that the assignor, and not the assignee, is the disseisor, though the landlord may sue the assignee in trespass. And, by committing waste, the lessee becomes a trespasser—it being a determination of his estate. The action of *waste* does not lie against him, nor is he liable in any form for mere *permissive waste*.<sup>1(a)</sup>

§ 10. The *death* of either landlord or tenant terminates an estate at will.<sup>2</sup>

§ 11. A distinction is made between the termination of the estate by *notice*, and a termination in other modes, without notice. In the former case, the tenant, it seems, becomes a trespasser by holding over, but not in the latter; as, for instance, by the *death* of the landlord, of which the tenant is not notified.<sup>3</sup>

§ 12. Where a parol letting is made for a particular object, the lessee's estate will not extend beyond the time necessary for this purpose. Hence, if the tenant is put upon the land *to raise a crop*, and absconds before the crop is completed, this determines his estate.<sup>4</sup>

§ 13. Although a tenancy at will may be terminated by the landlord, as above stated, yet as to third persons, while the tenant occupies, the title is regarded as being in him. Hence, for

<sup>1</sup> Warner v. Page, 4 Verm. 291; 1 Cruise, 191; Howell v. Howell, 7 Ired. 496; Chandler v. Thurston, 10 Pick. 209; Co. Lit. 57 a; Blunden v. Baugh, Cro. Car. 802; Lit. 71; Shrewsbury's case, 5 Rep. 13 b; Treat v. Peck, 5 Conn. 280;

Daniels v. Pond, 21 Pick. 367; Cooper v. Adams. 6 Cush. 87.

<sup>2</sup> Rising v. Stannard. 17 Mass. 284.

<sup>3</sup> Ib. 287.

<sup>4</sup> Chandler v. Thurston, 10 Pick. 209.

(a) Nor tenant from year to year. Torriano v. Young, 6 Carr. & P. 8; Gibson v. Wells, 1 N. R. 290. In Indiana, in case of waste, no notice to quit is necessary. Ind. Rev. L. 520. A tenant at will mortgages in fee, and the mortgagee enters under a judgment upon the mortgage. The lessor may have trespass against the latter. Little v. Palister, 4 Greenl. 209.

A conveys land to B but continues to

occupy as tenant at will to B. C, a creditor of A, levies an execution upon the land. himself enters, and A points out what part of the land he wishes to have levied upon, assists the surveyor, and gives no notice of B's title. Held. these facts constituted a determination of A's tenancy, so that B might maintain trespass against C. Campbell v. Procter 6 Greenl. 12.

any injury to the land, which affects merely the interests of the tenant, as by treading down the grass and breaking down a fence built by the tenant, the landlord cannot maintain an action.<sup>1</sup>

§ 14. It will be presently seen that the duration of estates at will, and the mode of terminating them by process of law, are now severally regulated by express statutes. In reference to the construction and application of such statutes, the following points have been settled.

§ 15. A statute for the relief of landlords applies only where this relation exists, or where the plaintiff claim under the landlord.<sup>2</sup>

§ 16. The statute (summary, &c.) does not apply where the tenancy ends by consent, as at common law.<sup>3</sup>

§ 16 a. A notice to quit must be *absolute*. A notice demanding possession and declaring that, if possession is not given by a certain day, rent at a given rate will be claimed, is not sufficient.<sup>4</sup>

§ 17. An unauthorized notice to quit has been held insufficient, though afterwards ratified by the landlord.<sup>5</sup>

§ 18. Where a person is in possession in pursuance of an agreement for a purchase, and fails to comply with his part of the agreement, ejectment will lie against him at the suit of the vendor, without notice to quit.<sup>6</sup> So where the defendant in ejectment was in possession under a contract for title with a third person, who was not shown to have any connection with the lessor or the plaintiff; held, notice to quit was not necessary.<sup>7</sup> Or if one, who has entered as tenant or quasi tenant, attempt to set up title under another.<sup>8</sup> Or, on a sale of land on execution, to maintain a suit against the defendant in execution, who is in possession.<sup>9</sup>

<sup>1</sup> Little v. Pallister, 8 Greenl. 6.

<sup>2</sup> Stockbridge v. Nute, 20 N. H. 271; Shackleford v. Smith, 5 Dana, 237; Avery v. Smith, 8 Blackf. 222; Ind. Rev. Sts. 585-6.

<sup>3</sup> Cooper v. Adams, 6 Cush. 87.

<sup>4</sup> Ayres v. Draper, 11 Mis. 548.

<sup>5</sup> Doe v. Goldwin, 2 Ad. & Ell. (N. S.) 143.

<sup>6</sup> Baker v. Gittings, 16 Ohio, 485;

Brumfield v. Brown, 7 Blackf. 142; Powers v. Ingraham, 8 Barb. 576. But see Bedford v. Thomas, 6 B. Mon. 832.

<sup>7</sup> Petty v. Doe, 13 Ala. 568.

<sup>8</sup> Meraman v. Caldwell, 8 B. Mon. 82; Bedford v. Thomas, 6 B. Mon. 832.

<sup>9</sup> Snowden v. M'Kinney, 7 B. Mon. 258. See Morrison v. Tenney, 15 N. H. 126; Hovey v. Blanchard, 13 Ib. 145.

§ 19. In case of summary process, no demand of rent is necessary.<sup>1</sup>

§ 20. The service of a notice to quit is not in law an admission of a subsisting tenancy, especially where accompanied with a declaration and notice in ejectment.<sup>2</sup>

§ 20 a. If, after notice to quit, the landlord receives rent for a period subsequent to its expiration, the notice is waived.<sup>3</sup>

§ 21. The statutory process is not barred by payment of the rent, if in receiving it the landlord expressly reserves his rights.<sup>4</sup>

§ 22. Where fourteen days' notice is necessary to determine a tenancy, a notice to leave "forthwith," not specifying a day certain, and not stating any cause for giving the notice, is insufficient, although such notice is in fact served fourteen days before action brought<sup>5</sup>(a)

§ 23. An insufficient notice for one rent day is not available for the succeeding one.<sup>6</sup>(b)

<sup>1</sup> Kimball v. Rowland, 6 Gray, 224.

<sup>2</sup> Powers v. Ingraham, 8 Barb. 576.

<sup>3</sup> Collins v. Canty, 6 Cush. 15; Whitney v. Swett, 2 Fost. 10.

<sup>4</sup> Kimball v. Rowland, 6 Gray, 224.

<sup>5</sup> Elliott v. Stone, 12 Cush. 174.

<sup>6</sup> Hultain v. Munigle, 6 Allen, 220.

(a) By the terms of an award between a landlord and his tenant, the tenant was to quit the premises on the 9th. The notice to quit necessary to sustain the action was given on the 8d, and the action was commenced on the 10th. Held, the plaintiff had no right to give notice until the 10th, and then, by the act of forcible entry and detainer, the defendant had six days in which to remove. Therefore the suit was premature. Ray v. Armstrong, 4 Cal. 208.

(b) In England, by recent statutes, New York, Pennsylvania, Maryland, Indiana, Connecticut, (applicable both to written and parol leases,) New Hampshire, Vermont, Maine and Massachusetts, a summary process is provided, by which a landlord may regain possession of land held by a tenant at will, after notice to quit. In Indiana, the right to emblements is saved. In most of these States, an accompanying provision is made, with regard to the time of notice requisite, before commencing the process referred to. In New York and Maryland, one month's notice is required; in Pennsylvania, Delaware, Massachusetts, Indiana, Michigan, Iowa, Maine, New Jersey and New Hampshire, three months'

notice; in Connecticut and Maine, thirty days'. In general, if the rent is made payable at shorter intervals than the periods above named, the time of notice is reduced accordingly. Where the rent is unpaid, only seven days' notice is required in New Hampshire, if the rent is payable at shorter intervals than three months; fourteen in Massachusetts; thirty in Maine. 4 Kent, 118; 1 Steph. 474-5; Iowa Code, ch. 78, sec. 1209; Ind. Rev. Sts. 584; Mass. Rev. Sts. 412, 628; Dela. Sts. 1829, 285; 1 Swift, 91; N. H. L. 1881, 22-4; Prindle v. Anderson, 19 Wend. 391; Conn. Sts. 1838, 399; Davis v. Thompson, 18 Maine. 209; White v. Bailey, 14 Conn. 271; Anderson v. Critcher, 11 G. & J. 450; Mich. Rev. Sts. 14; N. H. Rev. Sts. 424; Me. Rev. Sts. 398; N. Y. Sts. 1842, 293; 1849, 291; N. J. Sts. 1839, 104; Me. Sts. 1853, 85; Woodman v. Ranger, 80 Maine, 180; Quinebaug, &c. v. Tarbox, 20 Conn. 510; Smith v. Rome, 81 Maine, 212; Preble v. Hay, 82, 456; Falkner v. Beers, 2 Dong. 117; Chamberlin v. Brown, Ib. 120, n.; Buck v. Binniger, 8 Barb. 391; McKeon v. King, 9 Barr. 213; Sims v. Humphrey, 4 Denio, 185; Cunningham v. Goelet, Ib. 71; Hohly v. German, &c.

§ 24. With regard to the the precise time of a notice to quit; in case of a lease for five years, provided that either party may terminate it, if dissatisfied, by giving the other six months' notice, and fulfilling all the other requirements of the lease till the end of the six months, with an agreement in the lease to pay the rent by boarding the lessor and his family twenty-seven weeks each year, between October and May: held, the notice must expire at the end of a year of the term.<sup>1</sup>

§ 25. If a tenant at will, whose rent is payable quarterly, quit the premises on a quarter day, without three months' notice, he

<sup>1</sup> *Baker v. Adams*, 5 Cush. 99.

2 Barr, 298; *Layman v. Thorp*, 11 Ind. 352; *Vaugh v. Locke*, 27 Mis. 290; *Young v. Smith*, 28 Ib. 65; *Hunt v. Cobb*, Ib. 198; 1 Md. L. 166.

In Ohio, it is said, nothing is settled on the subject of notice. In ejectment against a tenant, there must be ten days' notice before commencement of the term at which the appearance is to be made; and, in the process of forcible detainer, ten days' notice before suit brought. It is intimated, that this is the only required notice to quit. But the notice must expire before or at the time when the period designated ends. If the tenant enter upon a new one, he shall hold till the end of it. The pay day or rent determines the length of the period. *Walk. Intro.* 280.

In South Carolina, where there is a lease or demise in writing, for one or more years, or at will, after a determination of the estate and a written demand, the lessor, after ten days, may have a summary process to obtain possession, against either the lessee or his sub-tenant. *Brev. Dig.* 16.

It is said that in New York, the statute, providing summary process against tenants, does not provide for any notice to a tenant *from year to year*. Hence he may be turned out without notice. The act does not apply to a tenancy created *by operation of law*. *Nichols v. Williams*, 8 Cow. 13; *Evertson v. Sutton*, 5 Wend. 281.

In England, after notice to quit, damages may be recovered for detention *Bramley v. Chesterton*, 2 C. B. (N. S.) 592.

In Indiana, if the tenancy is from year

to year, there must be three months' notice before the end of the current year, ending on the day when possession began. *Rev. Sts.* 584.

In Vermont, the summary process applies to parol leases. *Stat.* 1842; *Middlebury &c. v. Lawson*, 28 Verm. 688. The lessee and the parties in possession, sub-tenants, adverse claimants, &c., may be joined in suit. The plaintiff recovers all rent due at the time of judgment. *Ib.* See *Sts.* 1850, 11; *Hadley v. Havens*, 24 Verm. 520.

In Massachusetts, the statute (summary, &c.) does not apply, where the tenancy ends by consent, as at common law. *Cooper v. Adams*, 6 Cush. 87. A plea to a complaint under Revised Statutes, chap. 104, that the respondent "is not in possession of the premises demanded," is bad on general demurrer, and the complainant is entitled to judgment on the merits. *Davis v. Alden*, 12 Cush. 828.

Where a tenant abandons the premises during an action of forcible detainer, and another party intrudes, claiming title; the former is not liable for rent accruing after his abandonment. *Newman v. Mackin*, 13 S. & M, 888.

Where the landlord obtains possession by summary proceedings, which are reversed on *certiorari*; the tenant is not entitled to restitution if his term has expired. *Chretien v. Doney*, 1 Comst. 419.

Equity cannot stay summary proceedings, under the New York statute, (2 *Rev. Sts.* 511,) by a landlord to eject a tenant holding over after the term.

will be liable *prima facie* for another quarter's rent; and, in an action therefor, the burden of proof will be on him to show that the landlord had waived the notice, which would be a bar to the action, or that he had resumed possession under an agreement which discharged the tenant from further liability for rent.<sup>1</sup> So the lessor of a store gave the tenant three months' notice to quit, and, at the end of that time, upon the tenant's saying that it would be a great accommodation to him to remain longer in order to sell off his goods, the landlord consented to his remaining. Having staid sixteen days, the landlord commenced statutory process to eject him. Held, the notice had not been waived, and the action was maintainable.<sup>2</sup> On the other hand, a landlord, to whom rent was payable monthly, gave notice to quit "for the non-payment of rent." The same day the tenant tendered him several months' rent, but it did not appear whether the tender was before or after the service of the notice. The landlord said he did not wish to take the money, as the tenant had made repairs, and he did not know the amount due; that the tenant need not quit, and, when he should come again, he would ascertain the balance and settle. Six or seven weeks afterwards the landlord brings a process of ejectment. Held, under the notice, the plaintiff could recover only on the ground of non-payment of rent; that, if the tender was prior to the notice, the rent was not in arrear; if subsequent to the notice, there was a waiver of the notice, and a renewal of the tenancy.<sup>3</sup>

§ 26. The rule, that six months' notice to quit must expire at the end of the year, does not apply as between vendor and vendee by executory contract.<sup>4</sup>

§ 27. Where one enters under an agreement for a lease, which he refuses to accept, he may be immediately ejected. But, if the landlord has received the rent monthly, according to the original agreement, a month's notice is requisite.<sup>5</sup>

§ 28. The resolutions of the courts, turning estates at will

<sup>1</sup> Whitney v. Gordon, 1 Cush. 266.

<sup>2</sup> Babcock v. Albee, 18 Met. 278.

<sup>3</sup> Tuttle v. Bean, 18 Met. 275.

<sup>4</sup> Landers v. Beauchamp, 8 B. Mon. 498.

<sup>5</sup> Anderson v. Prindle, 23 Wend. 616.

into tenancies from year to year, though founded in equity and sound policy, are said to be a species of *judicial legislation*, and would seem to be opposed by the English statute of frauds, which was long subsequent to the introduction of this tenancy, and which declares "all leases, estates or uncertain interests in land, made by parol, to have the force and effect of estates at will only, and not in law or equity to be deemed or taken to have any other or greater force or effect, excepting, however, leases for not more than three years, on which a rent is reserved, amounting to two-thirds of the full improved value." "The English decisions," Chancellor Kent remarks, "have never alluded to this exception, but have moved on broader ground, and on general principles, so as to render the exception practically useless."<sup>1</sup>(a)

<sup>1</sup> 1 Pick. 46; 4 Kent, 118-14.

(a) The exception is dropped in the statutes of frauds of Massachusetts, New York, Maine, New Hampshire and Vermont, but retained in Missouri, Indiana, Georgia, South Carolina, New Jersey, Michigan, and in North Carolina and Pennsylvania (without reference to the amount of rent reserved.) Purd. Dig. 681; 1 Smith's St. 288-9; 1 Vt. L. 188; N. H. L. 1829, 505; Mass. Rev. St. 408; 1 N. J. Rev. C. 151; Misso. St. 284; Mich. L. 116-17; Ind. Rev. L. 269; Prince, 914; 1 N. C. Rev. St. 290.

In North Carolina, all parol leases for mining purposes are void. Briles v. Pace, 18 N. C. 279.

In Vermont, tenancy at an annual rent, which has been paid for several years without lease or agreement, is from year to year. Hall v. Wadsworth, 2 Wms. 410.

In Illinois, New York, Alabama, Rhode Island, Tennessee, Virginia, (1 Brev. Dig. 372; Illin. Rev. L. 813; S. C. St. Mar. 1817, p. 85; Aik. Dig. 207; R. I, L. 866; 1 Vir. Rev. C. 15; Tenn. St. 1801, ch. 25; 5 Yerg. 102; 2 N. Y. Rev. St. 134,) and in Missouri, (Misso. St. 117,) as the general rule, parol leases for more than one year are void for any longer than that term. Similar provision is made in Kentucky. But it is there held, and such undoubtedly is the settled general rule, that the statute does not render the lessee a trespasser.

The rent reserved may be the measure of compensation for use and occupation, for which an action or a distress will lie. And, it is said, one entering under a parol lease for five years, may retain possession against any process known to the law. 1 Ky. Rev. L. 784; Roberts v. Tennel, 8 Mon. 251; Calvert v. Simpson, 1 J. J. Mar. 548; 1 Swift, 260; Gudgell v. Duvall, 4 J. J. Mar. 280.

In New York, whether a parol lease for a year, to commence in *futuro*, is valid; see Creswell v. Crane, 17 Barb. 101; Young v. Dake, 1 Seld. 463.

A parol lease for more than a year is void. But if the rent is to be paid monthly, and the tenant enters, the contract in this respect is a binding one. Prindle v. Anderson, 19 Wend. 891. So a parol lease for four years has been held so far valid as to support a distress for rent. Edwards v. Clemons, 24 Wend. 480.

In Missouri, the holding will be from year to year, though rent be payable monthly. Ridgely v. Stillwell, 25 Mis. 570.

In a late work, the existing statutory provisions are stated as follows: A lease not exceeding three years from the making, is good in Georgia, North Carolina, South Carolina, New Jersey, Pennsylvania, Maryland, Indiana. In Florida not exceeding *two* years. One year in Connecticut, Rhode Island, New York,



§ 29. In Massachusetts, the court, in one case, founded their strict construction of the Statute of Frauds, differing from that given to the English statute, upon the consideration that the excepting clause contained in the latter is wanting in the former.<sup>1</sup> But, in another, Judge Putnam strongly contends that this is an unauthorized construction. According to him, the Statute of Frauds does not pretend *to describe the incidents* of an estate at will; but only provides that parol leases *shall have the effect of* leases at will—meaning the effect of such leases as construed by judicial proceedings. And he urges the adoption of the rule, established in these decisions, by weighty considerations of public policy as to agricultural tenants.<sup>2</sup>

§ 30. Tenant *at sufferance* is one that comes into the possession of land by lawful title, but holdeth over by wrong after the determination of his interest.(a) He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release; for he stands in no privity

<sup>1</sup> 1 Pick. 46.

<sup>2</sup> 2 Pick. 72-5-8, n.

Delaware, Kentucky, Michigan Wisconsin, Tennessee, Arkansas, Alabama. Iowa, Virginia, Texas, Mississippi, California. In Vermont, Maine. Massachusetts, New Hampshire, Ohio, Missouri, unwritten leases are purely at will. Browne, St. of Frauds, 501, 582.

In Connecticut, (Conn. St. 262, 350), the only statutory provisions are, that no action shall be brought upon a parol contract for the *sale* of lands, &c., and that no lease shall be valid for more than one year, against any but the lessor and his heirs, unless *written*, &c., and recorded.

In Virginia, leases of lands or lots, containing no stipulation to the contrary, if made from year to year, terminate with the current year. In a city, borough or incorporated town, three months', in the country six months' notice is required, before the end of the year. Where a time certain is fixed, no notice is necessary. In Maryland, it is provided that no conveyance of an estate *for more than seven years* shall be valid, unless made in writing, sealed, &c. This seems to be the only statute which bears upon the subject of estates at will. 1 Md. L. 126; Va. St. 1840-1, 76-7.

In Delaware, (Del. St. 1829, 286, 368,) every lease, which specifies no certain term, is for a year, or from year to year, unless the property has been usually let for a less term. A tenancy will not be construed *purely at will*, "where it can inure or be construed as being from year to year;" but the former requires three months' notice to quit. A lease can be good only for a year, unless made by deed. In case of a demise for one or more years, unless the landlord or tenant give notice to determine three months before the end of the term, it shall be renewed for one year.

(a) He is sometimes called tenant at will. 4 Kent, 114, n. A yearly tenant, holding over after the expiration of his term, under a void parol agreement, is a mere tenant at will, whose tenancy may at any time be determined by quitting the premises, or by a demand of possession on the part of the landlord. *Crommelin v. Thiess*, 31 Ala. 412.

An under-tenant, after the termination of his landlord's tenancy, becomes tenant at sufferance to the original lessor, and is therefore not entitled to the statutory notice to quit. *Evans v. Reed* 5 Gray, 308.

to his landlord, nor is he entitled to notice to quit; and, independent of statute, he is not liable to pay any rent. He is a *wrong-doer*, and holds by the *lashes* of the landlord, who may enter, using no more force than is necessary, (it seems,) and put an end to the tenancy when he pleases, or bring ejectment;(a) but, before entry, cannot maintain trespass.<sup>1</sup>(b)

§ 31. In New Jersey, it is held,<sup>2</sup> that, if a tenant for a fixed term hold over with the lessor's consent, he becomes a tenant from year to year. This consent may be express or implied; but it can be inferred only from acts; not from mere silence and inaction. Thus, where the lease was for a year, and the tenant

<sup>1</sup> Edwards v. Hale, 9 Allen, 402; 4 Kent, 115; Keay v. Goodwin, 16 Mass. 1; Mayo v. Fletcher, 14 Pick. 525; Duncan v. Blachford, 2 S. & R. 480; Overdeer v. Lewis, 1 W. & S. 90; Clapp v. Paine, 18 Maine, 264; Jones v.

Muldrow, 1 Rice, 64. See Pendergast v. Young, 1 Fost. 284; Wheeler v. Wood, 25 Maine, 287; Newell v. Sanford, 16 Iowa 191; McKinney v. Peck, 28 Ill. 174.\*

<sup>2</sup> Den v. Adams, 7 Halst. 99.

(a) Damages for a wrongful holding over, without payment of rent, cannot be recovered in an action on the lease for rent. Crane v. Hardman, 4 E. D. Smith, 889.

(b) In Ohio, it is said, though such occupant is not liable to rent, *as such*, he might be liable in an action for use and occupation. Walk. 280-1.

\* Upon the point, whether the landlord is justified in using force to regain possession, there seems to be some doubt. He undoubtedly thereby subjects himself to indictment for breach of the peace, and the only question is, whether the facts would furnish a justification to an action of trespass against him. See 4 Kent, 118, n. and anthys. Beecher v. Parmelee, 9 Verm. 852.

In a late English case, it is held, that the landlord cannot regain possession by force. Newton v. Harland, 1 Man. & G. 644; 1 Scott, N. 474. And, it seems, such re-entry does not terminate the estate. *Ib.* In case of a lease for a year, soon after the end of the year, the landlord removed the tenant's goods without notice. Held, he was not liable in trespass, unless he used more force than was necessary, or committed wanton injury. Overdeer v. Lewis, 1 W. & S. 90. See p. 880.

In Maine, after the expiration of a

written lease, no notice to the tenant is necessary for the purpose of terminating the tenancy. Preble v. Hay, 82 Maine, 456. Under the statutes of Maine, a tenant holding over by consent, after the expiration of the term, is a tenant at will, and is liable for rent only so long as he occupies. Kendall v. Moore, 80 Me. 827. In that State, where the occupant of land has held, under a written lease, for one year, and held over for nearly two years, and neglected to pay any rent; his right of possession will terminate in thirty days after written notice to quit, and he will be liable to the process of forcible entry and detainer, under Rev. Sts., ch. 28, sec. 5. Wheeler v. Cowan, 25 Me. 288.

In Delaware, a tenant under a written lease, holding over, continues, without notice to quit, to hold under its terms. Jackson v. Patterson, 4 Harring. 584. A tenant for years, who remains in possession after the expiration of his lease, is liable for the same rate of rent as that reserved under his lease. Baker v. Root, 4 McLean, 572. Whether a tenant at sufferance in Massachusetts is liable to pay rent, *quære*. Delano v. Montague, 4 Cush. 42. At the expiration of a lease for a definite period, the lessor may bring ejectment, though he has given notice to quit in three months. Evans v. Hastings, 9 Barr, 278.



held over for two years; held, ejectment would lie against him without notice. So, in New York, (a) a tenant for a year, who holds over without permission of the landlord, is liable to the summary process for obtaining possession, without having received a *month's* notice to quit. He is not a tenant *at sufferance* within the statute. Although the landlord's assent to his holding over may, it seems, be presumed from mere lapse of time, yet it was held that three months and twelve days was not a sufficient period for this purpose, more especially as the landlord had endeavored to regain possession without suit.<sup>1</sup>

§ 32. In case of a verbal lease for a certain term, the tenant agreeing to quit at any time within such term, if the premises shall be sold; he becomes a tenant at sufferance by remaining in possession after a sale, and is liable to the *landlord and tenant process* without notice to quit.<sup>2</sup> So the sale of land, mortgaged with power to sell, divests the mortgagor of all right and interest, and, if he afterwards continue in possession, he is a tenant at sufferance.<sup>3</sup>

§ 33. It has been held, in Massachusetts, that, under sec. 26, chap. 60, of the Revised Statutes, a tenant at sufferance is not entitled to notice to quit; but, if he hold possession unlawfully, by force, is immediately liable to the process of forcible entry.<sup>4</sup> And where, after the expiration of a lease for years, the agent of the lessor went upon the land, and cut trees by his order and for his use, but the lessee continued to occupy, cut wood, and plowed the land; and the tenant was notified to quit at the end of the term; in an action of trespass against him for an injury to the soil; held, the above notice, though not requisite to deter-

<sup>1</sup> Rowan v. Lytle, 11 Wend. 616.

<sup>2</sup> Hollis v. Pool, 8 Met. 350.

<sup>3</sup> Kinsley v. Ames, 2 Met. 29.

<sup>4</sup> Ib.

(a) In this State, the summary process is applied to tenancies at will and sufferance, to cases of default in payment of rent, of discharge under the insolvent laws, and sale of the tenant's estate on execution. Sts. 1849, 291.

Tenancy at will or sufferance may be terminated by one month's notice to quit (Rev. Sts. 745, sec. 7). This language,

though permissive, imposes a positive duty. But tenant *pour autre vie*, holding over after the expiration of his term, though by common law tenant at sufferance, is a trespasser (1 Rev. Sts. 749, s. 7), and not entitled to notice before ejectment brought. Livingston v. Tanner, 4 Kern. 64. And see Torrey v. Torrey. Ib. 480.

mine the lease, showed the lessor's intent in entering by his agent, and that such entry was sufficient to sustain the action.<sup>1</sup>

§ 34. Tenant at sufferance must be one who came to his estate by *act of party*. If one coming to an estate by *act of law* hold over, he is an *intruder*, *abator*, or *trespasser*. So, where one occupies land together with the owner, he cannot be a tenant at sufferance; for, if there is no agreement between them, the legal possession is in him who has the right; and, if there is an agreement, this negatives a *sufferance*.<sup>2(a)</sup>

<sup>1</sup> Dorrel v. Johnson, 17 Pick. 268.

<sup>2</sup> 4 Kent, 115; Johnson v. Carter, 16 Mass. 446. In North Carolina, any par-

ticular tenant, holding over, comes under the law pertaining to landlords. Montgomery v. Wymms, 4 Dev. & B. 581.

(a) By St. 4, Geo. II, ch. 28, and 11 Geo. II, ch. 19, if a tenant hold over after demand and notice in writing to quit, or after he has himself signified his intention to quit; he is liable for double rent. These statutes are substantially re-enacted in New York, Delaware, South Carolina and Arkansas (where thirty days are allowed), but not generally adopted in the United States. 4 Kent, 115; Ark. Rev. St. 520; Dela. St. 1829, 868; S. C. St. 1808; Reeves v. M'Kenzie, 1 Bai. 497. See Robinson v. Leeroyd, 7 Mees. & W. 48.

In Illinois and Missouri, if tenant for life or for years hold over after notice from the landlord, he is liable for double the *yearly value*; if after notice by himself of an intention to quit, double the rent reserved. And, in Missouri, there shall be no relief in equity. Illin. Rev. L. 675; Misso. St. 376-7.

In New York, if guardians and trustees to infants, or husbands seized *jure uxoris*, or others having estates determinable upon lives, hold over, they are trespassers, and liable for the full profits.

There is a similar provision in England, by St. 6 Anne, c. 18. 4 Kent, 115-6.

The same process, in general, lies against tenants at sufferance as against tenants at will. In England, a similar process is provided by a late act, 1 and 2 Vict. 74. In Indiana, the process does not apply to tenants at sufferance. The landlord may re-enter, without force. 4 Kent, 116.

In South Carolina a statute provides, that all written leases and agreements shall terminate at the end of the time specified therein. S. C. St., Mar., 1817. p. 85.

In the same State, it is said, a tenant, holding over after his lease expires, is liable for double rent. 4 Kent, 117, n. In Indiana, the summary process provided against tenants at will lies against a tenant for a term certain, without notice. Rev. St. 585-6.

In California, in an action for unlawfully holding over, after the expiration of the tenant's term, three days' notice is sufficient. Garbrell v. Fitch, 6 Cal. 189.

## CHAPTER XX.

## USES AND TRUSTS. USES PRIOR TO THE STATUTE OF USES.

- |                              |  |
|------------------------------|--|
| 1. Origin.                   | 10. How distinguished from legal estates.            |
| 3. Nature and definition of. | 21. Evils and mischiefs of, and statutes to prevent. |
| 6. The three incidents of.   |  |
| 9. Who might be seised to.   |  |

§ 1. HAVING treated of *legal* estates, we come now to consider *equitable* estates, or *uses* and *trusts*. (a) At an early period a practice arose in England, of one person's conveying lands to another, with a private agreement that the latter should hold the lands for the benefit and profit of the feoffor, or of a third person. The practice did not become general till the time of Edward III, when it was resorted to by the churchmen to evade the statutes of mortmain, and enable them to receive the rents and profits of lands, which those statutes prohibited them from receiving and holding in their own names. Such a conveyance made nominally to one person, but for the benefit of another, vested the legal estate in the former, and in the latter what the law termed a *use*.

§ 2. A use corresponds to the *fidei-commissum* of the civil law. Under that system there were many persons whom the law did not allow to be heirs or legatees. It became customary, therefore, for a testator, who desired to make provision for such persons, to constitute by will some *capable* person as his heir, adding a request that he would convey the estate to the intended object of his bounty. The latter, however, had only

(a) Legal estates may be described as those which are fully recognized, protected and enforced in courts of law; while equitable estates, for the most part, require an appeal to courts of equity, or those having equitable jurisdiction.

a *jus precarium*, or a right depending on *courtesy and entreaty*, and not a strictly legal claim. But, after the law had continued in this state for several centuries, the Emperor Augustus first, and afterwards Justinian, introduced regulations, which placed the *fidei commissum* upon a legal foundation; the former, by giving jurisdiction of it to the consuls and the prætor, (who was thence called *fidei commissarius*,) and the latter, by requiring an heir, supposed to be chargeable with such trust, to take an oath that he was not, or else to execute it.

§ 3. In the early age of uses, the party beneficially interested, called *cestui que use*, like the Roman *hæres fiduciarius*, had no legal, but only a *precarious* right. But, at length, to protect the rights of the clergy, who were chiefly interested in trust property, the clerical chancellors assumed jurisdiction of the subject; and, in the reign of Richard II, John Waltham, Bishop of Salisbury and Chancellor, for the first time issued a writ of *subpœna* returnable in Chancery, whereby the party charged with a trust was compelled to appear and answer upon his oath the allegations made against him. This form of proceeding, being contrary to the spirit of the common law, became very obnoxious; and, in successive reigns, petitions against it were presented to Parliament, but without success, till, in the reign of Henry VI, it was provided that no *subpœna* should issue until the party applying for it had given security to pay, if he should fail in the suit, all damages and expenses incurred by the defendant.

§ 4. Lord Bacon, in defining a use, says, "it is no right, title or interest in law,"—neither *jus in re* nor *ad rem*, neither an estate nor a demand, but something unknown to the common law, and for which, therefore, it furnished no remedy.<sup>1</sup> He proceeds to say, that a use is "*dominium fiduciarium*," an ownership in trust; and therefore a use, and an estate or possession, differ rather in reference to the forum which takes cognizance of them, than the nature of the thing,—one being in court of law, the other in court of conscience.

<sup>1</sup> Chudleigh's case, 1 Rep. 140 a.

§ 5. A use was no property at law, because it arose from a mere *declaration*, and not from *livery of seisin*, which was absolutely necessary to create a freehold estate. Thus it was very early held, that, if A enfeoffed B to the use of himself, A, the feoffer, should have nothing at law against his own feoffment. So, if the *cestui que use* entered upon the land, the feoffee to use might have an action of trespass against him; while, if the latter entered and ousted the former, he had no remedy at law, but his only redress was in chancery. The *cestui*, although usually in possession, was a mere tenant at sufferance, and, if he made a lease, the lessee might plead that he had no estate in the land.<sup>1</sup>

§ 6. Chancery at first interfered in favor of a *cestui que use*, only by compelling the feoffee to pay over the profits to him. But afterwards it proceeded to require that the feoffee should convey the land to the *cestui*, or such person as he should select; and also defend the title against any adverse claimant. Hence it was said that the three incidents of a use were *pernancy of the profits, execution of estates, and defence of the land*. It was still held, however, that the land was subject to all liabilities and incumbrances in the hands of the feoffee, as if he were the only party interested; as, for instance, to dower and forfeiture. And the *cestui's* right in equity was held to be not *issuing out of the land*, like a rent or right of common, but *collateral to it*; and therefore not chargeable upon the land, into whose hands soever it might pass, but only by reason and during the continuance of *confidence in the person and privity of estate*.<sup>2</sup>

§ 7. *Confidence in the person* at first extended only to the original feoffee; and it was held, that even his heir, after his death, was not liable to the use in chancery, but could only be charged by a bill in Parliament. But, as early as the reign of Henry VI, it was settled that the liability extended not only to the original feoffee, but to all who came to the estate in the *per*, either *without consideration*, or *having notice* of the use. Thus

<sup>1</sup> 4 Edw. IV, 8; 1 Rep. 140 a.

<sup>2</sup> 1 Rep. 122 a; *Dalamere v. Barnard*, Plow. 852; *Dillon v. Fraine*, Poph. 71.

an *heir* of the feoffee was charged with the use. So a *purchaser* from the feoffee, if he either paid no consideration and had no notice, or if he paid a consideration and had notice.<sup>1</sup>

§ 8. The requisition of *privity of estate* demanded, in order to a continuance of the use, that there should be not merely possession of the same land, but a continuance of the same estate in that land, which was held by the original feoffee. Hence a person holding the land, but not claiming in the *per*, even though he took with notice, was not chargeable; as, for instance, a disseisor, the lord holding by escheat, a tenant by the curtesy, or tenant in dower; all of whom claimed by a title paramount, and not the same estate with the feoffee.<sup>2</sup>

§ 9. Any person who was capable of taking lands by feoffment, might also be a feoffee to uses. And even those who were legally disabled to bind themselves, as infants and married women, if enfeoffed to uses, would be compelled in chancery to execute them; because such persons might inherit from a feoffee, and would then clearly be chargeable; and the execution of the use was deemed to be made by the *feoffor*, through his agent, the feoffee. But a corporation could not be seised to uses; not being subject to any compulsory Chancery process, and being supposed, as a matter of course, to hold to its own use.<sup>3</sup>

§ 10. It was remarked by Lord Bacon, "uses stand upon their own reasons, utterly differing from cases of possession;"<sup>4</sup> and the remark is illustrated by the following rules and principles.

§ 11. A use being recognized only in Chancery, which was governed to a great degree by the rules of the civil law, it was held, conformably to one of those rules, "*ex nudo pacto non oritur actio*,"—that no use could be created without a good or valuable consideration; for otherwise it was *donum gratuitum*. But this principle seems to have been applicable only to such conveyances as did not carry with them a change of possession; such as a covenant to stand seised, or bargain and sale, which were mere *contracts*.<sup>5</sup>

<sup>1</sup> Keilw. 42; Bro. Abr. *Feoffment al Use*, pl. 10; Chudleigh's, &c., 1 Rep. 122 b; Gilb. 178-9; 4 Pick. 71.

<sup>2</sup> 1 Rep. 139 b. 122 a.

<sup>3</sup> Bac. Read. 58; 4 Kent, 286; Plow 102.

<sup>4</sup> Bac. Law Tracts. 810.

<sup>5</sup> Bac. Read. 18; 4 Kent, 286.

§ 12. In other particulars, also, a use was not subject to the rules of the common law. Not being an *estate*, it was exempt from the burdens and incidents of feudal tenure. Thus it was not forfeitable for crimes. For the same reason, it was not *extendible* by process of law; and, being neither a chattel nor hereditament, was not assets to the executor or the heir. So there was neither curtesy nor dower in a use, because the *cestui* had no legal seisin.<sup>1</sup>

§ 13. A use, though held to be a mere right, was still, unlike other *choses in action*, subject to alienation; because, as no action at law lay to enforce it, the mischiefs of *maintenance* could not arise from such transfer.<sup>2</sup>

§ 14. A use might be transferred by any deed or writing, and without livery of seisin, of which, from its very nature, it was of course not susceptible.

§ 15. Contrary to the rule of the common law, a use might be declared to a person who was no party to the deed which created it.<sup>3</sup>

§ 16. St. 1, Rich. III, ch. 1, empowered a *cestui* to alienate the legal estate without consent of the feoffee. This act was passed to prevent feoffees from entering upon the land, after a transfer by the *cestuis*, which had often previously been done.<sup>4</sup>

§ 17. A use might be limited, without those technical words of limitation, which are necessary in a common law conveyance. Thus a fee-simple would pass without the word *heirs*. So a freehold might be limited, to commence *in futuro*; or a contingent freehold remainder, upon a precedent estate less than freehold; because the freehold estate of the feoffee was sufficient to support such remainder.<sup>5</sup> (See chaps. 42, 46.)

§ 18. A use might be so limited, as to be *revocable* by the will of the grantor, and give place to such new uses as he should appoint; or it might be so limited, as to change from the original *cestui que use* to another person, upon the happening of some future event, even though the first limitation were in fee, and, therefore, in case of a legal estate, would preclude any further

<sup>1</sup> Co. Lit. 272 a; 1 Rep. 121 b; Co. Lit. 874 b.

<sup>2</sup> Bac, Read. 16.

<sup>3</sup> Read. 14.

<sup>4</sup> 1 Cruise, 270.

<sup>5</sup> Shelley's case, 1 Rep. 101 a, 135 a.



disposition. Thus the limitation might be to A and his heirs, till B should pay him such a sum, then to B and his heirs. The reason of this distinction was, that a legal estate, being created by livery, could be defeated only by the corresponding act of entry; and a charge required a corresponding discharge—while a use, arising from a mere declaration, was subject to be changed in the same way.<sup>1</sup>

§ 19. A use was devisable, though lands at that time were not; and this was one reason for the large number of limitations to uses. But the devise of a use by a married woman was, in a very early case, held void, even in Chancery.<sup>2</sup>

§ 20. Uses, though differing in most points from legal estates, were subject to the same rules of descent.<sup>3</sup>

§ 21. The doctrine of uses, as above described, although productive of some convenience, in enabling persons to convey their lands with less restraint and technicality than they could otherwise do, was found to open a door for very great and serious mischiefs. Creditors were defrauded by secret conveyances; husbands were deprived of curtesy, and wives of dower; and titles became so private, variable and confused, that it was difficult for a legal claimant of land to determine against whom he should maintain his action. To remedy these and the like evils, several successive statutes were passed, from the reign of Edw. III to that of Henry VII, subjecting uses to legal process for the debts of the *cestui*, and to the feudal incidents and exactions of wardship and relief, where the *cestui* died without making a will.<sup>4</sup> These statutes, however, proved ineffectual to remedy the evils complained of. To avoid the feudal burdens consequent upon descent, devises became mischievously frequent. At length, after an unsuccessful attempt, made four years previously by the king, to procure the passage of such a law, the statute of uses,—27 Henry VIII, ch. 10,—was enacted, with the title of “An act concerning uses and wills.” This act will be considered in the next chapter.”

<sup>1</sup> 1 Cruise, 868; Bro. Abr. *Feoffment al Use*, 80; Bac. Read. 18.

<sup>2</sup> Bac. Read. 20; 1 Rep. 128 b; Mich. 18 Edw. IV.

<sup>3</sup> Co. Lit. 14 b; Gilb. 17.

<sup>4</sup> 1 Cruise, 869.



## CHAPTER XXI.

## USES AND TRUSTS. STATUTE OF USES, CONSTRUCTION AND EFFECT THEREOF.

- |  |   |
|--|---|
| 1. Terms of the statute; adopted in the United States. | persons; construction, where they are the same.               |
| 2. Instantaneous seisin of trustee.                    | 12. Exceptions to the rule.                                   |
| 3. Who may be seised to uses.                          | 13. There must be a use <i>in esse</i> .                      |
| 6. What estate may be held to uses.                    | 14. <i>Actual seisin</i> vests in <i>cestui</i> .             |
| 8. There must be a <i>cestui</i> " <i>in esse</i> ."   | 15. Estate of feoffee will not merge.                         |
| 9. What estate a <i>cestui</i> may take.               | 17. Limitations to uses, how far subject to common law rules. |
| 11. Feoffee and <i>cestui</i> must be different        | 19. Implied and resulting uses.                               |

§ 1. STATUTE 27 Henry VIII, chap. 10, called the *Statute of Uses*, and referred to at the end of the last chapter, recites, that, by the common law, lands could not be passed by will, but only by livery of seisin; but that divers subtle practices had been introduced, in the form of fraudulent conveyances and assurances, and of last wills, whereby heirs were disinherited, lords deprived of their dues, husbands and wives of curtesy and dower, and perjuries committed. The statute then proceeds to enact, that, where any person was or should be seised of any honors, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any person or body politic; the latter should have the legal seisin and possession, nominally given to the former, and corresponding to the use, trust and confidence held previously to the statute in lands so limited; and, where lands were limited to several persons to the use of a part of them, the latter alone should have the seisin and possession.(a)

§ 2. Since this statute, and conformably to its intent, one

(a) The English statute of uses is almost universally adopted in this country. It is substantially re-enacted in Illinois, Missouri and South Carolina. But, in

person, taking lands to the use of another, gains only an instantaneous seisin, which subjects them to no incumbrances in his lands; but the legal estate vests immediately in the *cestui*.<sup>1</sup>

§ 3. The same persons may be seised to uses now, that could have been so seised before the statute.

§ 4. In England, the king or queen cannot be seised to uses. Thus, where a man received a fine of lands to the use of the conusor, after the former had committed treason; the *cestui* then conveyed to a third person; and the conusee was afterwards attainted: it was held, by very distinguished lawyers, that the queen (Elizabeth) would hold the lands by forfeiture, clear of the use. The queen, however, relinquished them to the *cestui*.<sup>2</sup>

§ 5. Under the words of the statute, "any person or persons," a corporation cannot be seized to uses, nor an alien. And where lands are conveyed to a citizen and an alien to the use of another, the share of the alien shall be forfeited.<sup>3</sup>

§ 6. Under the word *seised*, in this statute, a person may hold any estate of freehold to uses. If the estate is less than a fee-simple, the use will continue while the estate lasts, but no longer. Thus it is said to be now settled, though formerly doubted, that a tenant in tail may be seised to uses. If the use is in fee, it is a fee-simple, determinable upon the death of the tenant in tail without issue. So a tenant for life may be seised to a use, which will terminate at his death.<sup>4(a)</sup>

§ 7. Under the words of the statute, any kind of real pro-

<sup>1</sup> 1 Cruise, 375; Brent's case, 2 Leon. 18.

<sup>2</sup> Pim's case, Moo. 196; Co. Lit. 18 a, n. 7.

<sup>3</sup> Bac. Read. 42, 57; King v. Boys, Dyer, 288.

<sup>4</sup> Jenkins v. Young, Cro. Car. 281;

Read. 57; Plow. 557; Co. Lit. 19 b; 1 Cruise, 376; Dyer, 186 a; Crawley's case, 2 And. 180; Fox v. Phelps, 20 Wend. 487; Payne v. Sale, 2 Dev. & B 455.

Ohio, it is said not to be in force. Illin. Rev. Laws, 180; Misso. St. 119; 2 Brev. Dig. 318; French v. French, 8 N. H. 256; Walk. Intr. 810; Thompson v. Gibson, 2 Ohio, 389; Hefelinstine v. Garrard, 7, 270.

In Virginia, it is said, under the statutes of 1792, a use is *executed*, only in deeds of bargain and sale, lease and release, and covenants to stand seised. 1

Lom. Dig. 188. It has been doubted whether the statute is in force in Vermont. Williston v. White, 11 Verm. 40.

In a recent case in Massachusetts, the statute of uses is said to be "a part of the common law of this commonwealth." Per Bigelow, C. J. Johnson v. Johnson, 7 Allen, 197.

(a) On the other hand, if the party seised to uses takes a fee, the *cestui* may

erty, whether corporeal or incorporeal, in possession, remainder or reversion, may be conveyed to uses, provided the estate is in the ownership of the grantor at the time of conveyance. And, if the estate is a rent, it may be so limited, though created *de novo* by the conveyance.<sup>1(a)</sup>

§ 8. A use requires a *cestui in esse*, and cannot therefore take effect if limited to a person not *in esse*, or an uncertain person.<sup>2</sup>

§ 9. A *cestui* may take any estate known to the law.<sup>3</sup> A use executed may be inherited.<sup>4</sup>

§ 10. All persons may be *cestuis que use*, who are capable of holding lands at common law. Corporations are expressly named in the statute.

§ 11. In general, the statute of uses is not applicable, unless the feoffee to uses and *cestui* are different persons. Where the same person is both feoffee and *cestui*, he will never take by the statute, unless there be a direct impossibility or impertinency for the use to take effect, by the common law. The words of the statute are, "seised to the use of some *other* person."<sup>5(b)</sup>

<sup>1</sup> Yelverton v. Yelverton, Cro. Eliz. 401; 22 Vin. 217; Read. 48. See Gilbertson v. Richards, 4 Hurl. & N. 277.

<sup>2</sup> 1 Cruise, 880.

<sup>3</sup> Ib.

<sup>4</sup> Pierson v. Armstrong, 1 Clarke, 282.

<sup>5</sup> Read. 68.

do the same, without words of inheritance. Devise to A and B and their heirs, to the use of C for life, after his death to the use of D and E, as tenants in common. Held, D and E took a fee-simple. Knight v. Selby, 8 Man. & G. 92.

If one take an estate *in trust* for another and his heirs, the legal estate of the trustee is commensurate with the equitable estate of the *cestui que trust*, which is a fee-simple. Newhall v. Wheeler, 7 Mass. 189.

The trustee takes an estate large enough for the purposes of his trust, and no larger. Norton v. Norton, 2 Sandf. 296.

In 1794, A executed a deed to B and six others, as "trustees of Methodist Society; *habendum* to said grantees, in their capacity aforesaid of trustees;" the *cestui que trust* being an unincorporated association. In 1848, B became the sole survivor of such grantees; his title never having been extinguished by

any release or act of his. After the grant, the society used and occupied the premises for more than fifteen years, in support and furtherance of the object contemplated by the deed. In an action of ejectment brought by B, against members of the Methodist Society, assuming to act officially, it was held, 1. That B and the other grantees had a freehold estate of such a duration as was necessary to effect the purposes of the trust. 2. That the title of B. had not been divested by the occupation of the defendants, such occupation not having been adverse to B's title. Burrows v. Holt, 20 Conn. 459.

(a) Limitations in trust to preserve contingent remainders, when such trusts were legal, were not executed by the statute of uses. Vanderheyden v. Crandall, 2 Denio, 9.

(b) A deed in trust for A and B, to the sole use, benefit and behoof of A and B, passes the legal estate to them. Adkins v. Hudson, 11 Ind. 872. See ch. 22.

Hence the principle above stated, that the estate of the *cestui* cannot exceed that of the feoffee, is inapplicable to this case. Thus, where a conveyance is made to a man and wife, *habendum* to the use of them and the heirs of their bodies, they take an estate tail, as they would if the words "the use of," had been omitted. It is not a use divided from the estate, but the use and estate go together. It is no limitation of the use, but a limitation of the estate. So a conveyance to one, to hold to him and his heirs, "to the use and behoof" of him and his heirs forever, passes the fee by the common law; the words meaning only "for his and their sole benefit," and indicating in how ample and beneficial a manner the grantee is to take the estate, without return of any service whatever to the grantor. The same construction is given in case of a conveyance to one and his assigns, *habendum* to him and his assigns, to the only use and behoof of him and his assigns during his life; or a conveyance to A, to hold to him and his heirs, to the only use of them during the lives of B, C and D.<sup>1</sup>

§ 12. But there are other cases of similar character, where a use is executed by the statute, in order to satisfy the parties' intention. Thus, where a conveyance is made to a person and his heirs, to the use of him and the heirs of his body; or where one covenants with another that he and his heirs will stand seised to the use of himself and the heirs of his body; or to the use of himself for life, remainder over in fee: in each of these cases, the use is executed by the statute according to the limitation.<sup>2</sup>

§ 13. Finally, there must be a use in *esse*, in possession, remainder or reversion.<sup>3</sup>

§ 14. It was formerly supposed that the statute of uses, being a mere act of Parliament, transferred to the *cestui que use* only a *civil* seisin, or seisin *in law*. (See p. 63.) But the established doctrine now is, founded upon the words, "shall be in lawful seisin, estate and possession to all intents, constructions and purposes

<sup>1</sup> Jenkins v. Young, Cro. Car. 230; Cas. and Opin. 281; Willson v. Cheshire, Dyer, 186 a, n.; Meredith v. Jones, Cro. 1 M'Cord's Cha. 238.  
Car. 244; 1 Gilb. Rep. 16-17; 2 Booth's

<sup>2</sup> Read. 63; Sammes' case, 14 Rep. 56.  
<sup>3</sup> Chudleigh's case, 1 Rep. 126 a.

in the law," that the *actual possession* of the land vests in the *cestui*.<sup>1</sup>

§ 15. By virtue of a saving clause in the statute, where a feoffee to uses previously had an estate in the same land, such estate shall not be *merged* or destroyed by the conveyance to uses. It is said, the intention of that statute was not to destroy prior estates, but to preserve them.<sup>2</sup> And where land was first leased for years, and afterwards conveyed to the lessee and others in fee, to their use, to the intent that a common recovery should be had against them to the use of a stranger, which was afterwards done; held, although there was a temporary merger till the recovery was suffered, yet, when this took place, it had relation back to the conveyance, and restored the term for years.<sup>3</sup>

§ 16. Upon the same principle, it seems, where the subsequent conveyance to uses, in England, is by *lease and release*, (a form not practised in the United States,) this lease, although prior to the release, does not merge the old estate for years; though, by accepting it, the lessee admits the lessor's power to make a lease. The lease, being made expressly to enable the lessee to accept a release to uses, shall not be construed as made to his own use; and, if the old estate for years were extinguished, it is revived by the release.<sup>4</sup>

§ 17. The preamble to the statute of uses sets forth an intention to restore the ancient common law, and to extirpate such limitations and conveyances as had grown up under the form of uses inconsistent therewith. Hence it was at first held, that under that statute uses must be limited according to the rules of the common law; so that no uses of inheritance would be created without the same technical expressions required in common law conveyances. In other words, the *estate* in the use, when it became an interest in the land under the statute, became liable to all the rules of common law estates.<sup>5</sup>

<sup>1</sup> Co. Lit. 266 b; Gilb. Uses, 280; Ventr. 195; Fountain v. Coke, 1 Mod. 107. Bliss v. Smith, 1 Ala. (N. S.) 278.

<sup>2</sup> 1 Cruise, 385; Ferrers v. Fermor, Cro. Jac. 648.

<sup>3</sup> Ferrers v. Fermor, Cro. Jac. 648; 1

<sup>4</sup> Cook v. Fountain, Bac. Abr. Lease R.

<sup>5</sup> 1 Rep. 129 b; Corbet's case, 1 Rep. 87 b.

§ 18. But, on the other hand, the *qualities*, which had attended uses in equity, followed them when they became an estate in the land itself. The complex and modified interests annexed to uses were engrafted upon the legal estate. Hence the same departures from the common law, in regard to the limitation of estates, have been allowed since the statute as before. To these reference has already been made (ch. 20), and they will hereafter be more fully treated, under the titles of *Remainder*, *Powers* and *Devise*. It is sufficient to state here, in general, that a fee in a use may be limited upon a fee; that a freehold estate may be made to commence *in futuro*, without any preceding estate to support it; and that the party who creates the uses may reserve to himself a power of revoking them, and appointing new uses in their place. It is said that, in the two former cases, the uses, being limited to take effect upon the happening of some contingency specified in the deed, come *in esse* by act of God; while in the latter case they arise by the act of man. Both are future or contingent uses till the act is done; and afterwards, by the operation of the statute, actual estates.<sup>1</sup>

19. Both before and since the statute of uses, if a person convey land without consideration, and without anything to show a different intent, the conveyance is sometimes held to be made to his own use, and not that of the grantee; and such a use is *executed* by the statute, so that in fact no estate passes from the grantor, but he remains seised as before. The law will not presume that a man intends to give away his estate. Such a use is called a *resulting* use.<sup>2</sup>

§ 20. It is said that so much of the use, as the owner of the land does not dispose of, remains in him.<sup>3</sup> Thus, in England, if he levy a fine or suffer a recovery, without consideration, and without declaring any uses, the whole estate remains in him as before, whether in possession or reversion; while, if certain uses are declared, he retains all that is left of the old estate, after these uses are satisfied. So, if one convey land to the use of

<sup>1</sup> 4 Kent, 289; *Ib.* 290; *Hopkins v. Hopkins*, 1 Atk. 591; 1 Cruise, 898.

<sup>2</sup> *Abbot v. Burton*, 11 Mod. 182; *Dyer*, 146 b.

<sup>3</sup> *Co. Lit.* 28 a, 271 a; *Dyer*. 166 a; *Armstrong v. Wolsey*, 2 Wils. 19.

such person or persons, and for such estate and estates, as he shall appoint by his will, or to the use of himself and his intended wife after marriage; till such appointment is made, or till such marriage occurs, the use results to him.<sup>1</sup>

§ 21. The use will result according to the estate which the parties who create or declare it had in the land, being but a trust and confidence, and therefore not subject to technical estoppels and conclusions. Thus, if husband and wife join in a conveyance of her land, the use results to her alone. So in case of joint tenants. So, if a particular tenant and the reversioner join in the deed, each takes back his former respective estate; and, if the former declare uses and not the latter, a use results to the latter alone. And, if one having no interest in the land joins the owner in the deed, nothing results to the former.<sup>2</sup>

§ 22. If uses are declared, but to take effect from and after the death of the grantor, a use results to him for life.<sup>3(a)</sup> But, if an intermediate remainder is limited to trustees, in trust to support contingent remainders, but to permit the grantor to receive the rents and profits for life, no use results to him.<sup>4</sup>

§ 23. Where a use expressly declared is the same which would result to the grantor, the declaration is void, and he takes a resulting use. Thus, where a remainder is limited to the use of his own right heirs, he retains a *reversionary* interest, the limitation being void.<sup>5</sup>

§ 24. Resulting uses arise from those conveyances, which operate by a change of possession; such as a feoffment, or, in the United States, a grant. Substantially the same principles

<sup>1</sup> Co. Lit. 23 a. 271 a; Dyer, 166 a; Clere's case, 6 Rep. 17 b; Woodliff v. Drury, Cro. Eliz. 439.

<sup>2</sup> Beckwith's case, 2 Rep. 58 a; Dyer, 146 b; Davis v. Speed, Show. Cas. in Parl. 104; Roe v. Popham, Doug. 24.

<sup>3</sup> Penhay v. Hurrell, 2 Vern. 370; 2 Free. 258.

<sup>4</sup> Tippin v. Coson, 4 Mod. 380; 1 Lord Ray. 38.

<sup>5</sup> Read v. Errington, Cro. Eliz. 321; Fenwick v. Mitforth, Moo. 284; Slade's case, 2 Rep. 91 b.

(a) A, in consideration of the marriage of B, his son, conveys to the use of B, for life, remainder to B's wife for life, remainder to B's first and other sons in tail, remainder to the heirs male of

the body of A. Inasmuch as the estates to B, his wife and issue may terminate before A's death, a use results to him, expectant upon such termination Wills v. Palmer, 1 Cruise, 295.



apply to those conveyances, in which the owner nominally does not part with possession, and of which the only one known in this country is a *covenant to stand seised*. In this case, so much of the use, as is not expressly disposed of, remains in the covenantor, under the name of a use by implication. Thus, where one covenants with another to stand seised to the use of the heirs of his own body by a certain wife, as he can have no heirs while living, a use by implication remains to him for life. So, if no use arises for want of consideration or any other cause, a use by implication arises to the covenantor.<sup>1</sup>

§ 25. No use will result where any circumstance shows a manifest intent to the contrary. Thus, where a recovery is suffered, or a conveyance is made, to the intent or on condition that the party receiving the land shall make an estate limited in a certain way, no use results; because then he would be unable to make an estate, as provided for. But, if this is not done in reasonable time, it seems, a use will result.<sup>2</sup> So, where the grantee is to make an estate to such person as the grantor shall name, and it is stipulated that he shall be seised to no other use than the one specified; the grantee holds to his own use till an appointment is made, or, if the grantor dies without making one, to the use of his heirs.

§ 26. As resulting uses depend upon intention, parol evidence is held admissible in regard to such intention. The statute of frauds, requiring uses to be proved by some writing, is applicable only where *third persons* are beneficially interested.<sup>3</sup>

§ 27. No use will result, where an estate is expressly limited to the grantor, with which a resulting estate would be inconsistent. Thus it is said, if a feoffment in fee be made to the use of the feoffor for life or for years, no use results, because the particular estate would merge in the fee, if they were held by one person. Otherwise, if it were an estate tail, and not for life or for years; because that might exist with the fee simple.<sup>4</sup>

<sup>1</sup> *Pibus v. Mitford*, 1 Vent. 827.

<sup>2</sup> *Roe v. Popham*, Doug. 25; *Altham*

<sup>3</sup> *Hummerston's case*, Dyer, 166 a, n. *v. Anglesea*, 11 Mod. 214.

<sup>4</sup> *Dyer*, 111 b, n. 46.

9; *Winnington's case*, Jenk. Cent. 6 Ca. 44.



So, where one limits an estate to the use of himself for years, remainder to trustees, remainder to his heirs; no estate for life results to him. because the term for years would merge therein.<sup>1</sup>

§ 28. The doctrine of resulting uses applies only to conveyances in fee simple; not to the creation of lesser estates in tail, for life, or for years, though made without consideration, or the declaration of any uses. This distinction is founded partly upon usage, but chiefly upon the principle, that the tenure, rent, and liability to forfeiture, incident to these lesser estates, constitute of themselves a sufficient legal consideration. The same rule applies, where a tenant for life or for years assigns his estate. And even though he declares the use of part of the estate, no use results to him for the remainder.<sup>2</sup> Thus A, a tenant for life, conveys to B, to the use of B for the life of A and B, and, if B die, living A, remainder to C. B dies, living A; C enters, leases to D, and dies, living A. Held, there was no resulting use to A, but D should continue to hold as special occupant, during A's life.<sup>3</sup>

§ 29. As a devise imports a bounty, it will always be to the use of the devisee, unless a contrary intent is manifest, and no use will result to the heirs of the deviser. But where one is a devisee to uses, which from any cause fail, a use results to the heir.<sup>4</sup>

<sup>1</sup> *Adams v. Savage*, 2 Salk. 679; *Rawley v. Holland*, 2 Abr. Eq. 753; 22 Vin. 188, pl. 11

<sup>2</sup> Bro. Abr. Feoffment al. Use, pl. 10; *Dyer*, 146 b; *Perk.* 584-5.

<sup>3</sup> *Castle v. Dod*, Cro. Jac. 200.

<sup>4</sup> 1 Cruise, 800.

## CHAPTER XXII.

## TRUSTS. EXPRESS TRUSTS.

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| 1. Trusts in general.  | gage, &c.; trust ceases when the objects are effected.   |
| 2. Trusts in real estate; uses preferred to.                                   | 8. Or when the <i>cestui</i> alienates.  |
| 3. Classifications of trusts.  | 9. Lands subjected to payment of debts—not necessarily a trust estate.   |
| 4. How created—use upon a use.   | 10. Where the estate is less than freehold—a trust.  |
| 5. Where the uses require a legal estate in the trustee; intention of parties. | 11. Express trust, how created—statute of frauds, &c.—need not be <i>declared</i> , but only <i>proved</i> , by writing. |
| 6. Trusts for married women.   |  |
| 7. Limitations with authority to mort-   |  |

§ 1. TRUSTS, in general, constitute one of the most common relations known to the law. It has been said that a trust exists, wherever one person is managing the funds of another. A trust, technically speaking, may be defined, as an equitable right, title or interest in property, distinct from the legal ownership thereof.<sup>1</sup> Where one person is in possession of property which he is bound to deliver to another, and he fails to do so, equity raises an implied trust, which is subject to the rules and principles of trust estates. Whatsoever is the agreement concerning any subject, real or personal, though in form and construction purely personal and suable at law only, and though technically informal, yet in equity it binds the conscience and raises a trust.<sup>2(a)</sup>

<sup>1</sup> *Hulse v. Wright*, Wright, 61; 2 Story on Eq. 280; *Crompton v. Ballard*, 1 Shaw. N. S. 251; *Garrard v. Lauderdale*, 8 Sim. 1; *Talbott v. Todd*, 5 Dana, 199; *Pooley v. Budd*, 7 Eng. L. & Eq. 229. See Mont-

*gomery v. Calton*, 18 Tex. 788; *Sturges v. Knapp*, 81 Verm. 1; *Doyle v. Murphy*, 22 Ill. 502.

<sup>2</sup> *Wamburzee v. Kennedy*, 4 Des. 477; *Harney v. Mix*, 24 Conn. 406.

(a) In determining whether a testator means to pass land outright or in trust, the fact, that he had in another clause

of the will devised an absolute estate in apt words, is strong proof of a trust. *Brown v. Brown*, 12 Md. 87.

§ 2. A trust, in relation to real estate, is *a use not executed by the statute of uses*. Before this statute, a use and a trust were substantially the same thing, and the statute itself uses the words synonymously.<sup>(a)</sup> But the judicial construction given to this act has rendered it inapplicable to several cases, which will be presently mentioned; and, in such cases, the estate of the party beneficially interested is now termed, not a use, but *a trust*.

Devise in trust, to be applied towards the support of an insane pauper, as the trustee should judge right and equitable, provided the town of S., on which the pauper was chargeable, should pay a reasonable sum yearly for the same purpose. A dispute having arisen between the town and the trustee, as to the respective amounts they should annually pay, the town brought a bill in chancery, praying that the trustee might be decreed to pay a sum equal to the annual interest of the trust fund, and also such portion of the principal as the court should deem proper. Held, the town had no such interest in the trust fund as would enable them to sustain the bill; that the pauper and not the town was the *cestui que trust*, and by her guardian was the proper person to call the trustee to account. *Sharon v. Simonds*, 80 Vt. 458.

Held, also, that the devise gave to the trustee a discretion as to how much he should pay towards the pauper's support; and that, when such discretion had been honestly exercised by him, as appeared to have been done in this case, a court of chancery could not interfere. *Ib.*

A testator devised to each of his five children a large amount of personal and real estate, "subject to the payment of one hundred dollars" each, to A, when she should arrive at the age of eighteen. Held, this payment was a trust to be performed by the children respectively, and not a duty imposed upon the executor. *Philips v. Humphrey*, 7 Ired. Equ. 206.

Such legacy is a lien on the property; and a purchaser of a portion of it, with notice, was held liable to pay to A the proportion of her legacy, which the legatees and devisees of whom he purchased were bound to contribute, respectively, and had failed to do. *Ib.*

Where a husband by his will gave the

entire profits of all his estate to his wife during her life, and entrusted to her the education and maintenance of his children, and provided, also, for the maintenance and education of his children "out of the profits" of his estate; held, the wife took an estate coupled with a trust for the education and support of the children; that the property was not liable for the debts of the wife; and that, if she refused to protect the same from being seized for her debts, it was the duty of the administrator of her husband to do so. *Lucas v. Lockhart*, 10 S & M. 466.

A devisee, who accepts a devise charged with debts or legacies, is in equity a trustee, to the extent of such charge, and equity will compel the execution of the trust. *Mahar v. O'Hara*, 4 Gilm. 424.

(a) It is said, the word "trust" referred rather to the person in whom the confidence was reposed; "use," to the party beneficially interested. 1 Steph. 829 n. See 11 Ind. 372; 26 Geo. 142.

A deed to A, B and C, their heirs, &c., in trust for the only proper use of the grantors during life, and then for the use of their grandchildren, conveys the legal estate as an executed use, and not a trust. *Jones v. Bush*, 4 Harring. 1.

If the only duty of the trustee is to convey (at a future day) the legal estate, his services are useless, the transfer will be made by the operation of the statute of uses, and chancery terminates the office. *Adams v. Guerard*, 29 Geo. 651.

A devise to trustees in trust for the separate use of testator's granddaughter, not then married or contemplating marriage, vests a complete legal estate in the granddaughter, clear of the trust. *Whitchote v. Lyle's Executors*, 4 Cas. 78.

It is an estate, for the most part, recognized only by courts of equity, and not by courts of law.<sup>1(a)</sup>

§ 3. Trusts are either *express* or *implied*. The distinction between these two kinds of trusts will be explained hereafter, in considering the somewhat extensive subject of *implied* and *resulting* trusts. (See ch. 23.) Trusts are further divided into *executed* and *executory*. The former are those "accurately created and defined by the parties," and are construed like legal limitations. They are not subject to revocation. Executory trusts are "where something remains to be done to complete the intention of the parties, and their act is not final;" or where the trustee has some duty to perform, requiring that the title remain in him.<sup>2</sup> Executory trusts are construed liberally.<sup>3(b)</sup>

§ 4. There are three direct modes of creating a trust. The first mode is by limiting *a use, or trust, upon a use*. In this case the latter *cestui* cannot take an executed use, because the statute

<sup>1</sup> 2 Ventr. 312; *Ayer v. Ayer*, 16 Pick. 330; *Fisher v. Fields*, 10 John. 494; *Bloughton v. Langley*, 2 Ld. Ray. 878; *Watkins v. Holman*, 16 Pet. 25; *Conway*, 4 Ark. 302; *Shoher v. Hauser*, 4 Dev. & B. 96; *Trotter v. Blocker*, 6 Por. 269; *Kennedy v. Kennedy*, 2 Ala. N. 572.

<sup>2</sup> 2 Story on Equ. 246-7, and n.; *Jer-*

*voise v. Northumberland*, 1 Jac. & Walk. 550; *Rycroft v. Christy*, 8 Beav. 238; *Berry v. Williamson*, 11 B. Mon. 245; *Porter v. Doby*, 2 Rich. Equ. 49; *Schley v. Lyon*, 6 Geo. 530.

<sup>3</sup> 1 Story, 74. 247, 250. See *Bunn v. Winthrop*, 1 John. Cha. 336; *Flint v. Steadman*, 86 Verm. 210.

(a) In Massachusetts, before the Supreme Court had the chancery jurisdiction which it now possesses in relation to trusts, upon principles of public policy, it was held that the court would, if possible, construe a limitation to be an executed use rather than a trust. *Newhall v. Wheeler*, 7 Mass. 198; *Davis v. Hayden*, 9, 519; 2 Blackf. 198.

(b) The rule in *Shelley's* case does not apply to them. *Porter v. Doby*, 2 Rich. Equ. 119. Of this nature are *marriage articles*, which are always construed liberally in favor of the issue, for whose benefit they are chiefly designed. The same principle does not apply to settlements in wills, which are a mere bounty. And equity will not enforce marriage articles in favor of *volunteers*, or other parties than the wife and issue or their representatives. But if enforced for the latter, they will also be enforced in favor of the former. See *Neves v. Scott*, 13 How. 268.

A testator devised property to A in

trust, to apply the proceeds to the maintenance of B and C during life, and, on their decease, to the heirs of B. Held, an executory trust, and that on the death of B the estate vested in his heirs as purchasers. *Porter v. Doby*, 2 Rich. Equ. 119.

Where a trust is merely voluntary, and the transaction on which it is based is still executory, it is not a proper subject of equity jurisdiction. *Clarke v. Lott*, 11 Ill. 105.

Lord Hardwicke seems to have rejected the distinction above mentioned, of executed and executory trusts; holding that an executed trust is, in fact, a use executed by the statute, and that all trusts, from their very nature, are executory, because they involve an obligation upon the trustee, at some time or other, to convey the legal estate to the *cestui* or for his benefit, whether the party creating the trust expressly so ordered or not. They are to be executed by *subpana*. *Bagshaw v. Spencer*, 1 Coll. Jurid. 413.

requires that the feoffee be seised of *lands* or *tenements*, which a use is not. Thus a conveyance or devise to A, to the use of B, in trust for or to the use of C, gives C a trust, the legal estate being executed in B.<sup>1(a)</sup> So, where there is *an appointment to uses* under a power, or a *covenant to stand seised* with one person to the use of another, the *cestui* takes only a trust estate. But with regard to devises it has been held, that, where there is no necessity for the trustee's taking the legal estate, and the intention is clearly otherwise, the above rule shall not be adopted. And, in one case, this principle was extended even to a deed.<sup>2</sup>

§ 5. A second mode of creating a trust, is the limitation of an estate to one for the use of another, in such a way as requires that the former should be in possession or receipt of the profits; as where it is provided that he shall *take the profits and deliver them* to the *cestui*, or that he shall *pay over the profits* to him, or permit him to take the *net* rents and profits, subject to a rent-charge, and with remainders over. A provision that the *cestui* should *take* the profits, or even that the feoffee should *permit him to receive them*, would make an executed use; because, in order to carry it into effect, the trustee need not be in possession. But, in order to *receive* rents and profits for another's use, the trustee must have the legal estate. If this is in the *cestui*, a mere power in trust to the trustee is of no effect. Thus a trust *for the support of infants* requires that the trustee be *pernor* of the profits.<sup>3</sup> In case of a *devise*, whether the trustee or *cestui* shall take the legal estate, depends upon the intention

<sup>1</sup> Marwood v. Darrill, Cas. Temp. Hard. 91; Whetstone v. Bury, 2 P. Wms. 146; Atty-Gen. v. Scott, For. 188; Hopkins v. Hopkins, 1 Atk. 581; Venables v. Morris, 7 T. R. 842, 438; Franciscus v. Reigart, 4 Watts, 108; Doe v. Passingham, 6 Barn. & C. 305; Vander, &c. v. Yates, 3 Barb. Ch. 242.

<sup>2</sup> 1 Cruise, 304, cites Boteler v. Alington, 1 Bro. Rep. 72; Doe v. Hicks, 7 T. R. 433; Curtis v. Price, 12 Ves. 89.

<sup>3</sup> You v. Flinn, 84 Ala. 409; Copp v

Norwich, 24 Conn. 28; Bro. Abr. Feoffment al Use, 52; Broughton v. Langley, 2 Lord Raym. 878; Wood v. Wood, 5 Paige, 114; 2 Pick. 460; Franciscus v. Reigart, 4 Watts, 109; Ayer v. Ayer, 16 Pick. 380; Wroth v. Greenwood, 1 Horne & H. 889; Tilly v. Tilly, 2 Bland, 442. See Doe v. Bolton, 11 Ad. & El. 188; Morton v. Barrett, 9 Shepl. 257; Stuart v. Kissam, 3 Barb. 498; Upham v. Varney, 15 N. H. 462.

(a) It was once doubted whether this doctrine was adopted in Massachusetts. Thatcher v. Omans, 8 Pick. 528. The

principle is roughly handled by Lord Mansfield, in Goodright v. Wells, 2 Dougl. 774.

of the testator as appearing from the circumstances. If the trustee is to do any act requiring a legal estate, it will vest in him, though (as we have said) he is to *permit* the *cestui* to receive the rents and profits. Thus, where the trustee is to pay annuities, or, after deducting taxes, repairs and expenses, to pay over the surplus, or to apply the rents and profits to the maintenance and education of a son, the trustee takes a legal estate.<sup>1</sup> And upon a devise of land, to be sold, and the proceeds paid to certain devisees, the title vests in the heirs at law in trust for the devisees.<sup>2(a)</sup> And the same test of *intention* has been sometimes

<sup>1</sup> Fearn's Opin. 422; Chapman v. Blissett, For. 145; Shapland v. Smith. 1 Bro. R. 75; Silvester v. Wilson, 2 T. R. 444; McCosker v. Brady, 1 Barb. Ch. 239.

<sup>2</sup> Burgin v. Chenault, 9 B. Mon. 285. See Roberts v. Lesly, 8 Rich. Equ. 85. Luken's, &c. 47 Penn. 856; Shankland, &c. Ib. 113; Barnett's, &c. 46 Ib. 392.

(a) A, holding a note and mortgage against B, devises them to C, B's son, on condition that he allow B to occupy the land for life, and upon the trust of supporting certain persons named. Held, this was a trust, not an executed use, and that B had no legal life estate liable to be taken by his creditors. Merrill v. Brown, 12 Pick. 216.

A devise of land to the testator's minor daughter, "to have and to hold to her sole use and behoof forever, subject, however, to the condition of the trust herein mentioned, to wit: I hereby authorize the trustee, hereinafter named, to receive, hold and manage said property until said daughter shall arrive at the age of twenty-one years, or shall marry," gives the trustee a legal estate, but not a fee; he cannot, therefore, maintain a writ of entry, but may maintain a suit of forcible entry and detainer. Fay v. Taft, 12 Cush. 448.

Where land is devised to trustees, in trust to sell and apply the proceeds to certain specified objects, without any limitation as to the continuance of the trust; the title will continue in the trustees until the land is sold, or until a court of equity, upon the application of the beneficiary of the trust, or some person having a right to call the trustees to an account, shall remove them. Duke, &c. v. Graves. 9 Barb. 595. See s. 7.

In an action of ejectment, brought by such trustees, the defendant, who shows no title, cannot object that, by their delay in executing the trust, the plaintiffs are divested of the title. Ib.

Where a will, valid on its face, conveys real estate in trust, and the objects are clearly defined, and are not, at the time the will takes effect, illegal, the trustees acquire a perfect legal title; and, in an action of ejectment brought by them against a stranger and intruder, without color or claim of title adverse to that of the plaintiffs, the latter cannot be required, in the first instance, to make any further proof of title than to prove the execution of the will. They are not bound to show who are the *cestuis que trust*. Ib.

If facts have transpired since the death of the testator, or any other circumstances exist, by which the trust has come to an end, it is incumbent on the defendant to prove them. Ib.

Where a testator devised all his real estate, in America or the West Indies, to trustees, in trust to sell, dispose of, or otherwise convert the same into money, and apply the proceeds, first in payment of his debts, and the residue in purchasing real estate in Scotland, to be conveyed and settled for the uses and trusts expressed in a settlement or deed of disposition which he had executed of his estates in Scotland; held, if the will was good and legal on its face, to pass the title to the trustees, it was sufficient for the purpose of an ejectment brought by them for a portion of the lands devised; and that they were not bound to produce and prove the deed of disposition referred to in the will. Ib.

A testator devised to his grand-children, the children of A, his daughter,



applied to a conveyance. Thus A conveys land to B, C and D, selectmen of the town of N., *habendum* to them or their successors, in trust for the use of N. forever; upon the condition, however, that, if A shall support himself and indemnify the town against his support, the deed, as also a bond conditioned for such support, to be void. Held, as the bond belonged to B, C and D, not to the town, and as the deed was merely collateral to the bond, such construction should be given to the former, as would best effect its object, according to the presumed intention of the grantor; and therefore B, C and D took a trust, not an executed use.<sup>1</sup>

§ 6. Where a *cestui que trust* is a married woman, and the provision is made for her separate benefit, clearly and distinctly, the law usually vests the legal estate in the trustee, and gives her only an equitable interest, because this will best effect the object in view. No particular form of words is necessary. (a) The husband may be himself a trustee for the wife.<sup>2</sup>

<sup>1</sup> Norton v. Leonard, 12 Pick. 152; 16 Pick. 880.

<sup>2</sup> Thomas v. James, 82 Ala. 728; 11 Md. 29. See Harvey's, &c. 85 Penn. 207; Blake v. Dexter, 12 Cush. 559; Garden-

hire v. Hinds, 1 Head, 402; Prewett v. Land, 36 Miss. 495; Ives v. Harris, 7 R. I. 418; Dean v. Lanford, 9 Rich. Equ. 428; Ralston v. Waln, 41 Penn. 279; Noble v. Cromwell, 26 Barb. 475.

all his estate, to be equally divided between them at her death. He also devised the use of the estate for the support of A and her children during her life; and, to carry into effect this provision, he appointed A and B trustees of the estate. Held, a trust estate. Donalds v. Plum, 8 Conn. 447.

(a) When the words "next of kin," "heirs" and "representatives" are used in marriage settlements to designate the persons who are to take at the wife's death, they are generally construed to exclude the husband. Hutchins v. Dixon, 11 Md. 29.

In such cases, it has been said, the trustees take the legal estate by way of an executed use. Harton v. Harton, 7 T. R. 652.

A mother, in consideration of love and good will for her daughter, a married woman, conveys land to one "in trust, and for the sole use and benefit" of the daughter during her life. Held, a trust estate. Ayer v. Ayer, 16 Pick. 327. See 1 Horne and H. 889; Stuart v. Kissam, 8 Barb. 493; Mass. St. 1852, 67; Porter

v. Bank, &c., 19 Verm. 410; Stanton, v. Hall, 2 Russ. & My. 175; Tyler v. Lake, 2 Sim. 144; Rogers v. Ludlow, 3 Sandf. Ch. 104; Dickerson, 7 Barr, 255

Devise in trust, for the equal use and benefit of the four sisters of the testator, two of whom were *femes covert*, in fee, to be managed as the trustees should think most for the interest of the parties. Held, a trust. Bass v. Scott, 2 Leigh, 856

Devise to trustees and their heirs, in trust for a married woman and her heirs; and that the trustees should, from time to time, pay and dispose of the rents to the said married woman, without the intermeddling of her husband. Held, a trust, and not an executed use. Nevill v. Saunders, 1 Ver. 415.

Devise of rents to a married woman for life, to be paid by the executors into her own hands, without the intermeddling of her husband. Lord Holt held, that the trustees took the legal estate. The other judges thought otherwise. South v. Allen, 5 Mod. 101; Bush v. Allen, 1 L. 68; South v. Alleine, 1 Salk. 228

§ 7. Another case of trust, is a conveyance or devise to trustees and their heirs, *in trust to sell or mortgage*, to raise money for payment of debts. This passes the whole legal estate to the trustees; so that a subsequent limitation in trust gives only an equitable interest to the *cestui*. Thus a devise was made to trustees, their heirs and assigns in trust, that they and their heirs should first, by the rents and profits, or by sale or mortgage, raise money for payment of debts; after which, to the trustees, for five hundred years, without impeachment of waste,

Devise to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman, and, after her death, that the trustees should stand seised to the use of the heirs of her body. Held, during her life, the trustees took a legal estate; but, after her death, a use was executed in her heirs. *Say v. Jones*, 1 Abr. Equ. 388; *Say v. Jones*, 8 Bro. Parl. Cas. 118.

Devise to A and his heirs forever, in trust for B, a *feme covert*, for life, and to such uses as she, notwithstanding any coverture, shall appoint; and, after her death, to the use of her heirs. Held, an equitable fee-simple in the first *cestui que trust*. *Armstrong v. Zane*, 12 Ohio, 287. See *Blacklow v. Laws*, 2 Hare, 49.

A, being the only son of his mother, B, by her first husband, and B being his heir, devised land to B, "to hold to her, her heirs and assigns, to be for the sole use of her, her heirs, executors, administrators and assigns." The mother had a second husband, who was intemperate and without capacity, and she lived apart from him, and supported herself by labor. Held, she took the property to her own separate use, and it was not liable for the husband's debts. *Smith v. Wells*, 7 Met. 240.

W conveyed land and slaves to L., in trust for his wife E during her life, and, after her death, to her children, with power to E, by and with the consent of the trustee, to sell and re-invest the proceeds upon the same trusts. L purchased a tract of land, stock and growing crops from A, and hired his slaves to assist in making the crop. In payment she gave her notes, secured by mortgages on her trust property. Held, it was competent for her to make this contract. *Wayne v. Myddleton*, 2 Kelly, 383.

A testator directed, that his daughter's share of his estate should be held in trust for her use, during the joint lives of herself and her husband, and, in case of her husband's death, the trust-money to be paid to her; and, in case of her husband's surviving her, her share to be paid to her children. Held, the husband interposing no claim, that, as against other legatees, her children were entitled at her death to interest accrued, but not to possession, during her life. *Yundt's Appeal*, 1 Harris, 575.

In New York, a trust, authorizing the trustee to control, manage, sell and dispose of the trust estate, and the income, and pay over the same to a married woman for her support and maintenance; is substantially a trust to receive the rents and profits, and apply the same to her use, within the statute of trusts, and is therefore void. *Campbell v. Low*, 9 Barb. 585.

Where husband and wife convey land belonging to her to a trustee, in trust to sell the same for the use of the grantors; the land being unsold, the trustee is not entitled to hold it, as against a subsequent *bona fide* mortgagee without notice, in satisfaction of debts due to him from the husband, before the mortgage was executed. *Siter v. McClanachan*, 2 Gratt. 280.

And parol evidence, in such case, is not admissible, to show that such was the agreement at the time of making the deed of trust. *Ib.*

So the trustee, being also a prior mortgagee of the same land, cannot tack debts due him from the husband to his prior mortgage, to the prejudice of the subsequent mortgagee. *Ib.*

Contrary, it would seem, to the general rule, it has been held in South Carolina, that a devise to a wife, "to be by her freely enjoyed to every intent and



upon divers trusts. After the termination of this term, devise to the trustees, their heirs and assigns; they to stand seised in trust to uses as follows: for one moiety "I give and devise to the use and behoof of A for life." &c. Held, A took only an equitable, not a legal interest; because the whole legal estate passed to the trustees, and would have passed even without mention of their heirs, as necessary to the execution of the trust; and no legal remainder could therefore be limited upon it.<sup>1</sup> So in case of a conveyance to the use of trustees and their heirs, in trust to sell, and with the proceeds purchase other lands, to be settled upon by the grantors, with a proviso that, until a sale were made, the rents should be received as before; held, the use of the estate was executed in the trustees, and that the proviso did not reserve any legal interest or title to the grantors.<sup>2</sup> But where the legal estate is vested in a trustee for the accomplishment of particular purposes, it will cease when those purposes have been effected, and a use will be executed in the party who is next beneficially interested. This has been already seen in some of the cases relating to married women. So, it is held, that where one is appointed trustee, by a marriage contract, for the sole purpose of protecting the wife's property

<sup>1</sup> Bagshaw v. Spencer, 1 Coll. Jurid. 378; Wright v. Pearson, Fearn, 126. See Wells v. Heath, 10 Gray, 17.

<sup>2</sup> Keen v. Deardon, 8 E. 248. See Steacy v. Rice, 3 Cas. 75; Greenwood

v. Coleman, 34 Ala. 150; Mitchell v. Mitchell, 35 Miss. 108; Glidden v. Blodgett, 38 N. H. 74; Smith v. Metcalf, 1 Head, 64.

purpose, as her own in every respect," did not create a separate estate in her. Wilson v. Bailer, 3 Strobb. Eq. 258.

A testator, for the support of a son and his family, devised and bequeathed his estate to his executors, and directed them to sell it and invest the proceeds, and gave the use and income thereof to the son for life, and the principal over to others on his decease. Held, a trust, and that a creditor's bill could not reach the son's interest unless there was a surplus beyond such support. Bramhall v. Ferris, 4 Kern. 41.

A deed of trust conveyed leasehold property for the "sole and separate use, benefit and behoof" of a *feme sole*, "her executors, administrators and assigns," so that she might "either receive and

take the clear rents, issues and income, or proceeds in case of sale," and apply them as she thought proper, "so that neither the trust estate and property, nor the rents, issues, income or proceeds thereof, should at any time be subject to the power, disposal or control of the present or any future husband," or be subject to his debts; and, in case of her death without a will, to such persons as would "take an estate in fee-simple by descent from her." Held, this deed carried the title to the property beyond the period of the wife's death, whether the last limitation were valid or void, and excluded the surviving husband from all claim thereto. Waters v. Tazewell, 9 Md. 291.

from the control of her husband, the trust is executed immediately on the termination of the coverture, whether by her death or otherwise, and the property vests in her representatives.<sup>1</sup> So a devise was made to trustees, in trust from the rents, &c., to pay two life annuities; after payment thereof, in trust, from the residue of the rents to pay to A a certain sum in trust. After payment of the annuities and said sum, devise to B for life. The trustees were empowered to grant building and other leases. Held, the trustees took the legal estate for the lives of the annuitants, with a term in remainder sufficient to raise the sum mentioned, subject to which B took a legal estate for life.<sup>2</sup> So a deed to A, in trust for certain purposes during the life of B, and, on B's decease, to the use of B's children, their heirs and assigns, vests the legal estate in B's children on B's death.<sup>3</sup> So a husband conveyed to A, "her executors, administrators, and assigns," all the estate which he had in the land of his wife, in virtue of his relation as husband, in trust for the wife, "giving her full power through her trustee to dispose of said property, collect rents, or do any other matter or thing, relating to said property, without let or hindrance" of the husband. Held, the trustee took an estate for the life of the wife only; and that, on the death of the wife, living the husband, the trust, not having been executed, ceased, and he was entitled to his estate by the curtesy in the premises.<sup>4(a)</sup>

<sup>1</sup> *Liptrot v. Holmes*, 1 Kelly, 881.

<sup>2</sup> *Doe v. Simpson*, 5 E. 162. See *Doe v. Ellis*, 4 Ad. & El. 582; — *v. Needs*, 2 Mees. & W. 129.

<sup>3</sup> *Morgan v. Moore*, 8 Gray, 819.

<sup>4</sup> *Norton v. Norton*, 2 Sandf. 296.

(a) A conveyance was made in New York, before the Revised Statutes were passed, to A in fee, in trust for her daughter B, in fee, provided B did not die of age, and without issue; if she did, then for the sole use of A in fee. A dies in the minority of B, leaving B her sole heir. Held, the trust ceased with A's death, and the absolute estate vested in B. *Dekay*, 4 Paige, 408.

Devise of a certain sum, to before the separate use of A, the daughter of the testator and the wife of B, for her life, free from the debts of B. B died, and A married a second husband. The trust

for the separate use of A ceased with the death of B. *Benson v. Benson*, 6 Sim. 126.

Conveyance in trust, for the separate use of A for life, remainder, upon her death, to such child or children of A as may be then living; or who shall marry or attain twenty-one years. Held; this created an executed trust, and a vested legal estate in A's children on her death. *Spann v. Jennings*, 1 Hill's Cha. 824.

Where the estate was not merely given in trust to the husband for the use and benefit of the wife, but for her separate use, thereby creating a separate es-

§ 8. Upon a similar principle, a trust estate, created for the benefit of the *cestui*, may be terminated or converted into a legal estate, in consequence of some act done by such *cestui*, which vests his interest in third persons. Thus a testator devised property to trustees, to be applied to the support, &c., of A for life, as they should think proper; the application for his benefit to be at their entire direction, and A to have no power in any way to sell, mortgage or anticipate the rents. A, being insolvent, made an assignment, under the insolvent act, to B. The Court of Chancery decreed a conveyance of the land to B.<sup>1</sup>

§ 9. Where lands are devised in trust, merely *subjecting them to payment of debts* will not vest a legal estate in the trustee. Thus, upon a devise of real and personal estate to trustees and their heirs, to the intent that they should first apply the personal estate in payment of debts, and as to the real estates, subject to debts, devise to A for life, &c.; held, as there was nothing to show that the trustees were to be active in the payment of debts, although convenience would so suggest, they did not take the legal estate.<sup>2</sup>

<sup>1</sup> Green v. Spicer, Tam. 896.

<sup>2</sup> Kenrick v. Beaucherc, 8 B. & P. 175;

(Jenifer v. Beard, 4 Har. & McHenry, 78.)

tate in her; held, when the powers of the trustee ceased by the limitation contained in the trust itself, he could no longer hold the trust estate in his hands; and, if he died without transferring it to the *cestui que trust*, or disposing of it for her benefit or use, the court should decree for her immediate possession. Waring v. Waring, 10 B. Mon. 881.

Where a trustee, under a deed of trust for the separate use of a married woman, agreed by articles to convey the trust to A, in consideration of certain sums to be paid for the maintenance of his *cestui que trust*, and he subsequently conveyed the property to A, and took a bond given for the purchase-money; held, the articles were merged in the conveyance and mortgage, and the trustee was entitled to recover the unpaid balance after the death of his *cestui que trust*. Disnmore v. Biggert, 9 Barr, 138.

A, having a long term in certain premises, conveyed them to a trustee, to receive the rents and profits, and apply

them to the support of B during her natural life, and, after her death, to C, her heirs and assigns. Held, the trust ceased at the death of B, the residue of the term then vested in possession in C, and the trustee could not afterwards maintain ejectment against a stranger therefor. Nicoll v. Walworth, 4 Denio, 885.

Devise in trust to the separate use of a married woman, her heirs and assigns, to be managed and invested under her direction, and the income, or, if she require it, the principal, to be paid to her; and, upon the death of her husband, the whole property to be conveyed to her in fee simple; and, upon her death, to be conveyed to such persons as she may appoint, or, on failure of such appointment, to her children. The children, on the death of their mother without having made such appointment, take as purchasers under the will, and not by descent from her. Hubbard v. Rawson, 4 Gray, 242.

§ 10. The third case, in which the trustees take the legal and the *cestui* only an equitable interest, is where the estate limited to the former is *less than a freehold*, and therefore not executed in the *cestui* by the statute of uses, which makes use of the word *seised*, a word applicable only to freehold estates.<sup>1</sup>

§ 11. The English statute of frauds, (3 Cha. II, c. 3, sec. 7,)(a) requires all creations or declarations of trusts in real estate to be manifested and proved by some writing signed by the party or by his last will. Parol trusts are contrary to the letter and spirit of the statute of frauds, and are calculated to let in all the litigation, uncertainty and mischief which that act intended to prevent.<sup>2</sup> A declaration of trust need not be *sealed* as well as signed. But it is held, that, if such declaration is unsealed, a *consideration* must be proved.<sup>3</sup>

<sup>1</sup> Bac. Read. 42; Dyer, 369 a.

<sup>2</sup> Per Sergeant, J., *Graham v. Donaldson*, 5 Watts, 452. See *Smith v. Gray*, 1 Humph. 491; *Robson v. Harwell*, 6 Geo. 589; *Parker v. Bragg*, 11 Humph.

212; *Miller v. Cotten*, 5 Geo. 341; *Hall v. Layton*, 16 Tex. 262; *Farrington v. Barr*, 86 N. H. 86; 88 Ib. 382; *Farnham v. Clements*, 51 Maine, 426.

<sup>3</sup> *Thompson v. Branch*, 1 Meigs, 390.

(a) It is said that this statute did not extend to the provinces, and was never adopted in the State of Massachusetts. *Russel v. Lewis*, 2 Pick. 508. But a similar provision has been made, it is believed, in nearly every State in the Union.

In Ohio, before the statute of frauds, passed in 1810, a parol trust was good.

In North Carolina, parol declarations of trust are held valid. *Fleming v. Donahoe*, 5 Ham. 256; *Foy v. Foy*, 2 Hay. 181. So also in some cases in Pennsylvania. But the declaration must be made by the grantor of the estate. If made by the nominal grantee, it will be invalid, unless founded on the consideration that the purchase-money was paid by the *cestui*; and in that case it is superfluous, because a trust results by implication. *Kisler v. Kisler*, 2 Watts, 324.

The re-enactment, in 1813, of the New York act of 1801. for the incorporation of religious societies, without re-enacting the statute of frauds, may be regarded as a modification or amendment of the statute of frauds, so far as to make a use or trust, in favor of a religious society, an exception to the provision of the statute of frauds, which required that declarations of trust should

be in writing. *Voorhees v. The Presbyterian, &c.* 8 Barb. 185.

Proof by parol, that the vendor of land, and the agent of the vendee, by whom the purchase was made, understood, at the time of the purchase, that it was made upon a certain trust, does not show that the vendee himself so intended and understood the transaction, and is insufficient to establish a parol trust. *Harris v. Barnett*, 8 Gratt. 339.

In Pennsylvania, a trust in real estate, coeval with a deed for the same, may be proved by parol. *Wetherell v. Hamilton*, 8 Harris, 195.

A devise, made on the parol promise of the devisee, to hold the estate devised in trust for herself and another, creates a valid trust. *McKee v. Jones*, 6 Barr, 425. See *Bennett v. Fuhner*, 49 Penn. 155.

Where a mother, at the request of her son, devised her land to her daughter, to hold in trust for herself and the son; held, this created a valid trust, although made for the purpose of avoiding the creditors of the son. *Ib.*

By the statute of frauds of Illinois, all trusts, except resulting trusts, to be valid, must be created or evidenced in writing. *Hovey v. Holcomb*, 11 Ill. 660.

§ 12. A trust, in order to be valid, need not be *created* by writing, nor at the time the land is purchased; it is sufficient that there is *any written evidence of its existence* showing its creation or acknowledgment even after the purchase. As, for instance, a letter signed by the trustee, and acknowledging the trust. So a pamphlet, published by the trustee, was held a sufficient declaration of the trust.<sup>1</sup> So if A gives a bond to B to secure an estate for him, and B enters; this is a sufficient creation or declaration of trust.<sup>2</sup> So a written acknowledgment of a trust, created by parol, will bind a purchaser from the trustee.<sup>3</sup> And if the writing be lost, its contents may be proved by parol evidence, as in other cases.<sup>4</sup> So *an act of the legislature* may operate as a creation or declaration of a trust. Thus the State of North Carolina having made provision in public lands for the revolutionary officers and soldiers; held, an equitable fee-simple in the lands thereby vested in the latter, and the State became a trustee, with the usual liabilities incident to that office.<sup>5</sup> So an admission of a trust by an answer in Chancery is sufficient to bind a trustee. (a) Thus A, in consideration of £80, made an absolute conveyance to B. A brings a bill in equity to redeem. B in his answer insisted that the deed was absolute, but con-

<sup>1</sup> Vandever v. Freeman, 20 Tex. 388; Osborne v. Endicott, 6 Cal. 149; Montague v. Hayes, 10 Gray, 609; Forster v. Hale, 6 Ves. jun. 696; Fisher v. Fields, 10 John. 495; Arms v. Ashley, 4 Pick. 71; Conwell v. Evill, 4 Blackf. 67; United, &c. v. Woodbury, 2 Shepl. 281;

Duke, &c. v. Graves, 9 Barb. 595; Brown v. Brown, 1 Strobb. Eq. 363.

<sup>2</sup> Barrell v. Joy, 16 Mass. 223.

<sup>3</sup> Orleans v. Chatham, 2 Pick. 29.

<sup>4</sup> Rutledge v. Smith, 1 M'Cord's Cha. 119.

<sup>5</sup> Orleans v. Chatham, 2 Pick. 29.

Under the statute of New Hampshire, no trust in lands can be created unless by writing, except such as arises or results by implication of law. Moore v. Moore, 88 N. H. 382.

Parol evidence is admissible to establish a fact from which the law will raise or imply a trust, but not to prove any declaration of or agreement for a trust, such as declarations of the grantee that he holds the lands in trust. Thus a bill in equity charged that the complainant made an absolute conveyance to the defendant, but upon a parol agreement that the defendant should reconvey on certain

conditions, on request. The answer denied the trust. The plaintiff's evidence showed merely repeated statements of the defendant that he held the lands in trust. Held, insufficient. *Ib.*

(a) To affect one with knowledge of a secret trust, who was purchasing land from the apparent owner, in whom the legal title was vested, it must be shown that he was fully aware of the precise terms of the trust before he completed his purchase. Indefinite and uncertain admissions will not authorize the positive denials of the answer. Conner v. Tuck, 11 Ala. 794.

fessed that, after payment of the £80 and interest, he was to hold in trust for A's wife and children. Held, this was a legal declaration of trust.<sup>1</sup> But such acknowledgment must show not only the existence, but the precise nature and terms of the trust. So the trustee's own admission is said to be very weak evidence of the trust; and the declarations must be under the party's hand, and clear and explicit. Thus letters, addressed by a son to his father and brothers, equivocal in their language, were held insufficient to prove that the former held an estate, which he bought at a sale on execution against the father, in trust for the latter. So with loose accounts, in which the father was charged and credited in connection with such purchase. And parol evidence is held admissible to control or explain such ambiguous declarations.<sup>2(a)</sup>

§ 13. A trust cannot be established by parol evidence, even though this goes to confirm other written evidence, in showing the title to the land not to be in the supposed trustee, or to rebut parol evidence, which shows a fraudulent conveyance by such trustee.<sup>(b)</sup>

<sup>1</sup> *Hampton v. Spencer*, 2 Vern. 288.

<sup>2</sup> *Pinson v. Ivey*, 1 Yerg. 296.

<sup>3</sup> *Steere v. Steere*, 5 John. Ch. 1.

(a) A conveys land to B, who gives back an unsealed writing, stating that B had paid A a certain sum and taken a deed of the land, and had agreed to let A "have the improvement or sell, provided he should pay said sum in three years, and interest." The land was worth more than the sum named. Held, the word *paid* should be construed to mean *lent* or *advanced*; that the effect of the agreement in regard to a sale was, to authorize A to negotiate for such sale, and an engagement by B, he having the legal estate, to carry it into effect; and that B held *in trust* for A. *Scituate v. Hanover*, 16 Pick. 222.

A, by a covenant, authorizes B to convey his (A's) land, and retain one-third of the money or property received for it as a compensation for his services. B covenants to pay and deliver to A the other two-thirds. Held, a good declaration of trust. *Armstrong v. Campbell*, 3 Yerg. 201.

Where an execution was levied on rents and profits for a term, and the creditor afterwards executed a written unsealed instrument, reciting that the note on which the judgment was founded belonged to another in part, and promising to pay him the rents and profits, or allow him the use and improvement of the estate after satisfying his own debt; held, a sufficient declaration of trust. *Arms v. Ashley*, 4 Pick. 71.

It has been held, that, if a grantee, in an account subsequently stated, credit the grantor with the proceeds of sale of a part of the land, this raises a trust. *Prevost v. Gratz*, 1 Pet. Cir. 366.

(b) A, the husband of B, conveys to C, her father, all his interest in her land for a nominal, but no actual consideration. C, being insolvent, afterward reconveys to B, taking her note for a small sum, with the mutual intent to protect the land from creditors. The land is afterwards taken by C's creditors. A



§ 14. A trust may be proved by circumstantial evidence.<sup>1</sup>

§ 15. It has been held in Massachusetts, that the statute establishing Chancery jurisdiction of trusts had no effect upon the prior statute, which excludes parol evidence of them.<sup>2</sup>

§ 16. It is held, that, where a transaction may be viewed as "*ex maleficio*," as where one purchases at sheriff's sale in trust for another, and refuses to fulfil the trust, the statute of frauds does not apply.<sup>(a)</sup> But where an execution plaintiff purchased the land sold, agreeing with the defendant to reconvey on payment of his judgment, and took possession, greatly improved the land, and occupied for ten years; held, he was not bound to fulfil the agreement.<sup>3(b)</sup>

§ 17. In cases of fraud, accident or mistake, it seems, Chancery will interfere to enforce a parol trust. But where A conveyed to B by an absolute quit-claim deed, expressing a valuable consideration, it was held, in Chancery, that A could not prove by parol evidence, either upon the principles of the common law or the statute of frauds, an agreement, by which B was to hold in trust for him, and subsequently executed a writing to that effect; and that B acknowledged the agreement, and was solicitous to have it fulfilled, but by negligence, accident, or some

<sup>1</sup> Gunter v. Janes, 9 Cal. 648; Lamb v. Girtman, 26 Geo. 625.

<sup>2</sup> Black v. Black, 4 Pick. 284.

<sup>3</sup> Graham v. Donaldson, 5 Watts, 451-2.

upon conveying to C, gave him a bond against exercising any control over B's estate. B always occupied the land. Held, no trust was legally proved which would constitute a valuable consideration for the deed of C to B, and that C's creditors should hold the land. Smith v. Lane, 8 Pick. 205.

(a) So where lands were bid on at a sale under execution by one who professed to act as the friend of the debtor, and this was understood by those present at the sale, who were thereby prevented from bidding; and the purchaser agreed, in an instrument under seal sent to the debtor, to pay off the execution debts and the other liens, and to pay debts due to himself, and then to convey the remainder of the lands to the debtor or his heirs; and the debtor released his

title to the purchaser, who not only paid all the existing debts, but judgments obtained after the purchase against the debtor, and then conveyed some of the lots to the heirs of the debtor; and the whole were finally divided between the heirs and debtor; held, the lands were purchased and held in trust by the purchaser, and were subject to the debts of the debtor: and that the burden of debts, which before the division of the lands would have been a common one, ought to be borne proportionably. Lytle v. Pope, 11 B. Mon. 297. See ch. 25.

(b) Where a deed by mistake conveys more than was sold, and the grantee resells, he holds a proportional part of the proceeds in trust for the grantor. Andrews v. Andrews 12 Ind. 848.

unaccountable cause of delay, the execution was delayed till B's death. And, as the evidence went to show an *express trust*, it would not sustain the claim of *an equitable lien* for advances of money.<sup>1</sup>

§ 18. If a trustee executes a trust created by parol, he will be bound by it.<sup>2</sup>

<sup>1</sup> *Dean v. Dean*, 6 Conn. 285.

<sup>2</sup> *Elliott v. Morris*, Harp. Equ. 281.





that this is too strong language, and suggests the following substitute: "A trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, this is the fair and reasonable interpretation of their acts and transactions."<sup>1</sup>

§ 2. Implied trusts are, 1. Those which stand upon the presumed intention of the parties; 2. Those independent of such intention, and forced upon the conscience of the party by operation of law, as in case of fraud or notice.<sup>2(a)</sup>

§ 3. It has been already seen (p. 47), that equity regards *money, which has been agreed to be turned into land, as land*. From this principle arises an important class of implied trusts. After a written contract for conveyance of land, and payment of the price, the holder, until a conveyance is actually made, becomes a trustee for the other party. So, a subsequent purchaser with notice from him. And such purchaser must be joined in a suit for specific performance.<sup>3</sup> After payment of the price, if the vendor and purchaser conspire to protect the land from creditors of the latter, Chancery will give relief.<sup>4</sup>

§ 4. Where one person pays the money for the purchase of

<sup>1</sup> 2 Story's Equ. 439.

<sup>2</sup> Ib. 438. See 1 Lom. Dig. 200.

<sup>3</sup> *Davie v. Beardsham*, 1 Cha. Ca. 89; *Acherley v. Vernon*, 9 Mod. 78; *Astor v.*

*L'Amoureux*, 4 Sandf. 524; *Stone v. Buckner*, 12 S. & M. 78.

<sup>4</sup> *Forsyth v. Clark*, 8 Wend. 687.

(a) It is remarked by the court in Pennsylvania, that in England there are two kinds of resulting trusts: 1. Where a deed is made to A, but the purchase-money is B's, the purchaser's; in which case a trust results to B. 2. Where trusts are expressly declared for a part of the estate; and then a trust results for the residue. There are other cases where a specific lien is allowed upon land purchased in part with money withdrawn from a trust fund. But these are not, technically, resulting trusts. *Kisler v. Kisler*, 2 Watts, 824.

The distinction between *express* and *implied* trusts has been thus stated. A trust, which results to a purchaser by operation of law, must be a pure, unmixed trust of the ownership and title of the land or estate itself. Where there is a mere interest in the proceeds, or a lien upon the land as security, or a claim upon the money to be

raised by a sale or mortgage of it, these are subjects of express agreement, and require potential ownership in the trustee. They are too complex, and partake too much of the nature of contracts, to belong to the class of pure and simple trusts, the sole operation of which is to vest the estate in the actual purchaser, in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those for whose benefit the legal owner may be under a moral obligation to hold or apply it. An implied trust seems often to partake of the character of an *executed use*, being saleable on execution and authorizing an ejectment against the trustee. *White v. Carpenter*, 2 Paige, 238-9. See *Doe v. Rock*, 1 C. & Mar. 549.

In general, it is said, no resulting trust can arise in contradiction to the terms of a deed. *Hoxie v. Carr*, 1 Sumn. 188.

land,(a) but the conveyance is made to another, (as has been stated, s. 2, n.) the former has a resulting trust in the land. So, also, where a joint conveyance is made to both, whether to hold concurrently or successively;(b) and such payment of the money may be proved by parol evidence.<sup>1</sup> But the money must be paid before or at the time of the conveyance, in order to raise a resulting trust. The claimant must have occupied a position originally, which would entitle him to be substituted for the grantee.<sup>2</sup> A subsequent advance of money, either to the grantee or the grantor, may be evidence of a new loan, or the ground of some new agreement; but will not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance, that the moneys of the real, not the nominal, purchaser, formed *at the time* the consideration of that purchase, and became converted into the land.<sup>3</sup> And the mere *charging* of a third person with the price of the land, by the nominal purchaser, will not raise a trust for the former.<sup>4</sup>(c)

<sup>1</sup> 2 Story, 443; Smith v. Strahan, 16 Tex. 814; Cloud v. Ivie, 8 Mis. 578; Barnet v. Dougherty, 82 Penn. 371; Claussen v. La Franz, 1 Clarke, 226; 2 Clarke, 487; 82 Miss. 190; 2 Vent. 361; Riddle v. Emerson, 1 Vern. 109; Willis v. Willis, 2 Atk. 71; Lloyd v. Spillett, Ib. 150; Sugd. on Vend. 2, 152; 8 Mas. 347; 2 John. Cha. 405; Cox v. Grant, 1 Yea. 166; Baker v. Vining, 80 Maine, 121; Thomas v. Walker, 6 Humph. 98; Murdock v. Hughes, 7 S. & M. 219; Coates v. Woodworth, 13 Illin. 654; Livermore v. Aldrich, 5 Cush. 481; Williams v. Hollingsworth, 1 Strobb. Equ. 103; Lounsbury v. Purdy, 18 N. Y. (4 Smith) 515; Beck's, &c. v. Graybill, 4 Cas. 66; Kelly v. Johnson, 22 Mis. 249; Selden's, &c. 81 Conn. 548; Mahorner v. Harrison, 18 S. & M. 53;

Stephenson v. Thompson, 18 Illin. 186. See Work v. Work, 2 Harr. 816; Tarpley v. Poage, 2 Tex. 139; Watson v. Le Row, 6 Barb. 481; Dudley v. Bosworth, 10 Humph. 9; Hollis v. Hays, 1 Md. Ch. 479; Lindsey v. Platner, 23 Miss. 576.

<sup>2</sup> Alexander v. Tams, 18 Illin. 221; Perry v. McHenry, Ib. 227. And see Coppage v. Barnett, 84 Ala. 558.

<sup>3</sup> Botsford v. Burr, 2 John. Cha. 409; Hoxie v. Carr, 1 Sumn. 188; Seward v. Jackson, 8 Cow. 406; Foster v. Trustees, &c., 3 Alab. N. 302; 18 S. & M. 58; Smith v. Sackett, 5 Gilm. 534; Alexander v. Tams, 18 Illin. 221; Perry v. McHenry, Ib. 227. But see Harden v. Harden, 2 Sandf. Ch. 17.

<sup>4</sup> Steere v. Steere, 5 John. Ch. 19.

(a) *Natural love and affection* is not sufficient consideration for an implied trust. Miller v. Stokely, 5 Ohio N. S. 194.

(b) This is said to be a clear result of all the cases, without a single exception. 2 Sugd. 152.

(c) So where A agreed to convey land to B, upon his paying so much money at specified times, and a part had been paid; held, there was no resulting trust. Conner v. Lewis, 4 Shepl. 268. But if A buys land and takes a deed in the name

of B, B advancing the purchase-money and taking A's notes therefor, with the agreement to convey to A upon being repaid; this may be considered as a loan of the money, and a resulting trust to A. Page v. Page, 8 N. H. 187; Osborne v. Endicott, 6 Cal. 149.

A surety who pays the purchase-money, upon the default of his principal, takes no interest in the land. Gee v. Gee, 82 Miss. 190.

§ 5. It is not to be understood, that actual *payment of money* is necessary to constitute a resulting trust. Any other *valuable consideration* will undoubtedly have the same effect. Thus the agreement of one person to form a settlement and commence improvements upon lands, to be conveyed to another for his benefit, is a sufficient consideration to raise an implied trust for the former.<sup>1(a)</sup>

§ 5 a. It is sometimes held, that, in the absence of allegations of fraud or mistake, an absolute conveyance cannot be made out to be in trust by parol evidence. Thus one, whose grantee has sold the land, is precluded from showing a resulting trust, and recovering the price of the land.<sup>2</sup> And it seems to be well settled that, to constitute a resulting trust, the parol evidence of a payment by the real purchaser must be clear and undoubted, especially after a long time has elapsed; of so positive a character as to leave no doubt of the fact, and at the same time so clearly defining the trust as that the court may see what is requisite for its due execution. Evidence of naked declarations, made by the nominal purchaser, is most unsatisfactory, being so easily fabricated, and from the impossibility of contradicting it. And, on the other hand, the implication resulting from this fact, called by Lord Mansfield "an arbitrary implication," is only presumptive, and may be rebutted by parol evidence to the contrary.<sup>(b)</sup> Before the statute of frauds, a resulting trust might

<sup>1</sup> *Malin v. Malin*, 1 Wend. 625.

<sup>2</sup> *Sturtevant v. Sturtevant*, 20 N. Y. (6 Smith) 89; *Sullivan v. McLennans*, 2

*Clarke*, 487. See *Swinburne v. Swinburne*, 28 N. Y. (1 Tiffa.) 568.

(a) Where a daughter furnished her father with a portion of the purchase-money to buy land for her; the balance being furnished by him, charged to her as an advancement, and deducted from her share in his estate; and she went into possession: held, there was a resulting trust in her favor.

Also, that a conveyance by the father to one, who, having another wife, married the daughter, and claimed the land by virtue of the cash payment and advancement, gave him no title as an independent purchaser ignorant of her equitable title. *Becks v. Graybill*, 4 Cas. 66.

(b) B paid the purchase-money of an

estate conveyed by a third person to A, who agreed to convey it to B, subject to a mortgage; and A and B afterwards agreed that A should raise additional money by another mortgage, and convey the estate to B, subject to the two mortgages. B subsequently accepted of A a deed of the estate subject to the two mortgages, the latter of which was never in fact made. Held, the presumption of a resulting trust, raised by the first agreement, was rebutted by the subsequent agreement and the acceptance of the deed. *Livermore v. Aldrich*, 5 Cush. 481.

A, being improvident, conveyed lands



own answer in equity, which, after his death, of course cannot be had. But Mr. Sugden doubts the correctness of this opinion, and also refers to some late authorities against it.<sup>(a)</sup> Judge Story thinks, that any declaration or confession made by the party in his life is sufficient evidence. So, also, any expression or recital in the deed itself; a memorandum or note made by the nominal purchaser; papers left by him, and discovered after his death; and, it seems, his answer to a bill of discovery.<sup>1(b)</sup>

§ 8. It has been held, that a resulting trust might be proved by evidence merely circumstantial; as, for instance, the poverty of the nominal purchaser, and his inability to pay for the estate.<sup>2</sup> This, it seems, must come in aid merely of other proof.

§ 9. A resulting trust may be rebutted as to a part of the land itself, or a part of *the interest* in the land.<sup>3</sup>

§ 10. It has been said, that no trust will result, unless the party interested paid the *whole* consideration. This doctrine, however, seems to have been overruled in England,<sup>4</sup> and, in Pennsylvania, a purchase with trust money, *in whole or in part*, gives to the owner of the money a proportional interest in the land. So in Kentucky, where slaves were purchased by A, *in part*, with the money of B; held, a trust resulted to B *pro tanto*. So, where land is purchased by several persons, and a joint deed received, a trust results in favor of each, to the ex-

<sup>1</sup> 2 Story, 444, n.; Lloyd v. Spillet, 2 Atk. 150, n.; 2 Sug. 156-7.

<sup>2</sup> Willis v. Willis, 2 Atk. 71.

<sup>3</sup> Benbow v. Townsend, 1 My. & Keen, 506.

<sup>4</sup> Chadwick v. Felt, 85 Penn. 805; Bruce v. Roney, 18 Ill. 67; Crop v. Norton, 9 Mod. 285; Wray v. Steel, 2 Ves. & Beam. 388; 8 Mas. 364.

(a) In New York, Indiana and Kentucky, parol evidence is received against the answer of the purchaser denying the trust, and, it seems, even after the purchaser's death. But such evidence shall be received with great caution. Boyd v. M'Lean, 1 John. Ch. 582; Snelling v. Utterback, 1 Bibb, 609; 4 Blackf. 589.

In Indiana, the bill must be supported by two witnesses, or one with corroborating circumstances. Blair v. Bass, 4 Blackf. 589.

(b) Particularly the case of Lench v. Lench, 10 Ves. 511, in which Sir Wm.

Grant remarked, that, whatever doubts might have been formerly entertained on the subject, it is now settled, that (after the death of the alleged trustee) money may be followed into the land in which it was invested; and a claim of this sort may be supported by parol evidence. A devisee may claim on account of money paid by the testator. Mahorne v. Harrison, 18 S. & M. 58. A resulting trust may be proved *against* heirs by parol admissions of the ancestor. Harder v. Harder, 2 Sandf. Ch. 17.



expresses a consideration generally, there is a resulting trust for the whole.<sup>1</sup>

§ 13. A grantor with warranty cannot set up a trust for himself, on the ground of an interest in the purchase-money, as being the proceeds of sale of other land, in which the alleged trustee had only a life interest, and of which the grantor owned the reversion.<sup>2</sup>

§ 14. Where land owned by two persons is conveyed to a third, and reconveyed to one of the grantors, the other grantor has no resulting trust in the estate. Thus, the wife of A owning lands in tail, they join in a conveyance to B in fee, who reconveys to A in fee. More than a year afterwards, A conveys to C. Upon a bill in equity by a creditor of A, to set aside the last conveyance as fraudulent against creditors; held, no trust could arise out of these conveyances for A's wife and children, and that such trust was not legally proved by a declaration of it in the answer to the bill, which could have only the weight of parol evidence.<sup>3</sup>

§ 15. The principle of a resulting trust, as arising from the payment of the purchase-money by one, and a conveyance to another, is not applicable, where a trustee is expressly directed by the trust itself to take and hold in his own name;<sup>4</sup> or where one man buys land merely *to benefit another*, and admits that, if the latter will repay him the purchase-money, he will convey the land;(a) or where a man verbally employs an agent to purchase land for him, but pays no part of the price. These

<sup>1</sup> *Malin v. Malin*,\* 1 Wend. 653.

<sup>2</sup> *Ring v. McCoun*, 10 N. Y. (6 Sel-den) 268.

<sup>3</sup> *Squire v. Harder*, 1 Paige, 494.

<sup>4</sup> *Jones v. Slubey*, 5 Har. & John 372.

(a) The mere violation of a parol agreement, in relation to land purchased by one for the benefit of another, will not raise an implied trust in favor of the latter, unless accompanied with fraud or *mala fides*. As, for instance, when one purchases at an execution sale for the benefit of the debtor. In such case, if there be fraud, the vendee will hold in trust for the creditors, and also for

\* This case relates to the notorious Jemima Wilkinson, called by her fol-

lowers "the Universal Friend." They supposed that her peculiar character and office disqualified her to hold property in her own name. The counsel who argued against the trust remarked that her followers were the only witnesses for the trust. "They believed they were testifying in a controversy between their God and a mortal; and can it be supposed that they believed they sinned when they obeyed the mandates of their Deity, uttered not from Sinai, but from the mouth of their God?"



facts constitute a mere *conventional* trust, or trust by contract, which is void unless proved by writing. So, where a conveyance is executed conformably to a written agreement, no resulting trust can be raised by parol evidence.<sup>1(a)</sup>

§ 16. A purchase by a third person at sheriff's sale, with the money or on account of the judgment debtor, raises a trust for the latter.<sup>2(b)</sup> (See chap. 25.)

<sup>1</sup> *Dorsey v. Clarke*, 4 Har & John. 551; *Pattison v. Horn*, 1 Grant, 301; *Smith v. Garth*, 32 Ala. 368; *Barnet v. Dougherty*, 32 Penn. 371; *St. John v.*

*Benedict*, 6 John. Ch. 111. See *London v. Fairclough*, 2 Man. & G. 674.

<sup>2</sup> *Deatly v. Murphy*, 3 Mar. 477; *Denton v. M'Kenzie*, 1 Dessau. 289; *Pegues v. Pegues*, 5 Ired. Equ. 418.

the debtor, unless he was privy to the fraud. *Robertson v. Robertson*, 9 Watts, 86; *Hains v. O'Connor*, 10, 343, 320; *Jackman v. Ringland*, 4 W. & S. 149; *M'Calloch v. Cowber*, 5, 427. See *Wil-link v. Vanderveer*, 11 Barb. 599. If done to defraud creditors, a creditor may file a bill in equity to set aside the conveyance so far as to satisfy his judgment. *Jackson v. Forrest*, 2 Barb. Ch. 576. Where A procured a deed from B. upon a promise to hold the land for C; held, such promise might be proved by B; and, if A had sold the land, that C might recover the price paid from him. *Miller v. Pearce*, 6 W. & S. 97. Where land was purchased at the land office by A in trust, and with the understanding that he should deed to the two claimants, B and C, to B all west of a certain road, and to C the residue, and B furnished A with the necessary entrance money for his portion of the land, prior to the purchase; held, A, as trustee, was responsible to B for his portion of the land. *Russell v. Lode*, 1 Greene, 566.

It has been held that a trust may result, where the purchase-money is advanced by a third person as a loan or gift to the *cestui*. *Getman v. Getman*, 1 Barb. Ch. 499.

Where a clerk in a store pilfers from his employer, and with the money purchases land, he cannot be held as the trustee of the land for the benefit of his employer, so as to enable him to compel a conveyance of the legal title. *Campbell v. Drake*, 4 Ired. Eq. 94.

(a) But where A paid for land, and B agreed to procure a deed for him, but took a deed to himself; held, A might maintain a bill in equity against B. *Pillsbury v. Pillsbury*, 5 Shepl. 107.

A and B agree by parol to purchase

land; A to make the purchase, and B to pay one-half of the price, and take one-half of the land. This is a case within the statute of frauds, and no trust will result therefrom to B. *Parker v. Bodley*, 4 Bibb, 102. But see *Kellum v. Smith*, 38 Penn. 158.

So, if A buy in his own name and upon his own credit, the statute of frauds is applicable; and it cannot be proved by parol evidence that the purchase was made for another's benefit. *Fowke v. Haughtier*, 8 Marsh. 57. So, where a son conveyed land to his father, nominally as a purchaser, but in reality as a trust, to enable the father to raise money for the son by mortgage, and the father died without raising the money; held, though the son had a lien for the price of the land, parol evidence of the trust was inadmissible. Judge Story says, this case stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts. *Le-man v. Whitley*, 4 Russ. 422; 2 Story on Eq. 442 n.

(b) Where a judgment was recovered in the name of A, and with his knowledge and consent, for the benefit of B, and an execution issued thereon was levied on the land of the debtor, which was set off to A; held, the legal estate thereby vested in A, in trust for B, and A was bound to release his title to B, who might maintain a bill in equity for such conveyance. B having brought his bill in equity, in the alternative, either for a conveyance or for a compensation in damages, and it appearing that A had previously sold and conveyed the land, and received the purchase-money, and thereby disabled himself from making a conveyance; held, B was entitled to recover the amount of the purchase-money, and

§ 17. No trust shall result to an alien.(a) It would be a fraud upon the rights of the State and the laws of the land. If the alien is to have the proceeds of the land, after satisfaction of certain express trusts by a sale, the surplus *escheats*, and may be reached in equity by the State. So, if the alien is to have the rents and profits, the State may claim them in equity.<sup>1</sup>

<sup>1</sup> Phillips v. Cramond, Whart. Dig. 580; Leggett v. Dubois, 5 Paige, 114; 8 Leigh, 492.

interest, or, at his election, a sum equivalent to the present value of the land. Peabody v. Tarbell, 2 Cush. 226.

A, finding himself insolvent, gave to his sureties, on a guardian's bond, a note for the deficiency in his guardian account. They sued the note, and obtained judgment, and partial satisfaction, by levying on real estate, and having it set off to them jointly. After the levy, &c., one of the sureties, B, paid the deficiency in the guardian's account. Held, up to the time of that payment, there existed a resulting trust in favor of A, the principal; that the right to insist upon this trust was not barred by the lapse of time, which bars the action for contribution; and that facts necessary to establish the trust might be shown by parol evidence. Held, also, that, upon the payment by B, a new trust arose in favor of the sureties themselves, in the proportions in which they had contributed towards the deficiency, and the necessary expenses and taxes. Brooks v. Fowle, 14 N. H. 248.

(a) But where there was a devise in trust to sell and divide the proceeds among certain persons, some of whom were aliens, and a sale was accordingly made under a decree; held, the owner could not claim any part of the money. Du Hourmelin v. Sheldon, 4 My. & C. 525.

In New York, where, as will be seen, (*infra*,) the whole doctrine of uses and trusts has been fundamentally changed, no trust shall result to a party who pays the purchase-money for land, except so far as to make the land liable for his debts existing at the time. 1 N. Y. Rev. Sts. 728; McCartney v. Bostwick, 32 N. Y. (5 Tiffa.) 53. See Siemon v. Schurck, 30 N. Y. (2 Tiffa.) 598; Swinburne v. Swinburne, 29 N. Y. (1 Tiffa.) 568.

In Massachusetts, Maine and New Hampshire (substantially) it is provided by statute that no trust shall be valid

without writing, "excepting such as may arise or result by implication of law;" and that no trust shall be valid against a subsequent conveyance or seizure on legal process, unless the purchaser or creditor had notice, express or implied. Mass. Rev. St. 408; N. H. Rev. St. 244-5; Me. Rev. St. 874. See Mass. Sts. 1844, 289; Gen. Sts.

It had previously been decided in Massachusetts, that payment of the purchase-money of land raised no trust in favor of the party paying it, though the grantee gave him a bond to convey to his order. Also, that there was in such case no fraud, which would render the land liable to creditors of the real purchaser. Perhaps such a transaction might constitute an unlawful conspiracy. Storer v. Batson, 8 Mass. 442; Jenney v. Alden, 12 Mass. 375; Northampton, &c. v. Whiting, Ib. 104. See 10 Allen. 15.

Land paid for by A was conveyed to B, in order to secure it from A's creditors. A took possession under a lease from B, and his creditors levied upon the land as A's property. Held, they could not recover possession from B by writ of entry. Howe v. Bishop, 8 Met. 20. Whether, under similar circumstances, B could have maintained his title *as demandant*, A being in possession, *qu.* That he could not, see Goodwin v. Hubbard, 15 Mass. 210.

It has been since held, that a trust resulting by implication of law is not within the statute of frauds of Massachusetts, (Rev. Sts. c. 59, sec. 80), but may be proved by parol. Peabody v. Tarbell, 2 Cush. 226. Also, that the Supreme Court has jurisdiction of implied as well as of express trusts. Whitten v. Whitten, 8 Cush. 191.

If it appear on the face of a bill in equity, brought to enforce a trust, not arising by implication, and concerning land, that it rests in parol; the statute



stood only on the footing of a simple contract creditor, and had no lien upon the lands purchased.<sup>1</sup>

§ 19. Where the trust money is identified, a trust will result, according to some authorities, although the investment is not in pursuance, but in *violation*, of the trust. But others hold, that in such case the party interested has a mere lien.<sup>2</sup>

§ 20. Where a trust results, in consequence of a payment of the purchase-money of land, either by the *cestui* or another for his benefit, the *cestui* may, at his election, claim the money instead of the land.<sup>3</sup>

<sup>1</sup> Perry v. Phelps, 4 Ves. 108; Perry v. Phelps, 17, 173.

<sup>2</sup> 2 Story, 457, and n.

<sup>3</sup> Phillips v. Cramond, 2 Wash. C. 441; Story, 457, and n.

stitute an absolute bar to a future suit. 3. The release by A, though absolute in its terms, was indispensable to guard the property against A's creditors, so as to induce capitalists to advance funds, and therefore was not inconsistent with a parol trust, and the evidence showed E to be acting as A's agent. 4. If E, knowing that A intended he should act as agent, did really intend to act for his own benefit solely, the concealment from A of such purpose was a fraud in equity. 5. This was a parol trust, resulting from agency, and resting upon honorary obligations, and, as such, equity would enforce it. 6. It was not within the statute of frauds, being a resulting trust as to A, and a trust as to E merely for his liabilities, compensation and expenditures; because it was a case of agency, of constructive fraud, and of part performance. 7. K was not a *bona fide* purchaser without notice, because, even if uninformed of the actual state of the title and A's claim, he had sufficient notice of the claim and controversy to put him on inquiry, which was sufficient notice in equity. 8. Though A might never have been able to fulfil his agreement with E, by discharging the incumbrances and remunerating him, yet this did not in equity extinguish A's rights, though it might furnish reason for foreclosing his right, and ordering a sale upon E's application. Jenkins v. Eldredge, 3 Story, 181.

The court in New Hampshire remark. Pritchard v. Brown, 4 N. H. 399-400-1; Page v. Page, 8. 187. (holding that a resulting trust may be either raised, rebut-

ted, or discharged by parol. See Brooks v. Fowle, 14 N. H. 248,) that Massachusetts is the only State where resulting trusts have not been treated as excepted from the operation of the statute of frauds. In the same case they remark, that the usual clause in deeds, acknowledging receipt of the consideration, states only who *paid the money*, not who *owned it*. The ownership is a mere inference or presumption from the payment, and therefore, *on general principles*, may be rebutted by parol evidence. Besides such clause is a mere *receipt*, which is always open to contradiction. And the evidence in question does not go to *defeat the conveyance*. Moreover, the statute of frauds provides, that no grant, assignment, &c., of a trust *by any person* shall be valid without a writing. But a resulting trust is a mere *creature of the law*. Hence, it is concluded, that the statute would not apply to resulting trusts, even if there were no excepting clause.

Similar observations have been made by Judge Story. Hoxie v. Carr, 1 Sumn. 186-7. He remarks, in reference to a resulting trust, that the parol evidence does not establish any fact, inconsistent with the legal operation of the words of the deed; but merely *engrafts a trust upon the legal estate*; and that the exception of resulting trusts from the statute of frauds is merely *affirmative*.

In Michigan, even an implied trust is invalid, against creditors and purchasers for consideration and without notice. But registration of the deed is sufficient notice. Rev. St. 261.



§ 24. A devisee cannot be converted into a trustee of the legal title, except on proof of an agreement to that effect, between him and the deviser, before the making of the will.<sup>1(a)</sup>

§ 25. There can be no resulting or implied trust *between a lessor and lessee*, because the covenants in the lease are a sufficient legal consideration. But there may be an implied trust between the assignor and assignee of a lease.<sup>2</sup>

§ 26. It is said, that, in case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the settler; otherwise, where it is a settlement for valuable consideration, and in the nature of a contract for the benefit of a wife or children.<sup>3(b)</sup>

§ 27. Although the same technical words are not required to create an estate by will as by deed, yet, when created, the same circumstances will raise a resulting trust to the heirs of the deviser in the former case, and to the grantor himself in the latter.<sup>4</sup>

§ 28. There are several other distinct cases, in which a trust results by operation of law. Thus, where land is conveyed for a consideration, to be determined by the price for which the grantee shall sell it; a trust results to the grantor till such sale is made, in the same way as if the grantee had been expressly

<sup>1</sup> Irwin v. Irwin, 84 Penn. 525.

<sup>2</sup> Pilkington v. Bayley, 7 Bro. Parl. Cas. 888; Hutchins v. Lee, 1 Atk. 447.

<sup>3</sup> Brown v. Jones, 1 Atk. 191; 1 Cruise, 314.

<sup>4</sup> Stevens v. Ely, 1 Dev. Eq. 493.

(a) A will recited that the testator had confidence in A B, and felt sure that he would conform to his verbal directions, and thereupon devised all the property to him. Held, that by the will a trust was attached to the property, but, as the terms thereof were not declared, it resulted for the distributees at law. Ingram v. Fraley, 29 Geo. 553.

(b) Where land is conveyed or devised to a trustee upon certain specified trusts, the residue of the estate, which remains after those trusts are satisfied, results to the grantor, &c., or his heirs. 2 Story, 482.

Devise to a trustee for ninety-nine years, in trust for the payment of certain debts, and an annual allowance to the sons

of the testator, remainder to his eldest son for life, remainder to his first and other sons in tail and a like remainder to the second son. The specified debts having been paid, other creditors of the sons bring their bill in equity, praying that the term may be attendant on the inheritance, and held liable for their claims. Held, inasmuch as the trust of the term was satisfied, the remainder of it resulted to the first son of the testator. 1 Cruise. 314.

Devise of freehold, leasehold and copyhold to A, B and C, *tenendum*, the freehold and leasehold in trust for A. Held, the copyhold descended to the heirs. Stubbs v. Sargon, 2 Keen, 255.



ment of the parental obligation of support. In ordinary cases, from the payment of the price the law presumes an implied trust in favor of the real purchaser, which, however, may be rebutted by parol evidence. But in this case the presumption is the other way, subject to be controlled by the same kind of evidence. And though, during the child's infancy, the father takes the profits, the law will intend that he does this as guardian; or, if there be a power of attorney, as agent for the son. So, if the father occupy the land during his life, lay out money in improvements, devise the estate to other parties, and by his will provide otherwise for the son, the latter shall still hold the land. So, although the son gave receipts to tenants for the use of the father. An infant cannot be presumed to have been intended for a trustee.<sup>1</sup> In an early case, however, the extreme youth of the child was regarded as a reason for not considering the purchase as an advancement.<sup>2</sup>

§ 31. Where the estate purchased by a father is conveyed to the minor son and a stranger jointly, the law still construes it an advancement for the child, more especially if the other grantee disclaims. In such case, it is said, if the child should die before the other grantee, the latter would then be a trustee for the father, and bound to reconvey to him. And this would seem to be the object of joining him in the deed, as well as the affording protection to the infant.<sup>3(a)</sup>

<sup>1</sup> *Gee v. Gee*, 32 Miss. 190; *Parish v. Rhodes*, Wright, 389; *Astreen v. Flanagan*, 3 Edw. 279; *Phillips v. Gress*, 10 Watts, 158; *Scawin v. Scawin*, 1 Y. & Coll. Cha. 65; *Skeats v. Skeats*, 2 Y. & Coll. Cha. 9; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Plunkett v. Lewis*, 3 Hare, 316; *Grey v. Grey*, 1 Chan. Cas. 296; *Ford v. Katharine*, Finch R. 841; *Mum-*

*ma v. Mumma*, 2 Vern. 19; *Dennison v. Goebing*, 7 Barr, 175; *Cullen v. Riley*, 7 Clarke, 517; *You v. Flinn*, 34 Ala. 409; *Murphy v. Nathans*, 46 Penn. 508.

<sup>2</sup> *Binion v. Stone*, Nels. Cha. R. 68; *Jackson v. Matsdorf*, 11 John. 96; *Sampson v. Sampson*, 4 Ser. & R. 388.

<sup>3</sup> *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

(a) The grantee of a farm, having mortgaged it for the price, lived upon it thirty-three years, till his death. He did no labor upon the farm, but his four youngest sons carried it on, and paid for it by their labor. Held, a trust resulted in their favor. *Harder v. Harder*, 2 Sandf. Ch. 17.

Where a father purchased tract A in his own name, with the money of his

son, and then agreed with him that the amount thus paid should go into tract B, the possession of which was delivered to the son by the father under a contract for a sale, paying a yearly sum to the father for life; and the son gave notice to his tenant of tract A, who then paid rent to the father; and the assessments were respectively charged, and the son continued in possession of tract B: held,



§ 32. But where a father, being indebted, buys and pays for an estate, and the conveyance is made to his children, and, upon a bill in equity by creditors of the former, the father and children deny any advancement, this, with other slight circumstantial evidence, will be sufficient to charge the land with the father's debts. And parol evidence is admissible in such case to rebut the presumption of a resulting trust.<sup>1</sup>

§ 33. Where a father purchases land, and for the purpose of defrauding his creditors has the conveyance made to a son, although no trust thereupon results in favor of the father, yet the fact of his having paid the purchase-money constitutes a good consideration for a subsequent agreement between the grantee and the father and another son, for a division of the land between the two sons; and, where such division is made and acted upon for several years, each son occupying his share, and making expenditures in consequence of the division, and upon the faith of it, the grantee will not be allowed to repudiate the agreement and claim the whole land.<sup>2</sup>

§ 34. The same principle has been applied to a purchase made by a grandfather in the name of his grandson—the father being dead; and is also applicable, it seems, to a purchase made in the name of a natural child, if described as the child of the purchaser; because there is an obligation on the parent to provide for such children. So, also, to the case of an *adopted* child or a nephew.<sup>3</sup>

§ 35. After the emancipation of a child from parental custody and support, as by his coming of age, marriage, advancement,

<sup>1</sup> Doyle v. Sleeper, 1 Dana, 581; Herrington v. Herrington, 27 Mis. 560. See Smith v. Strahan, 16 Tex. 814.

<sup>2</sup> Proseus v. McIntyre, 5 Barb. 424.

<sup>3</sup> Ebrand v. Dancer, 2 Cha. Ca. 26;

Lloyd v. Read, 1 P. Wms. 608; Fearne's Opin. 327; Astreen v. Flanagan, 3 Edw. 279; Currant v. Jago, 1 Coll. Cha. 261. See McDaniel v. Zelf, 8 Humph. 58; Wait v. Day, 4 Denio, 489.

there was evidence for a jury of a parol sale, which was not within the statute of frauds. Lee v. Lee, 9 Barr, 169.

A father agreed with his minor son to give him his own earnings, but the father occasionally received them, and, being then solvent, purchased lands of equal value, himself paying the price, but taking the deed in the son's name. The

father occupied without rendering any account, and afterwards became insolvent. Held, the land was not liable to the father's creditors, the circumstances not justifying any presumption of fraud, inasmuch as the receipt of the son's earnings furnished an equitable consideration for the conveyance to him. Jenney v. Alden, 12 Mass. 375.

&c., a purchase by the father in his name will not, in general, be deemed an advancement, but will create a trust for the father. But the emancipation or advancement must have been complete, and not merely partial. A child having only a reversion expectant on a life estate will be considered as unadvanced; and, even if he have been advanced, this will make no difference, if the father consider him as unadvanced. A purchase in the name of a child of full age, however, is to be considered as of equivocal effect, to be determined by the actual occupancy of the land during the father's life. If the father occupy, it will be considered as a trust for him; if the son, as an advancement.<sup>1</sup>

§ 36. The principle above stated, making a transaction, which would ordinarily create an implied trust, as between parent and child an *advancement*, is applicable, not only where payment of the purchase-money by the former is the ground of the trust, but also where he conveys property to trustees, declaring the trusts only in part. Thus a father, by deed, reciting his wish to provide for himself during his life, and his family afterwards, conveys his property to his son upon the trusts thereafter mentioned. He then declares trusts of a part of the property for his wife, daughter and niece. The son maintained the father many years. Held, there was no resulting trust for the father.<sup>2</sup>

§ 37. Where a father purchases land, and takes the conveyance to himself and a son jointly, although it was formerly held that the law would construe the transaction as an advancement to the son, it seems to be now settled that they shall take together, each a moiety of the estate; and, upon the father's death, his share will be held liable in a court of chancery to his creditors, more especially where the father occupied the estate during his life, and it constituted the only assets for payment of his debts. In making this decision, it was said by the court, that, although "*stare decisis*" should be their governing maxim, yet the doctrine of advancement had been already far enough

<sup>1</sup> Finch R. 841; Elliott v. Elliott, 2 Sug. on Ven. 2, 166; Gilbert Lex Prato. Cha. Ca. 281; Pole v. Pole, 1 Ves. 76; 271; 1 Cruise, 820.

<sup>2</sup> Cook v. Hutchinson, Keen, 42.



evidence; but that it would be a more simple view of the matter to regard a child as a *purchaser for valuable consideration*, upon the same principle by which the consideration of natural love and affection raised a use at common law. This construction would shut out evidence on the other side, the introduction of which is "getting into a very wide sea." Thus, where a son is *provided for*, the resulting trust is said not to be rebutted, though a father is the only judge what shall be a *provision*. So the conveyance is termed a *prima facie* advancement. Hence the principle has been subjected to great uncertainty and variation.

§ 42. A wife cannot be trustee for her husband. Hence a purchase in the names of the husband, the wife, and a third person, A, for their lives and the life of the longest liver of them, gives to the wife an estate for life, and after her death an estate to A, in trust for the executors of the husband. So, where a man purchases an estate in the names of himself, his wife and daughter, he cannot, by a mortgage, bind the land after his own death, and during the lives of the wife and daughter.<sup>1</sup> It is suggested, however, that a purchase in the name of a wife may be fraudulent against creditors. But, it seems, the St. of 13 Eliz. is not applicable to such case, because the husband might give her the money which is paid for the land, and therefore creditors are not harmed. It seems *actual* fraud is necessary to avoid the transaction.<sup>2</sup>

§ 43. If a husband purchase land in his own name with the money of the wife, a trust results to her as against his heirs at law or mere volunteers, but not creditors; and a purchaser from the husband will be charged therewith.<sup>3</sup> On the other hand, in case of a deed made to the wife, the husband paying or securing the price, even with the expectation that it will be ultimately paid by her, although the law presumes an advancement,

<sup>1</sup> Kingdome v. Bridges, 2 Vern. 67; 50 Penn. 368; Keanes v. Garrett, 34 Ala. 558.  
 Back v. Andrews, Prec. in Cha. 1; Back v. Andrews, 2 Vern. 120; Jenks v. Alexander, 11 Paige, 619. See Smith v. Strahan, 16 Tex. 314; Cowden v. Oyster,

<sup>2</sup> Sug. on Ven. 171-2; 11 Paige, 619.  
<sup>3</sup> Methodist, &c. v. Jacques, 1 John. Cha. 450; Brooks v. Dent, 1 Md. Ch. 528.

yet, if done to defraud his creditors, a trust results to him, and the land is liable for his debts.<sup>1</sup>(a)

<sup>1</sup> Guthrie v. Gardner, 19 Wend. 414; Hopkins v. Caroy, 28 Miss. 54.

(a) Where a wife, acting under a power of attorney from her husband authorizing her, among other things, to receive and collect all money and other property due to him, for her own use, purchased land with money so received, and took a conveyance thereof to herself; and, after the death of her husband, a bill in equity, alleging these facts, and also that the husband never intended that such purchase should be a provision for the wife, or her separate property, was brought by the heirs at law of the husband against the widow, for a conveyance of the land so purchased by her: it was held, on demurrer to the bill, that, upon the allegations therein contained, there was no resulting trust in favor of the husband or his heirs. *Whitten v. Whitten*, 8 Cush. 191.

Notice to a sheriff, by a wife, that she claimed the benefit of the exemption law out of property sold, and the subsequent renting of it from the purchaser, though strong evidence against the wife, would not estop her from setting up a resulting trust in the land. *Fillman v. Divers*, 81 Penn. 429.

A father placed trust funds in the hands of A, his son-in-law, for the benefit of his daughter. A purchased real estate with the funds, and took the deed in his own name. Held, the court would protect the estate against a creditor. *Lathrop v. Gilbert*, 2 Stockt. 345.

Certain land was bought for a wife, and the price paid partly from the proceeds of her own real estate, to the sale of which she assented only on condition the proceeds should be thus invested, and partly by the husband. Held, the land was not liable to sale on execution

against him, nor were the execution purchasers entitled in equity to a conveyance. *Williams v. Williams*, 6 Ired. Equ. 20.

Where real estate was purchased and paid for in part with the money or funds of the husband, and, with his assent, the conveyance taken to a trustee, who simultaneously gave a mortgage on the estate for the residue of the purchase money; and also, with the husband's assent, executed a declaration of trust that the premises were held to the sole and separate use of the wife, subject to the mortgage: held, the rights of creditors not being in question, the declaration of trust was valid and binding upon the husband, and he had no interest in such estate. *Martin v. Martin*, 1 Comst. 478.

If a husband sells his wife's land for his own benefit, under an agreement with her to purchase other land for her of equal value with that sold, and he afterwards, conformably to the agreement, makes such purchase, and causes the vendor to execute the conveyance to his wife; the lands so conveyed will not be subject in equity to the husband's debts, contracted subsequently to his payment for the land, but before the execution of the conveyance. *Barnett v. Goings*, 8 Blackf. 284.

In case of a partition between two *femes covert*, tenants in common, and mutual releases made to their respective husbands; each holds in trust for his wife. But, if only a pecuniary consideration is recited, a purchaser without notice will gain the absolute title. *Weeks v. Hoas*, 3 Watts & S. 520.

## CHAPTER XXII.

## TRUSTS. NATURE, ETC., OF A TRUST ESTATE.

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|--------------------------------|---|
| 1. Analogous to legal estates. | 15. Actions by and against the <i>cestui</i> , &c.                        |
| 2. Alienation of.              | 16. Conveyance of the legal estate, when presumed.                        |
| 2 a. Curtesy.                  | 17. Trust, how affected by lapse of time, and the statute of limitations. |
| 6. Dower.                      |   |
| 9. Subject to debts.           |   |
| 14. Merger.                    |   |

1. A TRUST being a *use not executed by the statute of uses*, it was held, in some early cases, that trust estates were to be regarded as identical in their incidents with uses prior to this statute. But a different doctrine is now settled. Although a *cestui que trust* has no legal estate, yet, in the consideration of a court of equity, where only, for the most part, his title is recognized, (a) he is *the real owner of the land*. He has an equitable seisin of it, corresponding in all respects with the legal seisin that is acknowledged in courts of law. In this respect, as in many others, equity follows the law; and it is said, if there were not the same rules of property in all courts, all things would be, as it were, *at sea*, and under the greatest uncertainty.<sup>1</sup> All the *canons of descent* apply to trusts. (b) They are alien-

<sup>1</sup> 3 Jones, 387; Nourse v. Finch, 1 Ves. 357; Watts v. Ball, 1 P. Wms. 108; Shrepnel v. Vernon, 2 Bro. 271; Burgess v. Wheate, 1 Eden, 206; 2 Story. 236-7; Chaplin v. Chaplin, 8 P. Wms. 234; Cudworth v. Hall, 3 Dess. Cha. 260; Cashborne v. English, 2 Abr. Eq. 728; Duffy v. Culvert, 6 Gill, 487.

(a) Judge Story (on Equity, 2, 228) places trusts under the *exclusive* jurisdiction of equity.

(b) The declaration of an executed trust without words of inheritance passes only an estate for life. Evans v. King, 3 Jones, Eq. 387.

Where real estate was placed in the hands of a trustee, to be conveyed to the appointee of A, or, on failure of an appointment, to her heirs, and she died without making one; held, as she had no legal title, the property could not be sold, in the ordinary course of adminis-

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lands to trustees in fee, in trust to pay his debts, and convey the surplus to his daughters, A and B, equally. A brings a bill for partition. C, the husband of B. being a defendant, alleges in his answer, that he married B under the belief of her owning the legal estate; that she was in receipt of the profits at the time of marriage, and the trust was not discovered till after her death. Held, C was entitled to curtesy.<sup>1(a)</sup> But, where land is given to trustees for the separate use of a married woman, the husband is not entitled to curtesy. Thus a devise was made to trustees in fee, in trust to apply the rents and profits to the sole and separate use of the testator's daughter A, for her life, with a power of disposal and appointment to her. She having made no appointment, her husband claimed to be tenant by the curtesy, on the ground that the inheritance descended to her. Held, the whole legal estate was in the trustees; that, although A had the (equitable) inheritance, she had no seisin in deed during coverture, and the husband had no equitable seisin, and could not have possession or take the profits; that the testator had treated the wife as a *feme sole*, and neither in law or equity was there any claim to curtesy.<sup>2</sup>

§ 3. Money agreed or directed to be laid out in land may, in equity, be subject to curtesy. Thus a woman devises to her daughter, A, £300, to be laid out by her executors in land, which was to be settled to the use of A and her children, remainder over. The money was never thus laid out. After A's death, and that of her issue, her surviving husband, by a bill in equity, prays that the land may be purchased and settled on him for life, or the interest of the money paid to him for life. Held, he should have the interest of the money.<sup>3</sup>

§ 4. It is said that, notwithstanding some opinions to the contrary, the husband shall have curtesy in an equitable inheritance

<sup>1</sup> Watts v. Ball, 1 P. Wms. 108; Md. L. 701.

<sup>2</sup> Hearle v. Greenbank, 1 Ves. 298; Ib. 8 Atk. 695; Cockran v. O'Hern, 4

W. & Serg. 95; Jarvis v. Prentice, 19 Conn. 272.

<sup>3</sup> Sweetapple v. Bindon, 2 Vern. 538; Cunningham v. Moody, 1 Ves. 174; Dodson v. Hay, 3 Bro. R. 404.

(a) In Maryland, (Md. L. 701,) curtesy is allowed in equities, but not to the

prejudice of any claim for the price of the land or other lien.



the wife, though the rents, &c., are to be paid to her separately during coverture. The receipt of them is a sufficient seisin. Though, if a devise is made to a wife for her separate, exclusive use, and with a clear and distinct expression that the husband is not to have any life estate or other interest; but that the same is to be for the wife and her heirs, Chancery will consider him as a trustee, and not allow any curtesy.<sup>1</sup> Thus a devise was made in trust to the use of the testator's daughter, to her separate use, to be disposed of as she might think proper; after the death of her husband, the trust to terminate, and the daughter's estate to become absolute. She died before her husband, leaving children. Held, the husband was entitled to curtesy, whether the trust was determined or not by her death.<sup>2</sup>

§ 5. Since a trust itself is subject to curtesy, it seems to follow as a course that a legal estate, to which a trust is annexed, is not subject. It is said, that tenant by the curtesy cannot stand severed to a use, for he is in by the act of law, in consideration of marriage, and not in privity of estate. But in equity such tenant would be affected by the use or trust.<sup>3</sup>

§ 6. In England, there is at law no dower in a trust estate, whether the husband have himself parted with the legal title before marriage, reserving only a trust; or whether a trust estate has been directly limited to him by a third person. And the same rule applies where the husband purchased an estate in the name of a trustee, who acknowledges the trust after his death.<sup>4</sup> It has been said that a trust does not differ from a legal estate, except in regard to dower.<sup>5</sup> (See ch. 31.) This point was first settled in the 12th year of Ch. II, and has been since, though with apparent reluctance, uniformly adhered to. (a) The

<sup>1</sup> 4 Kent, 31; Walk. 329; 3 Atk. 716; Story on Equ. (3d ed.) 74; Ray v. Ring, 5 Barn & Al. 581; Hamlin v. Hamlin, 19 Maine, 141; Cooper v. Whitney, 3 Hill, 95.  
<sup>2</sup> Payne v. Payne, 11 B. Mon. 133.  
<sup>3</sup> 2 Story, 284, n. 4.  
<sup>4</sup> Colt v. Colt, 1 Cha. R. 184; Bottom v. Fairfax, Pres. in Cha. 338; 1

Ambrose v. Ambrose, 1 P. Wms. 821; Danforth v. Lowry, 3 Hayw. 68.

(e) But, by St. 8 & 4 Wm. IV, ch. 1, sec. 2, a widow may claim dower in equity from any beneficial estate or inheritance in possession, except joint tenancy, in which she is not dowerable at law. 1 Steph. 349-50.

grounds of decision are said to have been, partly the universal understanding of the community, and corresponding practice of conveyancers, to depart from which would produce great confusion of titles, and defeat the intention of numerous limitations; and partly the phraseology of the statute of uses, which, in its preamble, recites that by means of uses women had been defeated of their dower; which incident must still belong to trusts, a trust being since the statute what a use was before.<sup>1</sup>(a)

§ 7. A distinguished English judge (Sir Joseph Jekyll) was of opinion, that the rule of precluding a widow from dower in a trust was applicable, only where the husband created the trust by some act of his own, as by purchasing an estate in the name of a trustee, thereby showing a clear intent to cut off the claim of dower, and not where the land came to the husband by the act of a third person. The same judge also held that the widow should have dower, where a time is fixed for the trustee's conveying the legal estate to the husband, but the latter dies before such conveyance is made; upon the principle that what ought to be done by a trustee is regarded in law as actually done.<sup>2</sup> These distinctions, however, have been since rejected, and the rule against the right of dower in a trust estate held to be a universal one. The cases, in which the above named suggestions of Sir J. Jekyll were made, are said to have turned upon their own peculiar circumstances, and not to warrant any general conclusion.<sup>3</sup>

§ 8. But the widow of a trustee shall not have dower<sup>4</sup>.(b)

<sup>1</sup> Chaplin v. Chaplin, 8 P. Wms. 235; Att'y-Gen. v. Scott, For. 138.

<sup>2</sup> Banks v. Sutton, 2 P. Wms. 708; Fletcher v. Robinson, For. 139.

<sup>3</sup> Godwin v. Winsmore, 2 Atk. 525; Forder v. Wade, 4 Bro. R. 525; For.

139. See Knight v. Frampton, 4 Beav. 10; Hamblin v. Hamblin, 1 Appl. 141, adopting the English rule.

<sup>4</sup> Robison v. Codman, 1 Sumn. 121; Cooper v. Whitney, 8 Hill, 101; Derush v. Brown, 8 Ohio, 412.

(a) Another reason of the distinction made between curtesy and dower in trusts is said to be, that there had long been an understanding among the people that a trust estate was not subject to dower, and numerous conveyances and settlements had proceeded upon this supposition. During coverture, a woman could not aliene without her husband; and therefore it was not deemed necessary to obtain her concurrence in a

transfer of the land. But no one would purchase an estate subject to curtesy, without the assent of the husband. Therefore, the allowance of dower would operate injuriously upon purchasers, while that of curtesy would not, because they had provided against it. 2 Story, 237. n. 1; D'Arcy v. Blake, 2 Sch. & Lef. 387.

(b) Five persons purchased land for the joint use of all, and agreed, in

§ 9. By the English statute of frauds, and by the late St. 1 & 2 Vict. ch. 110, sec. 11, trusts are made liable to *the debts* of the *cestui que trust*, and declared to be assets in the hands of his heir. The contrary had previously been held by the courts, in analogy to the old law of uses.(a)

§ 10. Land held in trust cannot be sold by the administrator of the trustee, as assets. Nor is it bound by a judgment, even though confessed, and for the purchase-money;(b) nor can it be taken upon execution against the trustee<sup>1</sup>

§ 11. Although the aid of a court of equity is required to

<sup>1</sup> Robison v. Codman, 1 Sumn. 121; Elliott v. Armstrong, 2 Blackf. 198; 2 Story, 242; 4 J. J. Mar. 599; Williams

v. Fullerton, 12 Met. 846; Wilhelm v. Tolmer, 6 Barr, 296.

writing, that one should take a deed, and pay over shares of the proceeds to the others. Upon a bill for partition, held, the wife of the trustee had gained no inchoate right of dower. Castor v. Clarke, 8 Edw. 428.

In the United States, the rule against allowing dower in trusts has been extensively changed. In North Carolina, Virginia, Illinois, Indiana, Tennessee and Ohio, a widow has dower in all equitable estates. In Pennsylvania, generally, only in legal estates; but she has dower in a trust, by an immemorial usage, which has never been questioned. So in Maryland, by statute. 1 Vir. R. C. 159; Illin. R. L. 627; Purd. Dig. 221; 1 N. C. Rev. St. 614; 2 S. & R. 554; Ind. R. L. 209; Ten. St. 1823, 46; 4 Griff. 909; M'Mahan v. Kimball, 3 Blackf. 6.

(In Virginia, independently of a statutory provision, there would be no dower. Claiborne v. Henderson, 3 Hen. & M. 322.

Chancellor Kent says the above is said to be the rule as to trusts in New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Mississippi, Ohio, Illinois and Alabama. 4 Kent, 45; Clay's Dig. 157.

In Kentucky, a transfer by the husband bars dower in equitable estates. Lawson v. Morton. 6 Dana, 471.)

In Ohio, equitable estates are enumerated as "all the right, title and interest, &c., held by bond, article, lease, or other evidence of claim." But while, in legal estates, dower is allowed of all lands

owned during coverture, in equitable estates it is limited to such as the husband held at his death. Walk. Intro. 312, 324; Smiley v. Wright, 2 Ohio, 507. See ch. 10, sec. 8.

In Indiana, dower is allowed in property contracted for, in proportion to the price paid. Rev. St. 288-9.

(a) In North Carolina, equitable estates are declared to be personal assets; in Indiana, assets by descent in the hands of the heir. In Georgia and South Carolina, a trust estate is assets by descent. Bennet v. Box, 1 Cha. Cas. 12; N. C. Rev. St. 278; Ind. Rev. L. 276; Prince, 916; 2 Brev. Dig. 816.

(b) A and others, who had liens upon real estate of a corporation, held for church and school purposes, agreed to purchase the estate at sheriff's sale. It was accordingly purchased by A, and conveyed to him by the sheriff, and he executed a declaration of trust, that he would hold the same to sell, and pay to himself and his associates certain specified amounts, any remainder of the proceeds of the sale to be paid to the use of the corporation. Held, A had such an interest in the estate as could be bound by a judgment against him; and, on a sale by a trustee appointed by the court, in place of A, the share of the proceeds, formerly payable to A, was to be paid to his judgment creditor, in preference to one to whom he had transferred the same by an assignment subsequent to the judgment. Drysdale's Appeal, 3 Harris, 457.

obtain possession of a trust estate after the death of the *cestui*, yet, when obtained, it is legal, not merely equitable assets.<sup>1(a)</sup>

<sup>1</sup> 2 Atk. 293.

(a) In Massachusetts, Pennsylvania and Ohio, a trust estate cannot be taken in execution by a creditor of the *cestui*. In Ohio it may be reached by a process in Chancery. It is held, that an equitable title to land, which is not complete and perfect, and especially an imperfect equity of a complicated character, is not the subject of sale under execution. The creditor must resort to a court of chancery, in order to reach such an equity. Walk. Intro. 812; Russell v. Lewis, 2 Pick. 508; Merrill v. Brown, 12 Ib. 216; Ashhurst v. Given, 5 Watts & S. 323; Hopkins v. Carey, 23 Miss. 54; Eyrick v. Hetrick, 1 Harr. 488. See Mathews v. Stephenson, 6 Barr. 496.

(Judgment creditors in Pennsylvania are not protected against trusts of which they have no notice, or allowed in equity to hold against the *cestui que trust*. Shryock v. Waggoner, 4 Cas. 480.)

Trusts are liable to debts in North Carolina, Maryland, Virginia, Kentucky, Georgia, New York, New Hampshire and Indiana, more especially implied trusts. 1 N. C. Rev. S. 266; 1 Vir. Rev. C. 159; 1 Ky. R. L. 448, 658; Prince, 916; 4 N. H. 402-3; Ontario, &c. v. Root, 3 Paige. 478; Blair v. Bass, 4 Blackf. 539; Pool v. Glover, 2 Ired. 129; Lynch v. Utica, &c. 18 Wend. 286; M'Meehen v. Marman, 8 Gill & J. 57; Gowing v. Rich, 1 Ired. 553; Upham v. Varney, 15 N. H. 462; U. S. Dig. 1848, 127. (But not, in North Carolina, the interest of one holding a bond for conveyance. Justice v. Carroll, 4 Jones Eq. 429; Collins v. Robinson, 83 Ala. 91; Fawcetts v. Kimmey, Ib. 261.)

In Kentucky, the trust estate is liable in Chancery. And, pending a suit against the heir of the *cestui* for a debt due from the latter, the estate cannot be sold upon an execution against the heir himself. Gillispie v. Walker, 8 B. Mon. 505. A *cestui*, who is not party to a sale of the estate on execution, may be relieved in equity, after discharging the equitable claims of the purchaser. Casiday v. M'Daniel, 8 B. Mon. 519.

In Tennessee, where land has been sold under a deed of trust, it is redeemable, as in case of sales on execution and chancery decrees. In the same State,

the English statutes, subjecting trusts to execution, are held to be in force. But they are applicable only to trusts created by or resulting from a conveyance, not to those which are merely constructive or covenanted to be raised. Thus the interest of one holding an obligation for land is not subject to execution. Tenn. St. 1823, 28; Shute v. Harder, 1 Yerg. 1.

In New Hampshire, although the statute upon the subject provides only for levying executions upon estates in fee, it is the immemorial usage to levy them upon lesser estates, and upon trusts. So a devise in trust, to permit the *cestui* to occupy and receive the income, vests in him an interest which is liable to be taken on execution. It is an executed use. Pritchard v. Brown, 4 N. H. 402-3; Upham v. Varney, 15 N. 462.

In North Carolina, the statute, subjecting trusts to legal process against the *cestui*, applies only to those cases where the estate is held solely in trust for the defendant. A sale on execution passes not only his interest, but the trustee's also. Hence, where there are other trusts, as, for instance, to sell and pay debts, a sale on execution against the *cestui* would injuriously affect third persons. Harrison v. Battle, 1 Dev. Eq. 587; Davis v. Garrett, 8 Ired. 459. So, in New York, a trust is not subject to an execution against the *cestui*, unless the trustee holds the legal title as a *clear simple trust*, for the judgment debtor alone. Ontario, &c. v. Root, 3 Paige, 478.

In Texas, the interest of *cestui que trust* cannot be sold on execution, where it is of so varying and indeterminate a character that the transfer would greatly interfere with the purposes of the trust. Gamble v. Dabney, 20 Tex. 69.

A trust was for maintenance, with a power, to the trustees, of disposal, except as to a certain part, which was limited over. Held, that part could not be taken on execution against the *cestui que trust*. Ib.

In Georgia, a mere purchase in trust does not exempt the property from liability for the debts of the trustee, if it is conveyed to and paid for by him. Stanley v. Gilmer, 27 Geo. 589.

§ 12. A married woman, for whose benefit a trust has been created, even by herself before marriage, cannot, by her own act, subject the estate to be taken on execution. Thus a woman, before marriage, conveyed her property, in trust for herself, to her brother. The deed provided, that she and her future husband should remain in possession, so long as they made a proper use of the property, and that, whenever they should use it improperly, it should be at the trustee's disposal. The husband and wife were always in possession. They joined in giving a note in settlement of a claim against him; upon which judgment was recovered, and her interest in the estate sold on execution, the creditor having notice of the trust. The purchaser, being the judgment creditor, brings an action of trespass to try title. Held, Chancery would restrain such action by an injunction.<sup>1</sup>

§ 13. Where a trustee *by his own act* transfers the estate, the *cestui* may, at his election, hold him answerable. But, where the alienation takes place by a *decree* against the trustee, the only remedy of the *cestui* is by a resort to the adverse claimant, and the property in his hands.<sup>2</sup>

§ 14. A trust *merges* in the legal estate, when both become united in one person, because a man cannot be trustee for himself. Thus, where a trustee of land for the use of his children devised to them all the residue of his estate; held, the legal estate in such parcel was vested in the children, either under the residuary devise or by descent, and that their equitable estate was merged therein.<sup>3</sup> But the rule is applicable, only where the legal and equitable estates are co-extensive and commensurate. If the former is an absolute and the latter only a partial estate, there will be no merger, because it might be an injury to the party.<sup>4</sup> So, where a trustee is one of the beneficiaries of the trust, he takes a legal estate to the extent of his interest.<sup>5</sup>

§ 15. How far a *cestui que trust* may support or defend against

<sup>1</sup> Wilson v. Cheshire, 1 M'Cord's Cha. 238. v. Brydges, 8 Ves. 126; Nicholson v. Halsey, 1 John. Ch. 422; Gardner v. Astor, 3. 58.

<sup>2</sup> Cobb v. Thompson, 1 Mar. 518.

<sup>3</sup> Cooper v. Cooper, 1 Halst. Ch. 9.

<sup>4</sup> Wade v. Paget, 1 Bro. 863; Brydges

<sup>5</sup> Mason v. Mason, 2 Sandf. Ch. 432.

an action for the land, as, between himself and the trustee, or himself and a third person, upon the strength of his equitable title, seems to be a point unsettled in England, and with us variously decided in the different States.(a)

§ 16. Where the circumstances of a case are such as to

(a) Lord Mansfield held, that the *cestui que trust* might maintain ejectment, if the trust was clearly proved, but not otherwise; while Lord Kenyon ruled, that, where the legal estate is outstanding in another person, the party not clothed with that legal estate cannot prevail in a court of law, whether the action is brought by the trustee or by a stranger. *Armstrong v. Reise*, 8 Burr. 1901; *Goodtitle v. Knot*, Cowp. 46; *Doe v. Pott*, Dougl. 721; *Roe v. Reade*, 8 T. R. 122; 1 Pet. 299; *Ib.* 480; *Denn v. Allen*, 1 Penning, 50; *M'Henry v. M'Call*, 10 Watts, 456.

In New York and Massachusetts, the *cestui que trust* cannot defend in an ejectment by the trustee, by showing that he is the beneficiary of a resulting trust. *Crane v. Crane*, 4 Gray, 323; *Moore v. Spellman*, 5 Denio, 225; *Jackson v. Van Slyck*, 8 John. 488. More especially unless such interest is clear and precise. Thus a patent for lands was granted to A, B & C, for themselves and their associates, being a settlement of *Friends* on the west side of S. lake, to have and to hold the same to said three persons, as tenants in common for themselves and their associates. The plaintiff, claiming under the patentees, brings ejectment against the defendant, a member of the society, who had paid a proportion of the purchase-money. Held, the defendant's title was too uncertain, to prevail against the plaintiff's legal claim. But, where the trust is wholly nominal, and executed in the *cestui*, a third person cannot set it up as against the *cestui*. *Jackson v. Sisson*, 2 John. Cas. 821, (containing a learned examination of cases by Mr. Justice Kent.) *Welch v. Allen*, 21 Wend. 147.

In Pennsylvania, a *cestui que trust* may maintain ejectment, where possession is necessary, to give him such enjoyment of the property as it was intended he should have; and the legal title of the trustee cannot be set up against him by a third person. Thus, where the owner of a farm dedicates a portion of it to a charity, as to a school, without a conveyance, and afterwards conveys his

farm to another; the grantee becomes only trustee, in respect to the portion so dedicated, for the *cestuis que trust*; and, if he ousts them, they may maintain ejectment. *Kennedy v. Fury*, 1 Dall. 72; *Smith v. Patton*, 1 S. & R. 80. See *Ross v. Barker*, 5 Watts, 391; *Swayze v. Burke*, 12 Pet. 11; *Huston v. Wickerham*, 8 Watts, 519; *Presbyterian, &c. v. Johnston*, 1 W. & Serg. 56; *School, &c. v. Dunkleberger*, 6 Barr, 29. So a purchaser of land may bring ejectment against the vendor upon a mere agreement, after tender of the price; and the vendor against the purchaser, if the price be not paid. *Hawn v. Norris*, 4 Binn. 77; *Minsker v. Morrison*, 2 Ye. 844; *Mitchell v. De Roche*, 1, 12.

In Massachusetts, if the trustee bring a real action against the *cestui*, upon the plea of "*nul disseisin*," the former shall prevail. But the tenant may plead specially the trust, and that he is in possession as tenant at will, taking the rents and profits. In Maryland, such action will lie, unless, from the facts, a conveyance is to be presumed. In Alabama, the *cestui* cannot defend on the ground of improper conduct by the trustee. *Russell v. Lewis*, 2 Pick. 510; *Newhall v. Wheeler*, 7 Mass. 199; *Matthews v. Ward*, 10 Gill & J. 448; *Mordecai v. Tankersly*, 1 Ala. N. S. 100.

In Ohio, a trust cannot be taken advantage of in ejectment, and a court of law will not notice it. *Walk. Intro.* 816.

A *cestui* may maintain ejectment, after the purposes of the deed of trust have been satisfied; but the trustee or his grantee may do the same. *Hopkins v. Ward*, 6 Munf. 41; ——— *v. Stevens*, 2 Rand. 422.

The trustee, after the time fixed for payment by the terms of a trust deed, is invested with the legal title, and at law is the proper party to contest the legal sufficiency of the deed; and a verdict for or against him, if obtained without collusion and fraud, is binding and conclusive on his *cestui que trust*. *Marriott v. Givens*, 8 Ala. 694.



require or justify the presumption that the legal estate has been conveyed to the beneficial and equitable owner; the jury may be instructed to rely upon such presumption and give their verdict in favor of the latter. This presumption arises from long-continued possession by the *cestui* and those under whom he claims. Although somewhat analogous to the title acquired by an *adverse occupancy*; it is not precisely similar, because the possession may have been held under the equitable, instead of the legal title. But the presumption, in this case, is founded upon the principle, that the law will consider as done that which ought to have been done. Like the presumption of a grant, it does not proceed upon the belief, that the thing presumed has actually taken place, but is adopted from the principle of quieting the possession, and the impossibility of discovering in whom the legal estate, if outstanding, is actually vested. Mere possibilities are not to be regarded. The court must govern itself by a moral certainty; for it is impossible, in the nature of things, there should be a mathematical certainty of a good title. Hence, though the evidence of actual reconveyance be slight and inconclusive, yet, if it can be ascertained at what period the legal estate ought to have been reconveyed, such reconveyance may be presumed.<sup>1(a)</sup>

<sup>1</sup> Jackson v. Pierce, 2 John. 226; Jackson v. Moore, 18, 516; Hillary v. Waller, 12 Ves. 250-4; Lyddall v. Weston, 2 Atk. 19; Eldridge v. Knott, Cowp. 215; Doe v. Davis, 1 Ad. & Ell. (N. S.) 480. See Flournoy v. Johnson, 7 B. Mon. 698; Cunningham v. McKindley, 22 Ind. 149.

(a) A release or conveyance will not always be presumed, although the *cestui* has been in possession, and the trustees have ceased to act, for many years. Brewster v. Striker. 1 Smith, 821.

Where trustees are authorized to lease to a *cestui que trust* and he has been for many years in actual possession of a portion of the premises, it may be presumed that he holds under a demise from them. But, under the Revised Statutes of New York, a tenancy from year to year is all that will be presumed in such a case. *Id.*

Bill in equity, for specific performance of an agreement to purchase land. Defence—a want of title in the plaintiff.

It appeared that the land was conveyed in 1664, by way of indemnity against eviction from another estate, with a provision for reconveyance of one moiety, after the expiration of two lives, and eleven years thereafter. For one hundred and forty years, no claim appeared to have been made under this deed; but the grantor, and those claiming under him, were always in possession, although the deed was once mentioned in an instrument relating to the land, made in 1694. Held, a reconveyance might be presumed, as to one-half, at the time stipulated, and, as to the other, when the danger of eviction might reasonably be considered at an end, which must have been in much less time than one hundred

§ 17. On the other hand, the question may arise, how far the rights of a *cestui que trust* are impaired by mere lapse of time. On this point, it is held, that *express, technical, direct or pure* trusts, clearly proved, of which Chancery has proper, peculiar and exclusive jurisdiction, are not within the statute of limitations, though liable to be barred after the lapse of a reasonable time without enforcement; but *implied or constructive* trusts are. And, if the evidence of a trust is doubtful, adverse possession will have much effect in barring a party's rights. The period of limitation does not commence, till the *cestui* knows of some adverse act of the trustee. And where the owner of the equitable title is in possession, and afterwards evicted by the party having the legal title; the statute begins to run only from the time of eviction. Implied trusts have been defined, as those of which courts of law have jurisdiction.<sup>1</sup> The Supreme Court of

<sup>1</sup> Brock v. Savage, 81 Penn. 410; 8 Hayw. 158; Shelby v. Shelby, 1 Cooke, 182; Kane v. Bloodgood, 7 John. Ch. 111; Falls v. Torrance, 4 Hawk. 418; Van Rhyn v. Vincent, 1 M'Cord's Cha. 318; Oliver v. Piatt, 8 How. 383; White v. White, 1 Md. Ch. 53; McDonald v. Simms, 8 Kelly, 388; Evarts v. Nason, 11 Verm. 122; Finney v. Cochran, 1 W. & Serg. 118; Talbott v. Todd, 5 Dana, 199; Singleton v. Moore, Rice, 110; Bohannon v. Ithresley, 2 B. Monr. 488; Moore v. Green, 3 B. Monr. 418; Nicholson v. Lauderdale, 3 Humph. 200; Lloyd v. Currin, Ib. 462; Porter v. Porter, Ib. 586; Piatt v. Oliver, 2 Blackf. 268; Walton v. Coulson, 1 M'L. 120;

Maury v. Mason, 8 Por. 211; Hasell, 8 Y. & Coll. 617; Wedderburn v. Wedderburn, 4 My. & C. 41; Att'y, &c. v. Fishmongers' &c., 5 My. & C. 16; Price v. Blakemore, 6 Beav. 507; Bank, &c. v. Beverly, 1 How. 184; Baker v. Whiting, 8 Sumn. 476; Couch v. Couch, 9 B. Mon. 160; Thomas v. Brinsfield, 7 Geo. 154; Varick v. Edwards, 11 Paige, 290; Murdock v. Hughes, 7 S. & M. 219; Lexington v. Bridges, 7 B. Mon. 565. See Perkins v. Cartwell, 4 Harring. 270; the late case of Badge v. Badge, 2 Wall. 87 (where lapse of time was held to be a bar); also, Bennett v. Fuhner, 49 Penn. 155.

and forty years; and that the title was good. Hilary v. Waller, 12 Ves. 239.

Courts sometimes presume extinguishment of a title in order to sustain, but rarely to disturb the possession. Adair v. Lott, 8 Hill, 182. Where a deed was made to trustees for the use of a church, which was afterwards incorporated; held, after a long time a conveyance from the trustees to the corporation would be presumed. Dutch, &c. v. Mott, 7 Paige, 77.

But where the legal estate is vested by a will in executors or trustees, to effectuate the purposes of the will, and a release of their estate would be a

breach of duty; no presumption in favor of such release can be allowed. Brewster v. Striker, 2 Comst. 19.

Delivery and acceptance of a conveyance in trust will be presumed after possession held by the *cestui que trust* for more than twenty-five years, although the trustee be a lunatic at the time of the conveyance, and continue so. Eyrick v. Hetrick, 1 Harris, 488.

But where a trust was presumed, from strong circumstances, once to have existed, after the lapse of forty years, and the death of all the original parties, it was also presumed to be extinguished. Prevost v. Gratz, 6 Wheat 481.



the United States have said, that, where a trust is clearly established, more especially if there has been fraud, *on principles of eternal justice*, lapse of time shall be no bar to relief.<sup>2</sup>(a)

<sup>2</sup> Prevost v. Gratz, 6 Wheat. 498. See 2 Story, 785, *et seq.*: Planters', &c. v. Farmers', &c., 8 Gill & J. 449; Wood v. Wood, 8 Alabama (N. S.), 756; Smith v. Ramsey. 1 Gilm. 878.

(a) Where a will authorizes the executors to sell lands for payment of debts; a trust is hereby created, and the lien upon the lands continues, till a presumption of payment arises from lapse of time. Such lien is not limited with regard to time, as in ordinary cases. Alexander v. McMurray, 8 Watts, 504; Steel v. Henry, 9, 528. When an action is brought by a *cestui que trust*, to enforce against the trustee the provisions of the trust deed, and he does not deny the complainant's interest in the trust estate, but defends upon other grounds; the limitation to the suit is the time applicable to sealed instruments. Flint v. Hatchett, 9 Geo. 328.

One having the legal title to land conveyed it to a purchaser, having no notice of any trust, and he after eighteen years devised the land. Held, after the lapse of thirty years, a person claiming a trust

in the property was barred. Coxe v. Smith, 4 John. Cha. 271.

It has been said, that, as between trustee and *cestui*, the former does not cease to stand in that relation by any wrongful act in regard to the estate, except *at the election* of the latter. Also that trusts are excepted from the statute of limitations, only as between the trustee and *cestui*. Falls v. Torrance, 4 Hawk. 418; Fisher v. Tucker, 1 McC. Cha. 176; Llewellyn v. Mackworth, 15 Vin. 125.

Where one claims that land bought in the name of another was bought for him, and he was once ejected, and did not set up such fact in his defence, and had moreover quitted the land, and declared his intention to make no further claim to it, he cannot in equity recover of subsequent purchasers. Ferguson v. Tallmadge, 20 Ill. 581; Tallmadge v. Kirk, Ib. 600.

## CHAPTER XXV.

## TRUSTS. CESTUI AND TRUSTEE—THEIR RESPECTIVE INTERESTS, RIGHTS AND DUTIES, AS BETWEEN THEMSELVES, AND IN RELATION TO THIRD PERSONS.

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| 1. Incidents of a trust—right of <i>cestui</i> to a conveyance.                           | 22. For what amount trustees shall account.  |
| 2. <i>Cestui</i> not prejudiced by any act, &c., of trustee; change of estate by trustee. | 23. Exchange of lands.   |
| 3. Executory agreement—binding in favor of <i>cestui</i> .                                | 24. <i>Cestui's</i> remedy against trustees.   |
| 4. Conveyance by trustee to third persons—notice of trust, &c.                            | 25. Compensation and allowance to trustee.   |
| 10. Authorized sale by trustee—liability of purchaser to the <i>cestui</i> .              | 29. Trustee shall not purchase the trust estate; executors, agents, &c.; exceptions to the general rule. |
| 18. Joint trustees—conveyances and receipts by.   | 43. Disclaimer and release by trustee.   |
| 19. Liability of trustee to <i>cestui</i> . Release of debts.                             | 45. Trustee cannot delegate his power.   |
| 20. Sale of land.   | 46. Chancery may remove, appoint new trustee, &c.; descent of trust to heirs.                            |
| 21. One trustee, whether liable for another.  | 48. Who may be trustees.   |
|   | 49. Trust <i>fastens</i> on the estate.  |
|   | 50. How affected by escheat, &c.   |

§ 1. THE three leading incidents of a trust, as of a use at common law, are *permanency of the profits, execution of estates, and defence of the land*.<sup>1</sup> The first and last of these properties seem not to require any particular comment. With regard to the second, it is said, that, unless it is expressly provided that the trustee's interest shall be a continuing one, or where a *cestui* has an absolute interest in the trust, he may compel the trustee to convey the legal estate to himself or any one whom he shall appoint.<sup>2</sup> Of course, the *cestui* has no such right, where the trust is created only in part for his benefit; as, for instance, where annuities are first to be paid by the trustee. And the

<sup>1</sup> See ch. 20, sec. 6.

<sup>2</sup> *Stewart v. Chadwick*, 8 Clarke, 468;

1 Cruise, 850. See *Roberts v. Hall*, 85 Verm. 28.

rule seems equally inapplicable to that numerous class of cases, in which it was a leading object of the party, who conveyed or devised the land, to vest the legal estate permanently in the trustee and his successors, and such object would be defeated by compelling them to part with it. The rule is, that, in the exercise of a *sound discretion*, equity will compel the trustee to transfer the legal estate, unless the intent of the party creating the trust require that he receive the profits.<sup>1</sup> Thus, where one devised the use and improvement of land for the support of a child, providing that, so long as he should be industrious and economical, he should be entitled to the use and improvement, and to all he should raise by virtue of the improvement; the *cestui*, if shown to be incapable and of intemperate habits, though he were so in the testator's lifetime, shall not recover possession from the trustee.<sup>2</sup> It is held doubtful whether a trustee can safely make a conveyance to execute the trust, without a decree in equity, and costs will not be awarded against him for refusing to do so. The general rule is, in case of *infants*, that a trustee cannot be excused from strict performance without a decree.<sup>3(a)</sup> But a trustee cannot justify his refusal to convey the estate, by buying in an outstanding title.<sup>4(b)</sup>

<sup>1</sup> Bass v. Scott, 2 Leigh, 350; Jasper v. Maxwell, 1 Dev. Equ. 357; Lynch v. Utica, &c., 18 Wend. 286. See Morton v. Southgate, 28 Maine, 41; Bishop v. Bishop, 13 Ala. 475; Flourney v. Johnson, 7 B. Mon. 698; Hoare v. Harris, 11 Illin. 24.

<sup>2</sup> Root v. Yeomans, 15 Pick. 488.

<sup>3</sup> 2 Story on Equity, 248; Wood v.

Wood, 5 Paige, 597. See Holcombe v. Coryell, 2 Stockt. 392; Armstrong v. Zane, 12 Ohio, 287; Williams, 8 Bland, 190; Wampler v. Shipley, Ib. 188; Winder v. Diffenderffer, 2. 167; Jones v. Stockett, 426; Orchard v. Smith, 819; Dorsey v. Gilbert, 11 Gill & J. 87; Calvert v. Godfrey, 6 Beav. 97.

<sup>4</sup> Kellogg v. Wood, 4 Paige, 578.

(a) In Kentucky, a sale by a trustee is invalid, unless made under a decree, or unless the party creating the trust joins. 1 Ky. Rev. L. 449.

(b) Devise to trustees and their heirs in fee, as joint tenants and trustees, in trust to receive the rents and profits, and pay them to C, during his life, to then convey to his lawful issue who should be living at his death, in fee, and, if none should be living, then to M in fee. C having infant children living, and being unable to support and educate them, and the lands being unproductive; held,

the legislature, on the petition of C, with the concurrence of the trustees and the assent of M, might appoint a new trustee in place of those named, with all their powers; and authorize a sale or mortgage by such new trustee, with the assent of the court of chancery, of a part of the estate, and an application of the proceeds to pay debts contracted and to be contracted for the necessary support of the petitioner's family; the residue to be invested and disposed of as the land would have been. Towle v. Forney, 4 Duer, 164.

§ 2. It is the general rule of equity, that neither any act nor any omission on the part of a trustee shall be allowed to prejudice the *cestui que trust*.<sup>1</sup> To prevent this, equity will treat money as land, and land as money, and consider that which ought to be done as actually done.<sup>2</sup> So long as the subject of an express or implied trust remains in the hands of the trustee, or of his heirs, executors, administrators or devisees, the Court of Chancery will lay hold of it for the benefit of the *cestui*.<sup>3</sup>

<sup>1</sup> *Lechmere v. Carlisle*, 8 P. Wms. 215; *Banks v. Sutton*, 2, 715. See *Neate v. Pink*, 8 Eng. L. & Equ. 205.

<sup>2</sup> See ch. 1, s. 52.

<sup>3</sup> *Ridgely v. Carey*, 4 Har. & McHen. 198.

Also, that they might authorize a conveyance on a valuation to be agreed upon between such trustee and the respective creditors, provided that every such sale and mortgage and conveyance in satisfaction was approved by a master of the court, and a certificate of such approval was endorsed upon such deed or mortgage. *Id.*

Also, that such statutes are not inhibited by the constitutional provision then in force, which declares, "that no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land or the judgment of his peers;" nor by that clause of the constitution of the United States, which declares, that no State shall pass any law "impairing the obligation of contracts." *Id.*

Also, that a conveyance by such trustee to a third person, purporting to be upon a pecuniary consideration, having endorsed upon it a certificate of a master in Chancery, made pursuant to an order of the Court of Chancery, and in form thus: "Having examined the within deed, I approve it as to manner and form, Dec. 14, 1818, James Hamilton Master in Chancery," is, *prima facie*, valid. *Id.*

The legislature may constitutionally order a conveyance from the trustee to the *cestui*. *Dutch, &c. v. Mott*, 7 Paige, 77. Where land is given in trust to convey to the *cestui* at such a time, with a power of sale during the trust, and a conveyance is not then made, the trustee cannot afterwards sell, though the trust continues. *Grieverson v. Kirsopp*, 2 Keen, 653. See *Wood v. White*, *Ib.* 664.

An equitable tenant for life, under a will, may have possession, upon giving security to fulfil its provisions; and, although the trustee had previously leased to one having notice, the court still appointed a receiver to let to the tenant for life, with security. *Baykes v. Baykes*, 1 Coll. 537.

In decreeing a conveyance of the legal estate by a trustee, equity will not require a general warranty deed, but only a special warranty against his own acts. *Hoare v. Harris*, 11 Illin. 24. It is said, the court will not take the legal estate from a trustee, and vest it in the party entitled, till a refusal to act by the party entitled to a conveyance. *Hodgson, &c.* 4 Eng. L. & Equ. 182.

To a bill filed by a *cestui que trust* against the trustees and the other *cestui que trust*, for the purpose of obtaining a conveyance of the complainant's share of the legal title to real estate, alleged to be in the trustees, and for partition, the defendants pleaded that neither the complainant nor the trustees were, nor was either of them, in possession of the premises at the commencement of the suit; without denying the allegation in the bill, that the trustees held the legal title as trustees for the complainant and the other *cestui que trust*, in different undivided proportions. Held, the complainant was entitled to a decree establishing the alleged trust, and directing the conveyance of the complainant's share of the legal estate to him, whenever the trustees could legally make such conveyance, notwithstanding the whole premises were, at the time, held adversely to both parties. *Bradstreet v. Schuyler*, 3 Barb. Ch. 608.

A trustee, who permits the debtor to retain possession of the estate, waste it,

Where a *cestui* is of age, the trustee has no right, unless expressly empowered, to change the nature of the estate; to convert land into money, or the converse. Though it is otherwise, it seems, if the *cestui* is an infant.<sup>1</sup> And where a trustee disposes of the trust property, the *cestui que trust* may claim the thing received in exchange, if it can be identified.<sup>2</sup> And this, although the property received in exchange may have greatly increased in value. Though, if the increased value be the result of skilful labor, the rule may be different.<sup>3</sup> Thus a *cestui que trust* may follow the trust fund into land purchased with it by the trustee, whether the contract for the purchase be executed or executory.<sup>4</sup> So, money paid into court by the Liverpool dock trustees, in respect of leaseholds for years, taken by them under the powers of their act of Parliament, was ordered to be reinvested in the purchase of copyholds of inheritance.<sup>5</sup> And where a change in the nature of the estate occurs by operation of law, the property will be still held on the same terms as before, with respect to the mutual rights of the trustee and *cestui*. Thus real and personal property was devised in trust, the rents, issues and income to be paid to the *cestui*. A part of the real estate being taken for a railroad, and the damages paid to the trustee; held, this sum was not *income*, &c., to be paid to the *cestui*, but a substituted capital, of which he was merely entitled to the interest.<sup>6(a)</sup>

<sup>1</sup> 2 Story, 242; DeBevoise v. Sandford, 1 Hoffm. 192. See Couch v. Couch, 9 B. Mon. 160; Moshier v. Knox, &c., 82 Illin. 156; Forbes v. Hall, 84 Ib. 167; Wardens, &c. v. Rector, &c. 45 Barb. 858; Hamilton v. Crosby, 82 Conn. 842.

<sup>2</sup> Platt v. Oliver, 8 McLean, 27; Turner v. Petigrew, 6 Humph, 488.

<sup>3</sup> Ib.

<sup>4</sup> Brothers v. Porter, 6 B. Mon. 106.

<sup>5</sup> Coyte's, &c. 8 Eng. Law & Eq. 224.

<sup>6</sup> Gibson v. Cooke, 1 Met. 75.

and use it as his own, is responsible for the injury to the trust fund, out of his own estate. Harrison v. Mock, 10 Ala. 185.

It is no ground for staying a decree upon a claim for the execution of a trust, that a bill has been filed for its execution, embracing, in addition, other objects. Scott v. Hastings, 5 Eng. Law & Eq. 64.

(a) Devise to a trustee, his heirs and representatives, in trust, to invest and reinvest the land, from time to time, in

stocks or other safe securities, and pay the income, with \$200 annually of the principal, to the testator's daughter for life; afterwards to pay and transfer the whole of the trust fund to her children. Held, by necessary implication, the trustee had power to sell the real estate, discharged of the trust. Purdie v. Whitney, 20 Pick. 25. See Rathbun v. Colton, 15 Ib. 471; Rider v. Sisson, 7 R. I. 341.

An assignment by a trustee, purporting to transfer the trust property, al-

§ 3. Even where a trust consists in a mere *executory agreement* between the trustee and a third party; it is held that such agreement cannot be revoked to the prejudice of the *cestui*. Thus, where a father contracts in writing for the purchase of land, in trust for his son, the trust will be enforced, although the vendor has since, with the father's consent, devised the land to another person. So, where an owner of land contracts to convey to one person, and conveys to another, having notice of such contract, the purchaser takes subject to all the rights and equities of the former contracting party.<sup>1</sup>

§ 4. But, if a trustee convey the land held by him, for valuable consideration, to one ignorant of the trust, the latter shall hold it, discharged therefrom. It has been seen<sup>2</sup> that a creditor of the trustee cannot take the land to satisfy his debt; and in this respect it seems to make no difference whether the creditor has notice of the trust or not. But a mortgage by the trustee, though, like a judgment, it is a mere incumbrance, will pass a title to an ignorant mortgagee discharged of the trust.<sup>3</sup> In order to pass a perfect title to the purchaser from a trustee, there must be both a want of notice, either express, or, as is sometimes held, implied from *registration*, and a valuable consideration. Neither is sufficient of itself. Hence a gratuitous grantee without notice, and a purchaser for consideration with

<sup>1</sup> Taylor v. James, 4 Des. 1; Glover v. Fisher, 11 Illin. 666. See John. Cha. 186.

<sup>2</sup> Ch. 24

<sup>3</sup> Finch v. Winchelsea, 1 P. Wms. 278.

though insufficient to pass the interest of the *cestui que trust*, may pass the individual interest of the trustee. Platt v. Oliver, 8 McLean, 27.

Whether a trustee has an equitable right to convey, is a question purely of equitable jurisdiction, and cannot be entertained by a court of law. Canoy v. Troutman, 7 Ired. 155.

At law, a sale by a trustee conveys the legal estate, and the title of the purchaser is not affected by the trustee's having exceeded the power to sell, given by the trust deed, nor by a misapplication of the proceeds of the sale. These are equities which belong to another tribunal. D'Oyley v. Loveland, 1 Strobh. 45.

Where land was conveyed by an un-

sealed writing, in trust, to pay certain debts; held, it was not sufficient in itself to authorize the trustee to sell, but, as it was an equitable lien on the land, he should obtain authority to sell, by praying for a decree to sell for the purposes of the trust. Linton v. Boly, 12 Mis. 567.

The court has no power, upon the petition of the grantor, the *cestui que trust* and the trustees, to order a sale of real estate held in trust, and partly for the benefit of infants, although a sale would be beneficial to the *cestui que trust*, where such a sale would be contrary to the provisions of the grant, and the remaindermen are uncertain. Turner, 10 Barb. 552.

notice, shall be alike held chargeable with the trust.<sup>1</sup> In a suit by the *cestui que trust* against such purchaser for the price of the property, he is estopped to set up the invalidity of the sale, for he would thereby take advantage of his own wrong.<sup>2</sup>

§ 5. To constitute the notice requisite to charge a purchaser, it is sufficient that he has such information as ought to put him on inquiry.<sup>3</sup> It is a question for the jury.<sup>4</sup> The pendency of a suit in equity by the *cestui* against the trustee—after the service of a subpoena and filing the bill—is implied notice;<sup>5</sup> or possession of the land by the *cestui*;<sup>6</sup> but not a recital in a deed between third persons, though registered.<sup>7</sup>

§ 6. The purchaser from a trustee is chargeable, if he have notice of the trust, though he have no notice who is the *cestui*.<sup>8</sup>

§ 7. Where an insolvent trustee sells, partly for cash and partly in payment of his own debt, a mortgage given to him on the face of it as trustee, the purchaser is chargeable with the trust.<sup>9</sup> But where a survey of wild land, without an entry in the book of entries, constitutes no appropriation, notice of such survey to one holding a subsequent land warrant does not affect his title.<sup>10</sup> So if an executor, not in advance to the estate, dispose of the property for his own private purposes, whether in payment of a debt or for a new pecuniary consideration, the purchaser, having notice, is chargeable with the trust. Thus A, an executor, empowered to sell lands, sells them, and takes a deed of trust for the price, which he afterwards assigns as security for his own debt. The assignment refers to the deed of trust, which refers to the original deed, which refers to the

<sup>1</sup> *Nicholls v. Peak*, 1 Beasl. 69; *Davis v. Christian*, 15 Gratt. 11; *Stewart v. Chadwick*, 8 Clarke, 468; *Lancaster v. Allen*, 1 Head, 826; *Manning v. 6th Parish, &c.* 6 Pick. 18; *Page v. Page*, 8 N. H. 187; *Chaplin v. Givens*, Rice, 182; *Paine v. Webster*, 1 Verm. 101; *Wilson v. Mason*, 1 Cranch, 100; *Hagthorp v. Hook*, 1 Gill & J. 271; 1 *McCord's Cha.* 119-82; *Harrisburgh, &c. v. Tyler*, 8 Watts & S. 878; *Hanley v. Spragne* 7 Shepl. 481; *Hallett v. Collins*, 10 How. 174; *Harris v. De Graffenreid*, 11 Ired. 89; *Webster v. French*, 11 Illin. 254; *Heth v. Richmond, &c.* 4 Gratt. 482;

*Buck v. Winn*, 11 B. Mon. 820; *Pooley v. Budd*, 7 Eng. L. & Equ. 229; *Dixon v. Caldwell*, 15 Ohio St. 412; *Abbott v. Reeves*, 49 Penn. 494; *Hall v. Vanness*, Ib. 457.

<sup>2</sup> *Barksdale v. Finney*, 14 Gratt. 338.

<sup>3</sup> *Filliman v. Divers*, 81 Penn. 429.

<sup>4</sup> 2 Paige, 202.

<sup>5</sup> *Murray v. Ballou*, 1 John. Cha. 566.

<sup>6</sup> *Pritchard v. Brown*, 4 N. H. 404.

<sup>7</sup> 1 John. Cha. 566.

<sup>8</sup> *Maples v. Medlin*, 1 Mur. 219; *Conner v. Tuck*, 11 Ala. 794.

<sup>9</sup> *Pendleton v. Fay*, 2 Paige, 202.

<sup>10</sup> *Wilson v. Mason*, 1 Cranch, 100



will. Held, the assignee was chargeable with the trusts of the executor.<sup>1</sup> So an assignment of a deed of assignment is sufficient notice of the trusts contained in the latter.<sup>2</sup>

§ 8. If a trustee repurchase the estate from a purchaser without notice, the trust will revive as a charge upon the land in his hands.<sup>3</sup>

§ 9. But, in general, a purchaser without notice, from one with notice, is not chargeable with the trust. Nor a purchaser with notice, from one without notice,<sup>4</sup> even though the second purchaser had notice before the first purchase.<sup>5</sup>

§ 10. The rule above stated is sometimes held more particularly applicable to executory, as distinguished from executed trusts.<sup>6</sup> And it relates to *unauthorized* transfers by a trustee, which involve a violation of duty on his part. A different liability attaches to the purchaser of trust property, which the trustee was empowered and directed to sell, for a certain specified object. The general rule is, that the deed of a trustee conveys an absolute title at law, without proof by the purchaser that the conditions of sale have been complied with. But in equity it is otherwise.<sup>7</sup> Thus where one conveys or devises land to trustees, to be sold or mortgaged for payment of specified debts or legacies, or to obtain money to be invested in funds, the purchaser, mortgagee, &c., is bound to see to the application of the money, or the land will still be liable in his hands.<sup>8</sup> So, where land was sold under a decree in chancery, for payment of certain debts ascertained by a report of the master; it was held, that the purchaser was charged with the application of the money.<sup>9</sup> And a proceeding in equity will not discharge the purchaser from seeing to the application of his purchase-money; and, therefore, the *cestui que trusts* of the will are necessary parties to any proceeding looking to a conveyance.<sup>10</sup>

<sup>1</sup> *Graff v. Castleman*, 5 Rand. 195.

<sup>2</sup> *Russell v. Clark*, 7 Cranch, 69-97.

<sup>3</sup> *Bovey v. Smith*, 1 Cruise, 526.

<sup>4</sup> *Bumpus v. Platner*, 1 John. Ch. 213.

<sup>5</sup> *Bracken v. Miller*, 4 W. & Serg. 102.

<sup>6</sup> See p. 415; *Lancaster v. Allen*, 1 Head, 326.

<sup>7</sup> *Taylor v. King*, 6 Mun. 366-7.

<sup>8</sup> *Dunch v. Kent*, 1 Ver. 260; *Spalding v. Shalmer*. Ib. 301. See *Fyler v. Fyler*, 8 Beav. 550.

<sup>9</sup> *Lloyd v. Baldwin*, 1 Ves. 173; (*Lining v. Peyton*, 2 Desaus. Cha. 378.)

<sup>10</sup> *Duffy v. Calvert*, 6 Gill, 487.



§ 11. The same liability attaches to the purchaser, where the purchase-money is to be applied by the trustee to any other definite and specific object; as, for instance, where an act of parliament granted land in trust, to be sold, and the proceeds applied to the rebuilding of a printing house. And the rule is no less applicable, where lands are liable to debts without express charge, as is universally the case in the United States, than in England, where they are not thus liable; because, though no charge is superadded by the will, *as between the devisee and the creditor*, the relation of the devisees to each other is materially affected by it.<sup>1</sup> So if a trustee, without the direction of the *cestui*, dispose of and release the property, before the purposes of the trust are fulfilled; the lien on the property still continues, in equity.<sup>2</sup> So a release from the *cestui* to the trustee will not divest any rights and equities resulting from a violation of his trust by the latter.<sup>3</sup>

§ 12. Where the trustee is required to invest the proceeds of sale in a certain way, it seems, the liability of the purchaser extends so far only as to make him responsible for such original investment; and that he is not answerable for any subsequent misappropriation, either of the funds themselves, or interest or dividends arising from them.<sup>4</sup> And unless the debts and legacies are specified, the purchaser is not responsible for the application of the purchase-money. That is, unless the debts are specified, he is liable for neither; the debts being payable first. And in this respect it is immaterial whether the land is expressly given *in trust*, or merely *charged* with debts. A charge is said to be a devise of the estate, in substance and effect, *pro tanto*, upon trust to pay the debts.<sup>5(a)</sup>

<sup>1</sup> *Cotterel v. Hampson*, 2 Vern. 5; 12 Wheat. 501. See *Butler v. Hicks*, 11 S. & M. 78.

<sup>2</sup> *Wolfen v. Bate*, 9 B. Mon. 208.

<sup>3</sup> *Iddings v. Bruen*, 4 Sandf. Ch. 3.

<sup>4</sup> 2 Booth's Cas. and Opin. 114.

<sup>5</sup> *Jebb v. Abbet*, 1 Bro 186, n.; 1 Vern. 261; *Williamson v. Curtis*, 8 Bro.

96; Amb. 677; *Dursley v. Berkeley*, 6 Ves. 654, n.; *Bailey v. Ekins*, 7. 823; *Rogers v. Skillicorne*, Amb. 188; *Gardner v. Gardner*, 8 Mas. 218-9; *Andrews v. Sparhawk*, 18 Pick. 898; *Duffy v. Calvert*, 6 Gill, 487; *Chadbury v. Duval*, 10 Barr, 215.

(a) A trustee cannot waive rights of the *cestui que trust* by an executory contract, without a valuable consideration,

and in favor of one who knew of the equities between the trustee and the *cestui que trust*; and such contract will not

§ 13. Although most of the cases, in which the doctrine above named has been established, seem to relate to *trustees*, yet there is another class of decisions, in which a distinction is made between a purchase from a mere heir or devisee, charged with payment of debts, and one from a trustee, who is *the hand to receive the money*, and whose receipt, therefore, is said to be a

be enforced by a court of equity, to the injury of the trust estate. *Mayrant v. Guignard*, 8 Strobb. Eq. 112.

Where the owner of a farm dedicates a portion of it to a charity, as to a school, without a conveyance, and afterwards conveys his farm to another, the grantee becomes only trustee, in respect to the portion so dedicated, for the *cestui que trusts*; and, if he ousts them from the possession of it, they may maintain ejectment against him to regain it. *School Directors v. Dunkleberger*, 6 Barr, 29.

A testator left property in trust for the sole and separate use of his daughters. At the commissioners' sale, under an order of distribution, the husband of a legatee became a purchaser, and the legacy to his wife was allowed in part payment. Held, he took the land subject to the trusts declared in the will; and a sale of the land for the debt of the husband would not, after the death of the husband, prevent the court, on her application, from restoring her to possession, and ordering an account of the rents and profits from her husband's death. *Williams v. Hollingsworth*, 1 Strobb. Eq. 103.

Land was conveyed in trust to pay the debts of the grantor out of the rents and profits, the support of himself, his wife and children, and at his death to be divided among his children. Held, the trustees had no authority to sell, however urgent the necessity. *Mundy v. Vawter*, 3 Gratt. 518.

And a purchaser from such grantor and the trustees will be held to have notice of the trust, and be bound to know that the trustees had no power to sell. *Ib.*

But, it appearing from the title papers that the grantor had only an interest of one-fourth part of the lands described, although an equitable interest in the whole, the purchaser, without actual notice of the equitable title, will be held a purchaser with notice, to the extent of only one-fourth part of the land. *Ib.*

The *cestui que trust* having obtained a

decree against the purchaser for such fourth part, the trustees and grantor being also parties to the suit; the purchaser is entitled to a decree over for the same against the grantor and trustees, although he has a remedy at law on their warranty. *Ib.*

A purchaser of land from one who is in fact a trustee, but who sells in his own name, may defend against payment of the purchase-money, although he has taken a deed and given his bonds, on which judgments have been entered. *Beck v. Ulrick*, 1 Harris, 686.

Where a vendee of real estate, in his answer to a bill brought by the wife and children of A, admits that he had heard that the estate was in some way devised in trust for A, his wife and children; this admission charges him with notice. *Haywood v. Ensley*, 8 Humph. 460.

It is the duty of both the trustee and purchaser, where property held in trust for a wife is sold, to see that the fund is paid over to the trustee, and reinvested as directed. And if, in violation of the deed, the purchaser contract with the husband, pay him the purchase-money, and, upon the written authority of the wife, the trustee convey title to him, such sale and conveyance is a breach of trust, a fraud upon the power, and will, upon the application of the wife, be set aside. *Cardwell v. Cheatham*, 2 Head, 14.

The maker of a note sold an estate to the third indorser, under an agreement that the purchase-money should be appropriated to the discharge of the note, and to save harmless the second indorser. Held, the third indorser was a trustee for the second, and the assent of the second indorser to the trust would be presumed, and that the trust could not be afterwards defeated by arrangement between the maker and third indorser. *Stockard v. Stockard*, 7 Humph. 803. See *Ricketts v. Montgomery*, 15 Maryl. 46; *Washington v. Emery*, 4 Jones Equ. 82.

perpetual discharge.<sup>1</sup>(a) Sir William Grant remarked, that the doctrine on this subject had been carried farther than equity would warrant; and that although, where one purchased from a trustee having no right to sell, he ought to be charged with the trust, yet, where the trustee had such right, he should be able, as incident thereto, to give a receipt for the price.<sup>2</sup> Upon this principle, where an estate is limited to trustees for payment of debts and legacies, the trustees having raised the money, but misappropriated it; held, the creditors and legatees had no further lien upon the land, but, having once borne its burthen, it went to the heir; that the estate was debtor for the debts and legacies, but not for the faults of the trustees.<sup>3</sup>

§ 14. It is a common practice to make express provision in the deed or will, that the receipt of the trustees shall be a sufficient discharge to the purchaser. In such case, the latter is of course exempt from all liability. But, if there are several trustees, the receipt of a part only will not discharge a purchaser with notice, although the others have refused to act, and conveyed their interest to their fellows. An express renunciation of the trust, however, would dispense with the necessity of a signing by the trustee who renounced.<sup>4</sup>(b)

<sup>1</sup> Cuthbert v. Baker, Sug. Ven. 878; 4 Ves. 99.

<sup>2</sup> Balfour v. Welland, 16 Ves. 151-6.

<sup>3</sup> 1 Salk. 153. (It does not appear that the debts were *specified*.)

<sup>4</sup> Crewe v. Dicken, 4 Ves. 97.

(a) This distinction is rejected in Massachusetts; (Andrews v. Sparhawk. 18 Pick. 401,) but seems to be recognized in Maryland (Duffey v. Calvert, 6 Gill, 487) and Illinois (Reeves v. Allen, 5 Gilm. 236).

(b) Where a trustee, empowered to sell the land and re-invest the proceeds to the same uses, joins in a conveyance with the *cestui*; held, in South Carolina, partly on the ground of local circumstances and usage, that the purchaser is not responsible for the disposition of the money. Lining v. Peyton, 2 Dessaus. 375.

The whole doctrine of the liability of the purchaser, either from trustees or other parties authorized to sell, for the right application of the purchase-money, seems to have been overruled or very much shaken by the Supreme Court of

the United States, in the case of Potter v. Gardner, 12 Wheat. 498. (Acc. Cardwell v. Chatham, 2 Head, 14; Wyse v. Dandridge, 35 Miss. 672. See Taft v. Morse, 4 Met. 523; Ball v. Harris, 4 My. & C. 284, that, where property is charged with debts and devised in trust, the trustee may sell or mortgage, and the purchaser is not bound for the application of the purchase-money. Eland v. Eland, Ib. 420.)

In this case, the testator devised an estate to his son A, in fee, "he paying all my just debts out of said estate. And I do hereby order, &c., that my son shall pay my debts out of the estate," &c. A sold the estate to B. The executrix and other devisees filed a bill in equity against A and B, for the purpose of charging B with the application of the money to the debts of the testator. It

§ 15. It is said, that, where lands are devised, in trust to be sold for payment of debts, in case the personal estate shall prove insufficient for that purpose ; a purchaser without notice acquires a good title as against the heir, although the personal estate is not insufficient. The law does not require him to look into the condition of the testator's estate. But implied notice is sufficient to impair his title ; as, for instance, a *lis pendens*, to have an account between the heir and executor.<sup>1</sup> This doctrine, however, is denied by high authority ; and it is laid down, that, when a *power* is given to executors to sell for this purpose, deficiency of personal estate is a condition precedent to a good

<sup>1</sup> Culpeper v. Aston, 2 Cha. Ca. 115; Coleman v. McKinney, 3 J. J. Mar. 249.

appeared that a part of the purchase-money was paid, by extinguishing debts due from A to third persons, and a debt due from A to B, and that another part remained due in the form of a note not negotiable. Held, B should be charged with such part of the purchase-money as remained unpaid, *absolutely*; and with such part as had been applied to the debts of A, *contingently*; the decree, in regard to the latter, being in the first instance against A, and, on his failure to pay, against B. The court remark, that no question seemed to be made as to the authority of those *modern decisions*, which deny the distinction between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee for the payment of debts. In either case, the person who pays the purchase-money to the person authorized to sell is not bound to look to its application, unless the money is misapplied (as in this case) with his co-operation. With regard to this case it is to be observed, that, although the language of the court disavows the liability of *bona fide* purchasers, in *any case*, yet the facts would warrant no other decision, even according to the old rule, because the *debts were not specified*. Story, J., lays down the same rule, but *with this important limitation*. S. C. 8 Mas. 218. And the Supreme Court in Massachusetts adopt his views. Andrews v. Sparhawk, 13 Pick. 401.

In Pennsylvania, a testator devised the residue of his real estate to his wife A, for life, (she being also executrix,) and to trustees subject to her life estate, in

trust to sell and pay debts not otherwise provided for. The trustees conveyed to A, under the power, for a consideration mentioned in the deed, but not in fact paid. A mortgaged the land, and it was sold by the sheriff under the mortgage. Held, the mortgagee had priority over the creditors of the testator, who had obtained judgment within five years after his death ; and he was not bound to see to the appropriation of the purchase-money of the conveyance to A. Cadbury v. Duval, 10 Barr, 265; Franklin, &c., Ib.

Where an administrator purchases real estate with funds, a moiety of which belongs to himself, and the other moiety to others, in an action of ejectment by the *cestui que trust* against a purchaser of the land from the administrator, without notice of the trust, the purchaser is entitled to be reimbursed the one-half of the purchase-money paid by him before notice of the trust, unless he has been fully compensated to the extent of that moiety out of the rents and profits. It is not, however, necessary that the amount should be tendered before suit brought. Beck v. Uhrich, 4 Harris, 499.

The administrator, who was a co-defendant in the ejectment suit, is entitled to be reimbursed for expenses incurred in the creation of the trust, and advances made for the benefit of the trust. Ib.

The administration account, settled after the suit brought, is evidence in favor of the defendants, to show the amount of money advanced by the administrator in the purchase of the land, but it is not conclusive. Ib.

title in the purchaser.<sup>1</sup> And, inasmuch as the personal estate is by implication primarily liable, it seems the same rule is applicable, although the will does not expressly order that it be sold in the first instance. But an order of court, authorizing a sale of lands, is conclusive of its validity, though it turns out that there were personal assets.<sup>2</sup> And where a trustee is authorized, generally, to sell land for payment of debts, a purchaser acquires a good title, although more was sold than was necessary for this object; more especially where the sale takes place under a decree of Chancery, and with the consent of parties interested. Hence, under such circumstances, a purchaser cannot avoid the bargain, by alleging a defect in the title.<sup>3</sup>

§ 16. A beneficiary cannot set aside a sale by his trustee and recover back the property, and yet retain the consideration;<sup>4</sup> nor after long acquiescence.<sup>5</sup>

§ 17. A trustee, who conveys according to a sale made by his *cestui que trust* (who was *sui juris*) cannot, although the *cestui* might, set aside the deed, on the ground that the sale was a fraud on the *cestui*.<sup>6</sup>

§ 18. *Joint* trustees have all an equal interest and authority, and must join in conveyances and receipts. But, where one only receives money, the others, though joining in a receipt for it, will not in general be held accountable. An express provision is almost universally inserted in trust deeds, that each trustee shall be accountable only for such sums as actually come to his hands.<sup>7</sup> Payment to one of two trustees is held to bind both.<sup>8</sup> And one trustee is held liable for concealing the wrong of another.<sup>9(a)</sup>

<sup>1</sup> Fearn's Opin. 121; Sug. Ven. & P. 348.

<sup>2</sup> Leverett v. Harris, 7 Mass. 292.

<sup>3</sup> Spalding v. Shabner, 1 Vern. 308; Lutwych v. Winford, 2 Bro. 248.

<sup>4</sup> Fears v. Lynch, 28 Geo. 249.

<sup>5</sup> Mitchell v. Berry, 1 Met. Ky. 602; Ellig v. Naglee, 9 Cal. 688.

<sup>6</sup> Prouty v. Edgar, 6 Clarke, 358.

<sup>7</sup> Fellows v. Mitchell, 1 P. Wms. 81;

Bartlett v. Hodgson, 1 T. R. 42; Kip v. Deniston, 4 John. 26; Monell v. Monell, 5 John. Cha. 296. See Taylor v. Roberts, 8 Alab. N. 88; Nicoll v. Miller, 87 Ill. 687.

<sup>8</sup> Husband v. Davis, 4 Eng. L. & Equ. 842.

<sup>9</sup> See Att'y Gen. v. Holland, 2 Y. & Col. 688; Bayley v. Rees, Holt. Eq. 80.

(a) Two out of three trustees for a private association have no power to execute a deed of property, unless the third has had an opportunity to consult

§ 19. The general rule is, that a trustee shall not be allowed to derive any personal advantage from his trust. Hence, if he compound a debt due from the estate, the profit goes, not to him, but to the *cestui que trust*. But if, in good faith and with discretion, he release a debt, he shall not sustain any loss thereby.<sup>1</sup>

§ 20. Where a trustee commits a breach of trust, he will be held strictly accountable for all consequences. Thus, if he wrongfully sell the estate, he shall answer to the *cestui* for its full value.(a) So trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest, at 5% per cent.,—the accounts to be taken with rests. But the law will protect a trustee who acts with reasonable discretion and according to his best judgment, though he make some trifling mistakes in doubt-

<sup>1</sup> Robinson v. Pett, 3 P. Wms. 251; Pusey v. Clemson, 9 S. & R. 204; Forbes v. Ross, 2 Bro. 180.

and advise with them as to such conveyance; and equity may set aside a deed so made, and order a reconveyance. But the special terms of the trust deed might give such power. Heard v. March, 12 Cush. 580.

The abandonment of a trust, by one of two trustees who are joint tenants, does not vest his title in the remaining trustee, without deed or legal process. Webster v. Vandeventer, 6 Gray. 428. See Att'y, &c. v. Holland, 2 Y. & Col. 688; Bayley v. Rees, Holt. Equ. 80.

(a) Trustees for creditors cannot be held accountable as tenants for more than the profits actually received, where there is no pretence of negligence, malversation, or fraud. Hamburgh, &c. v. Edsall, 1 Beas. 892.

The *cestui* may, at his election, reclaim the property; or claim other property taken in exchange. Oliver v. Platt, 8 How. 388. Implied notice will bind the purchaser. *Ib.* And one joint owner will be bound by notice to the other. *Ib.*

If a trustee makes no effort to obtain a tenant, and himself occupies; he will be charged with the highest rent that could have been obtained. Landis v. Scott, 32 Penn. 495.

A *cestui que trust* may, under (New York) 1 Rev. Sts. 729, sec. 60, bring a bill in equity against his trustee, who has executed a lease with an inadequate rent, under a power to lease only at the best procurable rent, to compel him to make a new lease at a full rent, regardless of the old lease. Griffen v. Ford, 1 Bosw. 128.

Where trustees advance money to the *cestuis que trust*, understanding it will be deducted from the rents of the trust property, it is a lien on the incoming rents and not on the property in trust. Ellig v. Naglee, 9 Cal. 688.

The misconduct of trustees, for the purpose of urging a sale, cannot impair the rights of creditors interested in the sale. Carter v. Neal, 24 Geo. 346.

Trustees to sell and pay debts, selling within a reasonable time and applying the proceeds to pay the debts, execute their trust; but if the sale was fraudulent and the proceeds applied to the debts, the trustees would be accountable for the difference between the full value at the time, and the price brought, with interest. Cleghorn v. Love, 24 Geo. 590.



ful matters. So he is not responsible for wrongs to the estate, in which he had no agency.<sup>1</sup>

§ 21. One trustee is liable, for concealing the wrongful acts of another.

§ 22. A trustee in possession has been held bound to account for all that *might have been* received from the estate.<sup>2</sup>

§ 23. Where a trustee, authorized to sell lands, and apply the proceeds to payment of debts or purchase of stock, exchanges them for other lands, he shall account for the full value of the lands exchanged.<sup>3</sup>

§ 24. It has been intimated in England, and expressly decided in Massachusetts, that a *cestui que trust* may maintain an action at law against his trustee for breach of trust, as upon an implied assumpsit. Of course, even in England, he stands on the footing of a mere simple contract creditor. So a *cestui*, after the death of the party who declared the trust, may maintain a suit in his own name against the trustee, if the latter refuse to pay over.<sup>4</sup>

§ 24 a. A receipt in full from a *cestui que trust* to the trustee is *prima facie* evidence of a settlement, and throws on the *cestui* the burden of proving fraud; but less than the ordinary evidence will be required.<sup>5</sup> A *cestui* may go behind such receipt, though of age, if acting without full knowledge of the facts, and on *ex parte* statements, and subject to undue influence.<sup>6</sup>

§ 25. The statute of limitations begins to run from a settlement and receipt; but if such settlement is made while the trustee exercises undue influence over the *cestui*, he may have the settlement examined into at any time within the statutory

<sup>1</sup> Smith v. French, 2 Atk. 248; 1 Harr. & G. 11; Root v. Yeomans, 15 Pick. 488; Forshaw v. Higginson, 89 Eng. L. & Eq. 888; Courtee v. Dawson, 2 Bland, 289; Chase v. Lockerman, 11 Gill & J. 185; Rainsford v. Rainsford, Rice, 848; Angell v. Dawson, 8 Y. & Coll. 308; Hester v. Wilkinson, 6 Humph. 215; Hutchins v. Hutchins, 6 Eng. L. & Equ. 41. See Tucker v. Cocke, 31 Miss. 184; Ellig v. Naglee, 9 Cal. 688; Landis v. Scott, 82 Penn. 495.

<sup>2</sup> Boardman v. Mosman, 1 Bro. 68; Rogers v. Rogers, 1 Paige. 188.

<sup>3</sup> Ringgold v. Ringgold, 1 Harr. & G. 11.

<sup>4</sup> Stuart v. Mellish, 2 Atk. 612; Twitt v. Cootzer, 1 Harr. 451; Newhall v. Wheeler, 7 Mass. 198; Gifford v. Manley, For. 109; Lyddel v. Weston, 2 Atk. 19; Gadsden v. Lord, 1 Dess. 216. See Pickering v. DeRochemont, 45 N. H. 67.

<sup>5</sup> Keaton v. McGwier, 24 Geo. 217.

<sup>6</sup> Wellborn v. Rogers, Ib. 558.

bar. If fraud is discovered, the statute begins to run from the discovery, if the party labors under no disability, and is not in *laches*.<sup>1</sup>

§ 26. It was formerly held, that a trustee could not be allowed any compensation for his services. This rule was founded upon the reasons, that by such allowance the estate might be exhausted; that it was impossible to fix upon a fair amount, one man's services being worth more and another's less; and that the trustee had his option, whether to accept or refuse the office.<sup>2</sup> Another reason assigned is, that there is much solicitude and vexation in most trusts, which cannot be compensated by money.<sup>3</sup>(a) But where the party creating the trust directed that the trustees should be compensated, it was held that such order should be carried into effect; and the amount of compensation was referred to the master to settle.<sup>4</sup>(b)

<sup>1</sup> 24 Geo. 217.

<sup>2</sup> Treat. of Equ. lib. 2, ch. 7, sec. 8. See *Gilbert v. Dyneley*, 8 Man. & G.

12; *Thompson v. Finch*, 39 Eng. L. & Equ. 97.

<sup>3</sup> *Barrell v. Joy*, 16 Mass. 228.

<sup>4</sup> *Ellison v. Airey*, 1 Ves. 112.

(a) This rule seems to be still in force in Ohio, and in New York it has been held doubtful, whether even a positive agreement with the *cestui* for compensation, made after creation of the trust, is binding. *Constant v. Matteson*, 22 Ill. 546; *Walk. Intro.* 814; *Manning v. Manning*, 1 John. Cha. 527; *Meacham v. Stearns*, 9 Paige, 898; *Iddings v. Bruer*, 4 Sandf. Ch. 228; *Switzer v. Skiles*, 8 Gilm. 529.

(In New York, after the estate of trustees ceases, by the Revised Statutes, on the cessation of the objects of the trust, they have no longer a lien on the land for any unpaid charges and commissions. *Bellinger v. Shafer*, 2 Sandf. Ch. 298.

A trustee, on passing the trust estate to a new trustee, and discharging himself, was allowed commissions on stocks, bonds and mortgages, which he conveyed to the new trustees in specie, as they had remained during his own trusteeship; also, on certain houses and land, in which the proceeds of certain choses in action had been invested by a former trustee for the preservation of the property, and which were held to be personalty in equity. *De Peyster*, 4 Sandf. Ch. 511.)

(b) It is said, the general practice in America, and especially in Massachusetts, is, to allow commissions to trustees, in case of open and admitted express trusts, unless the trustee has forfeited them by gross misconduct. *Jenkins v. Eldridge*, 8 Story, 825. In Massachusetts, trustees are allowed a commission of five per cent. and the allowance thereof will not prevent that of specific charges also. In such case, the commissions are considered as a compensation for services not specially mentioned in the account. But a trustee cannot have an allowance by way of commission, on assuming his office.

("On the gross amount of all the property that has come to his hands," is the expression in one case (16 Mass. 221); "on net income from real and personal estate—income received and accounted for," is probably the more correct phrase, used in another and later case. 2 Met. 422. See *Kendall v. New England, &c.*, 13 Conn. 888; *Mitchell v. Holmes*, 1 Md. Ch. 287.)

In Pennsylvania, two and a half per cent were allowed on a sale by assignees of real estate, assigned for benefit of creditors, the purchase-money being about \$44,000, of which \$18,000 came



§ 27. It is said that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust. Upon this principle a trustee shall be liberally allowed all reasonable costs and charges incurred in the management of the estate. Thus if he bring a suit to recover the land, he will not be limited, in a settlement with the *cestui*, to the taxed costs, but will be allowed the expenses actually incurred in the suit. So, he will be allowed a solicitor's fee. But he will not be allowed the expenses of actions of assault and battery brought against him, though arising from his defence of the estate. Where he has

into their hands, the residue continuing a lien by agreement between a mortgagee and the purchaser. *Shunk's, &c.*, 2 Barr, 804. In case of misconduct, no compensation is allowed. *Berryhill's, &c.*, 35 Penn. 245.

In Pennsylvania, an executor is always compensated. So a trustee has been allowed three per cent on the price of property sold by him; in Maryland, five per cent. So in Virginia, North Carolina, Mississippi, and sometimes in Kentucky, compensation is made.

(In North Carolina, where a father made a conveyance of land and negroes to one of his sons, to be managed under the direction of that son, in trust that he would apply the proceeds to the support of the father and his family during the father's lifetime, and after his death sell the property and divide the proceeds among his heirs and distributees; held, the son was entitled to a reasonable compensation for his care and trouble. *Ralford v. Ralford*, 6 Ired. Eq. 490.)

In Delaware, upon a sale by order of court, the allowance is not over six per cent. on the first hundred dollars, nor over one per cent. on four thousand dollars. In Alabama, a provision in the deed for twelve and a half per cent. will not avoid it, unless proved to be unconscionable. See *Barrell v. Joy*, 16 Mass. 221; *Rathbun v. Colton*, 15 Pick. 471; *Dixon v. Homer*, 2 Met. 420; *Jenkins v. Eldridge*, 8 Story, 325; *Hogan v. Stone*, 1 Ala. (N. S.) 496; *Shurtliff v. Witherpoon*, 1 Sm. & M. 618; *Wilson v. Wilson*, 8 Binn. 560; *Pusey v. Clemson*, 9 S. & R. 204; *Walker*, Ib. 223; *Longley v. Hall*, 11 Pick. 120; *Marsteller*, 4 Watts, 267; *Miller v. Beverleys*, 4 Hen. & Munn. 415; *Nathans v. Morris*, 4 Whart. 389; *Brown v. Wallace*, 2 Bland,

59; *Winder v. Diffenderffer*, Ib. 207; *Tyson v. Hollingsworth*, Ib. 332; *Andrews v. Scotton*, Ib. 672; *Dela. St.* 1848, 507; *Sherrill v. Shurford*, 6 Ired. Eq. 228; *Phillips v. Bustard*, 1 B. Monr. 849; *Warring v. Darrall*, 10 Gill & J. 126; *Donelson v. Posey*, 18 Alab. 752; *Shunk's &c.*, 2 Barr. 804; *State v. Platt*, 3 Haring. 154; — *v. Rogers*, Ib.; *Goodburn v. Stevens*, 1 Md. Ch. 420; *Greening v. Fox*, 12 B. Mon. 187; *Barry v. Barry*, 1 Md. Ch. 20; *Stehman*, 5 Barr, 418.

When a trustee renders professional services in compelling a guardian to perform his duty, he is entitled to such reasonable compensation as he would have paid, had he been obliged to employ counsel. *Lowrie's, &c.*, 1 Grant, 378.

For extra services, trustees are entitled to extra compensation. Ib.

A trustee to invest moneys ought not to be allowed commissions on each temporary loan he may see proper to make, unless the circumstances of the case and interests of the *cestui que trust* indicate this course of procedure. Ib.

In South Carolina, a trustee was allowed compensation for his personal services in going to Alabama to see after and secure the trust property. *Sollee v. Croft*, 9 Rich. Eq. 474.

In California, professional services of a trustee, for the trust property, are to be paid out of the income merely. *Ellig v. Naglee*, 9 Cal. 688.

In New Jersey it is held that, generally, neither in law nor equity, independently of statute, is a trustee entitled to compensation. *Warbass v. Armstrong*, 2 Stockt. 268. And, if a trustee long neglects to reinvest, as ordered by the will, funds derived from a sale of the trust estate; he forfeits his claim to compensation. Ib.

advanced money, without any probability of gaining by it personally, the amount shall be reimbursed to him; and, in Pennsylvania, may be enforced by an ejectment and conditional verdict. And it is now usual to provide expressly for the reimbursement of all costs and expenses incurred in executing the trust. If the trustee pay off an incumbrance, he may reimburse himself from the property, and leave the *cestui* to call upon the grantor on his warranty, instead of doing it himself. *Taxes* paid are a lien upon the land, and may be paid out of the trust fund.<sup>1</sup>

§ 28. It is sometimes held that a trustee will not be allowed the cost of *permanent improvements*, such as building, clearing, road-making, &c., (a) and regard must be had to the probable duration of the trust, in determining what improvements fall under this designation. If, by means of improvements, the rent of the property is increased, the *cestui* may be put to his election, between allowing the charge and not receiving the increased rent. And the trustee shall be allowed for reasonable repairs, though not for pulling down and rebuilding. So it has been held, that, where lands are purchased in trust with the money of a wife, the trustee, whether the husband or a stranger, shall be allowed for permanent improvements. So where a person holding land in trust, with a power to sell, materially improves the estate, under a belief honestly entertained, with reasonable grounds for that belief, that he is the owner of the land, and the amount received upon the sale is increased in consequence of such improvements; he is entitled to retain such excess for his own use, but no more. But where the father of beneficiaries, with consent of the trustees, made permanent improvements on the land, while their tenant, the trust containing no authority

<sup>1</sup> Constant v. Matteson, 22 Ill. 546; Pierson v. Thompson, 1 Edw. Cha. 212; Trott v. Dawson, 1 P. Wms. 780; Green Addis v. Clement, 2 P. Wms. 455; Murray v. DeRottenham, 6 John. Cha. 62; Freeman v. Dilworth v. Sinderling, 1 Binn. 495; Tompkins, 1 Strobb. Equ. 58; Gary v. Jones v. Stockett, 2 Bland, 417; Greer May, 16 Ohio, 66; Amand v. Bradburn, 2 Cha. Cas. 128; Watts v. Watts, v. Putney, 1 Md. Ch. 262; Altimus v. 2 McCord's Cha. 82; 7 Bro. Parl. 266; Elliott, 2 Barr, 62.

(a) Otherwise in Pennsylvania. Dilworth v. Sinderling, 1 Binn. 495.

for the same; held, no allowance could be made for the improvements, as against the beneficiaries and those claiming under them. The value of improvements is estimated by their cost.<sup>1</sup>

§ 29. The policy of the law requires that the relation of trustee and *cestui* should be guarded with vigilance, and contracts between them scrutinized, that no injustice may be done the *cestui*.<sup>2</sup> The trustee never should be allowed to defeat the rights of a *cestui que trust*, so long as it is possible for a court of equity to enforce them.<sup>3</sup> And where a trustee has been guilty of secretly buying the property at his own sale, in order to avail himself of the *cestui's* acquiescence, he must show that he fully apprised the latter of the nature and extent of the fraud.<sup>4</sup>

§ 30. Upon this principle is founded the general rule, that a trustee shall not be allowed to purchase the trust property for his own benefit, or perhaps even for another, either directly or through an agent.(a) It is said to be a plain point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter shall not, in the same matter, act for himself, and make the business an object of interest. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain a profit. Hence, in whatever shape a profit accrues to the trustee, whether by management or good fortune, it is not fit that benefit should remain in him. It ought to be communicated to those whose interests, being put under his care, afforded him the means of gaining that advantage. He takes the land, clothed with the same trusts as it was liable to in his hands, previous to the sale. The same principle is sometimes said to be vigorously applied, and

<sup>1</sup> Dennis v. Dennis, 15 Md. 78; Williamson v. Seaber, 8 Y. & Coll. 717; Bridge v. Brown, 2 Y. & Coll. Cha. 181; Rathbun v. Colton, 15 Pick. 471; Trustees, &c. v. Jacques, 1 John. Cha. 450;

Bellinger v. Shafer, 2 Sandf. Cha. 298; Pratt v. Thornton, 28 Maine, 855.

<sup>2</sup> Ringgold v. Ringgold, 1 Harr. & G. 11.

<sup>3</sup> Gunter v. Janes, 9 Cal. 648.

<sup>4</sup> West v. Sloan, 8 Jones Eq. 102.

(a) To this case is applied the remark, that a trust *ex maleficio* is usually raised by the violation of some other

trust previously existing. Hogg v. Wilkins, 1 Grant's Cases, 67.

to be universal, subject to no qualifications or exceptions; as where the *cestui* is an adult, or the sale not beneficial, or the property has not come into the trustee's hands;—and sometimes, though not universal, a general one. It applies not merely to trustees technically so called, but to *judicial officers*, and all persons concerned in disposing of the property of others, such as attorneys, commissioners, sheriffs, &c.<sup>1(a)</sup>

§ 31. The above-named principle seems to have been limited in some cases to a purchaser from an *infant cestui que trust*. But this restriction is now done away; and, although the *cestui* be of age, the transaction morally fair and honest, a higher price paid by the trustee than any one else would give, the estate taken at an appraisement or in the name of a third person; yet, upon the ground of general inconvenience, the transaction may be set aside by the *cestui*. The trustee purchases subject to that equity.<sup>2</sup>

§ 32. Where the estate is sold under a decree in chancery, by an open bidding before the master; or where, in case of a trust

<sup>1</sup> Whichcote v. Lawrence, 3 Ves. jr. 740; Tate v. Williamson, Law Rep. (Eng.) Equ. 1866. Apr., p. 527; Hayward v. Ellis, 13 Pick. 272; Howell v. Baker, 4 John. Cha. 120; Voorhees v. Stoothof, 6 Halst. 145; Turner v. Bouchell, 8 Har. & J. 99; Davis v. Simpson, 5, 147; 1 Mon. 44; Bruch v. Lantz, 2 Rawle, 392; 2 Whart. 53; Misso. St. 425; 1 Ky. Rev. L. 623; Scott v. Davis, 4 My. & C. 87; Jones v. Thomas, 2 Y. & Coll. 498; Williamson v. Seaber, 3 Ib. 717; Brackenridge v. Holland, 2 Blackf. 380; Saltmarsh v. Beene, 4 Port. 288; Williams v. Powell, 1 Ired. Equ. 460; Field v. Arrowsmith, 3 Humph. 442; Ely v. Horine, 5 Dana, 404; Bowling v. Dobyne, Ib. 445; Van Eps v. Van Eps, 9 Paige, 237; Torrey v. Bank, &c., Ib. 649; Kerr v. Murphy, 2 Miles, 157; Small v. Jones,

1 Watts & S. 136; Campbell v. Pennsylvania, &c., 2 Whart. 53; Thorp v. McCullum, 1 Gilm. 614; Bank, &c. v. Torrey, 7 Hill, 260; Slade v. Van Vechten, 11 Paige, 21; Bell v. Welch, 2 Gill, 163; Iddings v. Bruen, 4 Sandf. Cha. 228; Rathbun v. Rathbun, 6 Barb. 98; Pratt v. Thornton, 28 Maine, 355; Conger v. Ring, 11 Barb. 356; Jenkins v. Eldridge, 3 Story, 181; Michael v. Michael, 4 Ired. Equ. 349; Herr's Estate, 1 Grant's Cases (Penn.), 272; Page v. Naglee, 6 Cal. 241; Wallace v. Associate, &c., 10 Ind. 162; Bank, &c. v. Dubuque, &c., 8 Clarke, 277; Northcraft v. Martin, 28 Mis. 469; Belcher v. Sanders, 34 Ala. 9; 15 Md. 46; Richardson v. Spencer, 18 B. Mon. 450.

<sup>2</sup> Campbell v. Walker, 5 Ves. 680.

(a) And the principle applies to public, as well as private trusts; as where a member of the legislature sought to obtain a title from the land-office, after the claimant had petitioned for confirmation of his right. O'Neill, 2 Bland, 151. It has been enforced in a late case even against a high dignitary in the church. A statute authorised a rector, with con-

sent of the bishop, to raise money by an annuity for the rectory-house. The bishop advanced the money, and obtained a grant of the annuity, charged on the living. Held, the proceeding was entirely void. Greenlow v. King, 8 Beav. 49. See Wardens, &c. v. Rector, &c., 45 Barb. 356.

for creditors, a majority of them assent; it is intimated that the purchase will be sustained. But, on the other hand, the circumstance that a sale is a judicial one is held to make no difference. So, in South Carolina, if made at the instance of the trustee, it is held to be his sale. And the mere fact of a public sale does not make the sale valid, even though there is no fraud. So where, in a sale made by executors, one of them became a joint purchaser and afterwards sole owner; held, although the sale was ratified by the heirs and devisees, the land was still liable to be taken by creditors.<sup>1</sup>(a)

<sup>1</sup> 1 Cruise, 358; Wiggins, 1 Hill's Cha. 354; Campbell v. Pennsylvania, &c., 2 Whart. 58; Whelpdale v. Cookson, 1 Ves. 9; 5 Ves. 678; Bruch v. Lantz, 2

Rawle, 392. See Pitt v. Petway, 12 Ired. 69; Haywood v. Ensley, 8 Humph. 460; 10 N. Y. 402; Barton v. Moss, 32 Ill. 50.

(a) See Ryan v. Dox, 84 N. Y. (7. Tiffa.) 307; Swinburne v. Swinburne, 28 N. Y. (1 Tiffa.) 568; Freeman v. Harwood, 49 Maine, 195. Where executors, empowered by will to sell real estate exposed it at public sale, and had it bought by a third person for themselves, and afterwards sold it at private sale, but not as executors, at an advance; held, they were accountable for the amount last received; and, although their final account had been filed and confirmed, the court might issue a citation to compel them to account for the balance. Herr's, &c., 1 Grant, 272.

One who agrees, even by parol, to purchase property at an execution sale, with his own money, and hold it for the wife and children of the debtor, and by reason of public notice of that intent has got the property at a low price, must account to the wife and children for the property and its profits, being allowed for all outlays and interest. Gilmore v. Johnson, 29 Geo. 67; Soggins v. Heard, 31 Miss. 426.

Where a lot in a town site, entered in pursuance of an act entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1853, is wrongfully conveyed by a county judge, the grantee becomes a trustee for the rightful owner; and, in order to compel a conveyance from the trustee, it is not necessary for the owner to tender or offer to pay to the trustee the amount paid by him to the county judge for the lot. Harris v. Stone, 8 Clarke, 322.

Where a receiver of a bank purchased property at his own foreclosure sale, made in behalf of the estate, and afterwards sold at public auction a bond and mortgage on the same property, having no efficient existence, and not constituting a lien on such property, without the consent of the *cestui que trust*; equity will presume, as against the purchaser, that the first purchase by the receiver was on account of the *cestui*, unless the purchaser of the bond and mortgage acted under such circumstances of notice as to be unable to invoke the aid of the principle of equitable estoppel. Jewett v. Miller, 10 N. Y. (6 Seld.) 402.

A, a relative of B, an execution debtor, bought the house taken on execution for less than its value, stating that he bought it for B. but not by such statement affecting the sale. Held, there was no express trust, there being no writing; and, the sale being valid, there being no understanding with B that it was for his benefit, no advance of money by him, nor any fraud, that a trust did not result. Gilbert v. Carter, 10 Ind. 16.

If the property purchased by the trustee is a *lease*, which he renews in his own name, the renewal shall be for the *cestui's* benefit. Holeridge v. Gillespie, 2 John. Ch. 88.

And this rule applies, although the trustee requested a renewal for the *cestui*, before obtaining it for himself; more especially where the *cestui* is an infant. The court will, in such case,

§ 33. If, after purchasing the estate, the trustee re-sells it at an advance, more especially if in pursuance of a previous bargain, the *cestui* may affirm the sale, and claim the profits. But, in such case, the trustee shall be allowed money paid to his agent for making the purchase. So, where the holder of a mortgage assigned it in trust, for the benefit of children, and afterwards accepted a reassignment of it from the assignee in trust; held, he was accountable as a trustee to the *cestui que trusts*. So, where a trustee became the owner of land, on which was a mortgage belonging to the trust estate, cancelled the

order an assignment of the lease to the infant; an account of the profits since the renewal; and that the trustee be indemnified from the covenants in the lease. *Keach v. Sandford*, Sel. Cas. in Chy. 6; *Blewett v. Millett*, 7 Bro. Parl. 367; *Killick v. Fleane*, 4 Bro. 161; *James v. Dean*, 11 Ves. 883; *Fitzgibbon v. Scanlan*, 1 Dow. 261; *Taster v. Marriott*, Amb. 668; *Owen v. Williams*, Ib. 784; 5 Bro. Parl. 10.

A assigns to B a lease of land as security. Afterwards, for a consideration expressed, but not actually paid, A agrees to give up one-half of the land to B. B takes possession, surrenders the old lease, and takes a new and extended one. Held, the agreement to give up the land appeared on the face of it to be procured by undue influence, and by taking advantage of the former assignment; that the maxim, "once a mortgage, always a mortgage," was applicable; and that A should have the benefit of the new lease, on payment of the amount due B. *Holridge v. Gillespie*, 2 John. Ch. 88.

A joint lessee will also be held responsible as trustee in case of renewal. *Burrell v. Bull*, 8 Sandf. Ch. 15. So a partner will, in respect to a renewed lease, be a trustee for the firm, where he would not be so with respect to a purchase of the reversion. *Anderson v. Lemon*, 4 Sandf. 552.

A and B held a lease, fixtures, stock, &c., in common, and A carried on the business of a refectory. C and D held mortgages on A's interest, and, not feeling secure, agreed to pay the arrears of rent if immediate possession were given, which was done, and they also agreed to protect the interests of B. They did not pay the rent, but suffered a sale under a distress, purchased the fixtures,

stock, &c., at the sale, and continued the business. It having been arranged that C should procure a renewal of the lease, for the common benefit of B, C and D, C procured the renewal in his own name, and then he and D separately sold their interests in the whole to E, who took possession of the whole concern, and kept B out of possession. Held, in a suit by B, that C and D were bound to account to him for his share of the profits previous to the sale to E, and for his share of the purchase-money, deducting his share of what had been paid. *Burrell v. Bull*, 8 Sandf. Ch. 15.

So if a trustee buy in an incumbrance upon the estate, he can hold it only as security for the sum paid by him, with interest. See *Broome v. Alston*, 8 Flori. 307; *Killick v. Flexney*, 4 Bro. R. 161; *Quackenbush v. Leonard*, 9 Paige, 384; *Webb v. Sagar*, 2 Y. & Coll. 247; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 Y. & Coll. Ch. 219, 349 b.

Numerous cases are found, relating to *executors and administrators*. One to whom a legacy is given, coupled with a trust, is chargeable with the latter, and cannot legally deal with the *cestui*. *McCants v. Bee*, 1 McCord's Cha. 388. An administrator purchases land, sold upon a judgment in favor of his intestate. Held, he took it in trust. *Fellows v. Fellows*, 4 Cow. 682. See *Darcus v. Crump*, 6 B. Mon. 363. *Painter v. Henderson*, 7 Barr, 48.

So, if an executor purchase the land of his testator at sheriff's sale, recode from his purchase, and the land be re-sold, he is chargeable for the highest price. *Guier v. Kelly*, 2 Bin. 294.

An action was brought against A, as administrator, for his own benefit, but in the name of B. A suffered a judgment



mortgage on the record, sold one-third of the same land, taking back a mortgage thereon for the same amount as that which he had cancelled, and executed a declaration of trust, acknowledging that he held it in trust, in lieu of the one cancelled, but the land covered by this substituted mortgage was greatly inadequate security; on a bill by the *cestui que trust*, setting forth that these acts of the trustee were done without his knowledge or consent, and that the original bond and mortgage had never been paid, a decree was made, establishing the original bond and mortgage, as valid existing securities, securing the rights

to be rendered against him, and, in the levy of the execution upon the estate of the intestate, acted both as defendant and agent of B. Held, the proceedings were illegal and collusive, and the levy was void as against a subsequent execution. *Goddard v. Divoll*, 1 Met. 418.

An executor who buys, or procures another to buy for him, at his own sale, holds the land on the original trusts. And, upon a re-sale for an increased price, the *cestuis que trusts* are entitled to such increase, with the rents and profits received in the meantime. And this, although he has filed an account purporting to be a final settlement, in which he charges himself with the amount bid by his agent. *Shuman's, &c.*, 8 Cas. 64. See *Den v. McKnight*, 6 Halst. 385; *McCants v. Bee*, 1 McC. Cha. 388; *Fellows v. Fellows*, 4 Cow. 682; *Darcus v. Crump*, 6 B. Mon. 368; *Painter v. Henderson*, 7 Barr, 48; *Garrett v. Garrett*, 1 Strobb. Equ. 96; *Beeson v. Beeson*, 9 Barr, 279.

An executor, who, with the money of the estate, redeems land of the testator sold on execution, holds it in trust for the estate. *McCrary v. Foster*, 1 Clarke, 271.

A deed to an administrator, reciting that the grantor had sold or agreed to sell to, and received the consideration from, the intestate, appears upon its face to be in trust for the heirs. *Blythe v. Easterling*, 20 Tex. 565.

A widow invested property of her husband in real estate, to the amount of her share, and married again. There was neither will nor administration. Held, in an action against the husband for the land, with rents and profits, she took the real estate in trust, and neither she nor the husband could, years afterwards, say that it was merely a manner of distributing and taking her share, nor

that the wife was entitled to dower, which had not been assigned; but that the heirs were entitled to the income. Also, that a deed of declaration of trust, made after the second marriage, was admissible against the husband. *Claussen v. La Frauz*, 1 Clarke, 226.

A widow, who, without taking out administration, takes possession of the property of her husband, and applies it to the completion of his contract for the purchase of real estate, taking the title in her own name, holds the property in trust for the heirs. *Schaffner v. Grutmacher*, 6 Clarke, 137.

Devise of land mortgaged, and a direction to the executors to redeem the mortgage. Though having assets, the executors took an assignment of the mortgage. Held, they should hold it in trust for the devisee, whose right, it seems, would be barred only by the lapse of twenty years. *Jenison v. Hapgood*, 7 Pick. 1.

The cases relating to agents are equally strong. See *Wynn v. Shaner*, 23 Ind. 578; *Eshleman v. Lewis*, 49 Penn. 410.

A trust results in favor of one who has furnished his agent with money, to purchase for him a parcel of land, if the agent takes the conveyance to himself. And, if the agent dies solvent, equity may decree that the heirs shall release to the equitable owner. *Brown v. Dwelley*, 45 Maine. 52; *Wells v. Robinson*, 18 Cal. 183; *Jamison v. Glascock*, 29 Mis. 191.

So where a person, in whose favor another has confessed a judgment, accepts a power of attorney to dispose of land, and then has an execution issued upon the judgment by confession, and levied upon the land, which he purchases; it is held a binding trust. *Ib.*

of subsequent *bona fide* mortgagees, and directing a sale of the premises, and payment of any deficiency by the trustee. So, where a trustee has borrowed money, and with it purchased other property, and added it to the trust, and repaid the borrowed money out of the proceeds and profits of the trust property; the property thus purchased will belong to the beneficiaries in the trust.<sup>1</sup>

§ 34. The *cestui que trust* "must not lie by to speculate upon events," but disaffirm the sale in a reasonable time; and what is reasonable time, depends on the circumstances of each case,

<sup>1</sup> 1 Cruise, 858; Wiggins, 1 Hill's Cha. 854; Campbell v. Pennsylvania, &c., 2 Whart. 58; Whelpdale v. Cookson, 1 Ves. 9; 5 Ves. 678; Bruch v. Lantz, 2

Rawle, 392. See Pitt v. Petway, 12 Ired. 69; Haywood v. Ensley, 8 Humph. 460; 10 N. Y. 402.

Counsel, consulted respecting a title to land, cannot buy in an outstanding adverse claim, and set it up against his client. Hackenbury v. Carlisle, 5 W. & S. 348. See Ward v. Carttar, Law Rep. (Eng.) Equ., Jan. '66, p. 28.

An attorney, employed to collect or foreclose a mortgage, takes a conveyance to himself of the equity, instead of foreclosing. Held, the estate was subject to the trust in the hands of his heirs; and that they were bound to reconvey, on payment of the amount paid for the equity, and of the trustee's claim for his services, together with the value of improvements made by themselves before notice of the trust. So, where a bank is bound to pay off and discharge a mortgage, so as to relieve the property of a third person from sale under a decree of foreclosure, and the cashier attends the sale as agent for the bank, and bids off the property on his own account; held, he must in equity be regarded as having purchased for the benefit of the bank, and that the purchase was improper, and should be set aside. So a purchase, by the general agent of heirs, of the land of their ancestor, from the vendee at a tax sale, instead of redeeming the land, inures to the benefit of the heirs. Myers, 2 Barr, 468.

Land was sold upon execution. The plaintiff directed his attorney, A, to bid it off. A confessed that he had done so, and said that the deed would be made to the plaintiff, and that he had made a temporary sale to save the expense of advertising, and would receipt the exe-

cution when paid. The sale was made on a stormy day, and only A and the officer were present. A purchased the land, and afterwards conveyed to B, who had notice of the facts. The land was worth \$2,000, while only \$80 was due on the execution. Held, it was doubtful whether the plaintiff's attorney could, in any case, legally purchase land sold on execution, inasmuch as he has the whole control of the proceedings, and therefore great opportunity for unfairness; and that in this case the judgment debtor might redeem, on payment of the sum due upon the execution and interest, the amount paid to discharge incumbrances by A or B, and the cost of improvements made by the latter. Howell v. Baker, 4 John. Ch. 118.

Where A, an agent, to sell a mortgage, represented to B, his principal, that a certain price was all that he could obtain for it, when it was of greater value, and it was sold for that price to A; held, the remedy of B was not an action for fraud, but to avoid the assignment, or compel an account for the true value. Thompson v. Hallet, 26 Maine, 141. So if heirs elect to set aside purchases made by executors, &c., or guardians at their own sale, they must resort to equity. Worthy v. Johnson, 8 Geo. 236.

A party who encourages another to buy land, acts as his agent after the purchase, adjusts the lines, pays the taxes, assists in the sale, and receives a commission on the purchase-money, cannot afterwards buy up and assert a better title to part of the land. He is es-



more especially in the absence of fraud. The sale is not void, but only voidable at his election; and, the rule being adopted solely for his benefit, neither remainder-men, strangers, nor parties to the deed, nor those claiming under them, can raise the objection, nor will the deed be set aside as against a *bona fide* purchaser, on application by or on behalf of the trustee himself.<sup>1</sup> Though the representatives or creditors of the *cestui*, or a receiver for his creditors, may avoid the sale.<sup>2</sup> So, where a trustee purchases the trust property, and the sale is not impeached by the *cestuis*, he has a title upon which the wife's right of dower attaches.<sup>3</sup> And a *cestui*, knowing of a purchase of the trustee, and of his right to avoid it, may ratify it by assenting to the application of the purchase-money to his use.<sup>4(a)</sup>

§ 35. Upon the filing of a bill in chancery, to obtain a re-sale of the premises, it will be referred to a master to settle whether such re-sale would be beneficial to the plaintiff. And, if such

<sup>1</sup> Price v. Cleghorn, 21 Ind. 80; Thorp v. McCullum, 1 Gilm. 614; Worthy v. Johnson, 8 Geo. 236; Pitt v. Petway, 12 Ired. 69; M'Kinley v. Irvine, 13 Ala. 681; Ward v. Smith, 3 Sandf. Cha. 592; Painter v. Henderson, 7 Barr, 48; Cos-

teris, &c., 1 Har. 292; Woelhers, &c., 2 Barr, 71.

<sup>2</sup> Iddings v. Bruen, 4 Sandf. Ch. 228

<sup>3</sup> McNish v. Pope, 8 Rich. Eq. 112.

<sup>4</sup> Beeson v. Beeson, 9 Barr, 279.

topped. Beanpland v. McKeen, 4 Casey. 124.

A trustee agreed to purchase a farm for the *cestui* from the proceeds of trust property. He bought the farm, and gave a bond and mortgage for the purchase-money, but refused to pay them when due, and procured a foreclosure and sale by the mortgagee, at a loss of \$4,000. Held, he was liable for the loss. Green v. Winter, 1 John. Cha. 27.

One of several remainder-men purchased the particular estate, avowedly for all. Held, a trust for the others. Anderson v. Bacon, 1 Mar. 51.

A, a tenant in common, released his right to B. C was in possession, claiming under a sale for taxes. He was also a tenant in common, and agent for A and the other proprietors. Held, he must be considered a trustee for A and B, and was bound to convey to them upon receiving the amount of his expenditures, and a fair compensation for his services. Baker v. Whiting, 3 Sumn. 476.

The same rule is applied (in part on the ground of a statute) to a purchaser

by *next friend* in a proceeding for partition. Collins v. Smith, 1 Head, 251.

The same principle has been applied in case of husband and wife. A husband, with the consent of his wife, sold her lands, promising to invest the price in other lands for her benefit, took a deed of such lands to himself, and died. Held, on proof of these facts by parol evidence, a trust resulted to her. Pritchard v. Wallace, 4 Sneed, 405.

(a) After six years and a protracted litigation, decided for the trustee, the value of the land having increased; it was held too late to avoid the sale. Wiswall v. Stuart, 32 Ala. 488.

So after a delay of nearly four years. Jones v. Smith, 33 Miss. 215.

So a purchase of land by an administrator, at a sale of the estate of his intestate, if not actually fraudulent, can not be avoided by the heirs, unless (in Pennsylvania) suit be brought within twenty-one years from the sale, or within ten years after the heirs come of age, if they were then minors. Mussulman v. Eshleman, 10 Barr, 394.

re-sale takes place, and no advance is made upon the sum paid by the trustee, he will be held to complete the purchase.<sup>1</sup>

§ 36. Where there are joint trustees, a sale of the trust property by one to another is illegal; and the latter is liable for any neglect on the part of the former to pay over the purchase-money, or apply it to the purposes of the trust. The purchaser is also answerable for all profits arising from the property.<sup>2</sup> But where one trustee purchases at the sale of another, it is necessary, in order to render the sale absolutely void for the fraudulent acts of the latter, to connect the former with them.<sup>3</sup> And where an heir or devisee, being one of several, becomes constructively charged with a trust, but, having no notice of it, purchases the shares of the others, he shall hold the latter discharged of the trust, though his own share remains charged.<sup>4</sup>

§ 37. Although a purchase by the trustee of the trust property is a transaction of great hazard and delicacy, to be watched with the utmost diligence, yet such purchase may be valid, provided it appears, after the most careful investigation, that there was a distinct and clear contract, understood by the *cestui*; and that on the part of the trustee there was neither fraud, concealment, nor any advantage taken of his situation as such.<sup>5</sup> It is sometimes said that the *utmost fairness* must be shown.<sup>6</sup> Thus, a trustee for payment of debts purchased the estate as agent for his father, both being creditors and partners, and the *cestui* had full knowledge, and took the sole management of the sale, making surveys, settling the particulars, prices, &c. Held, the purchase was good.<sup>7</sup> So a trustee may validly purchase directly from the *cestui*, provided he practises no unfairness. By such a contract, he in fact removes himself from the character of a

<sup>1</sup> Campbell v. Walker, 5 Ves. 678; Ball v. Carew, 18 Pick. 81; Den v. McKnight, 6 Halst. 885; Davis v. Simpson, 5 Har. and J. 147; Lacey, 6 Ves. 625; Thorp v. M'Collum, 1 Gilm. 614; Allen v. Bryant, 7 Ired. Equ. 276; Marshall v. Stephens, 8 Humph. 159.

<sup>2</sup> Ringgold v. Same, 1 Har. & Gill, 11; Hulbert v. Grant, 4 Mon. 582; Case v. Abeel, 1 Paige, 393.

<sup>3</sup> Beeson v. Beeson, 9 Barr, 279.

<sup>4</sup> Giddings v. Eastman, 5 Paige, 561.

<sup>5</sup> Salles v. Chandler, 26 Mis. 124.

<sup>6</sup> Richardson v. Spencer, 18 B. Mon. 450.

<sup>7</sup> Coles v. Trecothick, 9 Ves. 284; Morse v. Royal, 12 Ves. 855; Naylor v. Winch, 1 Sim. & Stu. 555; McCants v. Bee, 1 M'Cord's Cha. 389. See Murdock, 2 Bland, 467; Kennedy v. Kennedy, 2 Alab. (N. S.) 572; Marshall v. Stephens, 8 Humph. 159.

trustee.<sup>1</sup> And, after the trust ceases, the trustee may always make a valid purchase. So a trustee may become purchaser, at a sale made by virtue of proceedings prior to his becoming such. Thus, the assignees of an insolvent may purchase land sold on execution under a mortgage prior to the assignment.<sup>2</sup> So where A mortgages land for security to B, his surety, and A then transfers to C, a creditor, all his remaining interest in the land, without the knowledge and not for the account of B, and afterwards transfers such interest to B; held, in the absence of all fraud, B's purchase was not invalid, as made by a trustee; for, by A's transfer to C, he had ceased to stand in that relation.<sup>3</sup> And the rule against a trustee's purchasing does not prevent him from *occupying*.<sup>4</sup> In a recent case the general rule is thus expressed: A trustee may purchase directly from the *cestui que trust*, or by his consent; but such purchase will be regarded with suspicion, and it is incumbent on the trustee to show, circumstantially or otherwise, that it was in all respects just and fair, and with the most abundant good faith on his part, and the fullest deliberation upon the part of the *cestui*, with the aid of all the information possessed by the trustee touching the subject.<sup>5(a)</sup>

§ 38. The purchase of trust property by a trustee, through a secret agent, does not, of itself, render the sale utterly void, unless used as a means of deceiving or misleading the *cestui que trust*.<sup>(b)</sup>

<sup>1</sup> Sanderson v. Walker, 13 Ves. 601.

<sup>2</sup> Fisk v. Larher, 6 Watts & S. 18.

<sup>3</sup> Ball v. Carew, 18 Pick. 28. Acc. Rice v. Evans, 26 Mis. 80.

<sup>4</sup> Root v. Yeomans, 15 Pick. 495.

<sup>5</sup> Jones v. Smith, 88 Miss. 215; Vea sey's, &c. v. Graham, 17 Geo. 99.

(a) Where the trustee had substituted a new security, by way of mortgage, for a former mortgage, but only on a part of the property; and there was no gain made or intended by him; and, so far as appeared, the new security would have been deemed sufficient at the time; and it was accepted by the *cestui*, who was competent to judge of the value; held, the transaction was not void. Stuart v. Kissam, 11 Barb. 271.

(b) Where one of two partners, in his own name, and with his own funds, pur-

chased in fee the premises on which the firm, under a lease, was conducting its business, (after the term limited for the partnership had expired, but before an actual dissolution,) such purchase being made, not fraudulently, but without the consent or knowledge of his co-partner, and the purchase of the real estate not being any part of their ordinary business; held, the latter could not, at his election, claim that the premises were partnership property. Anderson v. Lemon, 4 Sandf. 552.

§ 39. Although, on a bill for partition by an heir against the administrator who had purchased the land, or his grantee, the purchase by the administrator may be set aside as fraudulent; yet in equity the sale will be set aside only on equitable terms ~~as~~ against the grantee, though its invalidity has previously been established in a suit at law touching another piece of land, included in the same administrator's sale and deed, in which no terms were or could be imposed.<sup>1</sup>

§ 40. A *cestui que trust* can purchase at a sale of the trust estate as freely as a third person, but he does not become a trustee for parties interested without a repayment to him of the purchase-money.<sup>2</sup>

§ 41. A trustee may retain the amount of a loss, occasioned by the failure of a *cestui que trust* to comply with the terms upon which he purchased a portion of the trust estate, out of the income of such trust estate, payable to said *cestui que trust*.<sup>3</sup>

§ 42. The *assent* of parties beneficially entitled under a trust deed will be presumed, in the absence of proof of repudiation.<sup>4</sup> The assent of the trustee is not necessary. If he refuses to execute the trust, a court of chancery will do it for him.<sup>5</sup> Nor is a formal delivery material, the execution of the instrument for the purposes intended being fully proved.<sup>6</sup> The law presumes acceptance by the trustee until the contrary appears, but does not force him to accept, and he may renounce by deed, matter of record, or any written instrument, or by answer in chancery, and it seems even by parol.<sup>7</sup>

<sup>1</sup> *Obert v. Obert*, 1 Beasl. 428.

<sup>2</sup> *Walker v. Brungard*, 18 S. & M. 723.

<sup>3</sup> *Waters v. Waters*, 1 Md. Ch. 196.

<sup>4</sup> *Cloud v. Calhoun*, 10 Rich. Equ.

858; 1 Head, 185.

<sup>5</sup> *Saunders v. Harris*, 1 Head, 185.

<sup>6</sup> *Id.*

*Goss v. Singleton*, 2 Head, 67.

Two partners had been conducting business, on leased premises. The term for their connection had expired, but the business was continuing, with a view to arrange a further term. One of them, with the other's knowledge, was treating with the owners of the reversion for its purchase, professedly intending the premises for the use of the firm, if it continued, and consulting his copartner as

to the price demanded. The latter, privately, without the knowledge of the former, bought the premises with his own means, and in his own name, and then refused to continue the firm permanently. Held, the purchase was not made fraudulently as against the purchaser's partner, and the premises were not partnership property. *Ib.*

§ 43. Where one of several trustees refuses to accept the trust, it is usual for him to *disclaim* by deed, or release all his interest to the others. A *release* implies a prior acceptance, and therefore cannot affect such duties as are founded in personal confidence. Thus, notwithstanding such release, the trustee must still join in a receipt for purchase-money, if the will required that all should sign it.(a)

(a) With regard to the rights and duties of *joint trustees*; in general, they are not responsible for the acts of each other. 2 Story's Equ. 520; 4 Kent, 306, n. See *Lockhart v. Reilly*, 39 Eng. Law & Equ. 385; *Methodist, &c. v. Stewart*, 27 Barb. 553. Thus, where a loss accrues to a trust fund, through the default of one of five trustees, his co-trustees will not be held responsible for such loss, if they have acted in good faith, and exercised that vigilance over the fund, which a man of ordinary prudence will exercise over his own property. *The State v. Guilford*, 18 Ohio, 500.

Otherwise, where money has been jointly received, or a joint receipt given for it, (unless this was a necessary or merely formal act, and proof is given of actual payment to one alone,) or where, though payment was made to one, it was done by the act, direction, or agreement of the other. 2 Story, 520; 4 Kent, 406, n. See *Griffin v. Macaulay*, 7 Gratt. 476; *Banks v. Wilkes*, 8 Sandf. Ch. 99; *Johnson v. Corbett*, 11 Paige, 265; *Richardson v. The State*, 2 Gill, 489; *State v. Guilford*, 15 Ohio, 598.

Where there are several trustees, who unite in a breach of trust, the *cestui que trust*, in seeking relief, may proceed against all or either of the trustees. *Gilchrist v. Stevenson*, 9 Barb. 9.

With regard to the *powers* of joint trustees; in general, they must act together, in order to render their doings legal and effectual.

Thus in receipts and conveyances; their power over the subject matter of the trust being equal and undivided, they cannot act separately. *Ridgeley v. Johnson*, 11 Barb. 527.

A deed in the names of, and purporting to be executed by, three trustees of a trust in lands, appeared, upon its production, to have been, in fact, executed by only two of the trustees. The trustee who did not execute the deed had been appointed only a few months previously to the date of the deed. Held,

that inasmuch as the deed, upon its face, assumed that he was still alive, and he was named as one of the grantors therein, the presumption was, that he was alive at the date of the deed; and that a party claiming under the deed, in order to avail herself thereof, by showing authority in two trustees only to execute it, was bound to prove that such third trustee was dead at the time the deed was executed by the others. *Ib.*

A sale by one of two trustees, of property held by them jointly under an assignment for the benefit of creditors, is void. *Wilbur v. Almy*, 12 How. (U. S.) 180. One of the trustees cannot release a mortgage. *Van Rensselaer v. Akin*, 22 Wend. 549. But it is held, that though, where a trust is appointed for private purposes, all the trustees must join in receipts for money; in cases of public trusts, a majority of the trustees will be sufficient. *Hill v. Josselyn*, 18 S. & M. 597. In Maryland, where one of two trustees appointed by a will relinquishes the trust, the other may execute it. Md. L. 1828, ch. 174.

In North Carolina, it is provided, that, where several executors are appointed in trust to sell lands, if some of them refuse administration, the others may give a valid deed. A similar provision is made in Pennsylvania, where an executor has died, removed, or been discharged; and, in Illinois, where one of the executors empowered to sell dies. In Ohio, a surviving trustee under a will may execute it, unless an intention is expressed to the contrary.

In Kentucky it is held, that, where a mere discretionary power to sell lands is given to several executors, they have a *power*, without an *interest*, and one cannot sell alone, though the rest do not qualify. But a devise to executors to sell, for payment of debts, gives them an interest. In New York, upon the refusal of one trustee to accept the trust, the whole estate vests in the others, as if the former were dead, or had not been

§ 44. After accepting and entering upon the execution of a trust, or perhaps even after suffering himself to be appointed, the trustee cannot disclaim or surrender it without the assent of the *cestui* or order of court.<sup>1</sup> It is said any change of relation requires mutual consent.<sup>2</sup> Also that the relation is not destroyed by an agreement of the settlor and trustee.<sup>3</sup> But although equity will not disturb a voluntary settlement in trust, on application of the settlor, yet, when the purpose of the trust is satisfied, and he alone has any interest in the property, equity will order a reconveyance.<sup>4(a)</sup>

§ 45. A trustee cannot delegate his power, as, for instance, a power to sell.<sup>5</sup>

<sup>1</sup> *Dieffendorf v. Spaker*, 10 N. Y. (6 Seld.) 246; *Sheperd v. McEvers*, 4 John. Cha. 186. See *Mass. St.* 1848, 278; *Chaplin v. Givens*, Rice, 182.

<sup>2</sup> *Gunter v. Janes*, 9 Cal. 648.

<sup>3</sup> *Smith v. Brannan*, 18 Cal. 107.

<sup>4</sup> *Eaton v. Tillinghast*, 4 R. I. 276.

<sup>5</sup> *Hawley v. James*, 5 Paige, 818.

named. And, if one refuse to accept, and formally renounce the trust, the Court of Chancery has no authority to reinstate him, even with his consent, and on application of another trustee. 1 N. C. Rev. Sts. 281; *Purd*, 301-2; *Illin. Rev. L.* 641; *Woolridge v. Watkins*, 8 Bibb, 349; *Baird v. Reman*, 1 Mar. 215; *Swan*, 1001; *King v. Donnelly*, 5 Paige, 46; *Schoonhoven*, Ib. 559. See *Champlin*, 8 Edw. 571; *Niles v. Stevens*, 4 Denio, 399; *Taylor v. Morris*, 1 Comst. 341. In Missouri, where there are joint trustees, and one dies, the others take by survivorship. *Stewart v. Pettus*, 10 Mis. 755.

(a) All the trustees of a will declined to act, and did not act or take upon themselves the trusts of the will. A petition was presented for the appointment of certain persons as trustees, "in the place or stead of" the trustees so declining to act, who appeared by counsel and disclaimed. Held, that the disclaiming trustees were, nevertheless, "existing" trustees, so as to authorize an order appointing the new trustees in their "place or stead," within the meaning of the 32d section of the Trustee Act. of 1850. *Tylers, &c.* 8 Eng. Law & Eq. 96.

A marriage settlement contained a power for the two trustees and the survivor of them, and the executors or administrators of such survivor, to sell certain estates with the consent of the

husband and wife. The settlement contained no power of appointing new trustees. One trustee died; the other trustee went to reside abroad; and, upon a bill filed for that purpose, two new trustees were appointed under an order of the court. Held, that the trustees appointed by the court had no right to execute the power of sale. *Newman v. Warner*, 7 Eng. Law & Eq. 182.

A and B contracted for the building of a house on a certain lot, which A erected, and for which B became indebted to him in the sum of \$6,000. Shortly afterwards, B conveyed the house and lot to A and C, in trust for the use of B's wife and children, and to be held by them free from B's debts. After B's death, A prosecuted his claim against B's estate, and sought by a bill in equity to have the trust estate sold under his execution. Held, that, having accepted the office of trustee, A could not renounce it; and, as he was to hold the property free from B's debts, he could not enforce his own claim against the trust estate, as it would be a violation of his duty as trustee. *Strong v. Willis*, 8 Florida, 124.

Where a testator provides that his executors shall sell, lease or dispose of his real estate at their discretion, the trust is personal; and, if the executors renounce, it cannot be executed by an administrator under the will. *Armstrong v. Park*, 9 Humph. 195.



§ 46. If a trustee refuses to accept the trust, the Court of Chancery will either appoint a new one, assume the execution of the trust itself, or direct a release to other trustees, if there are such, who are willing to accept the office.<sup>1</sup> A Court of Chancery may also, in some cases, remove a trustee from office, though he is willing to act. As where his co-trustees refuse to join with him; or where a female trustee marries a foreigner, though she expressly disclaim all intention of going abroad. And it is said there is great inconvenience in a married woman's being trustee.<sup>2</sup>

§ 47. It is usual to provide expressly in trust deeds, that, if any of the trustees die, become incapable of acting, or wish to relinquish the trust, a new trustee shall be appointed, either by the others or by the *cestui*, and the property conveyed to him jointly with the rest.(a) Where there is no such clause, the

<sup>1</sup> 2 Brev. Dig. 805; *Barnet v. Barnet*, 4 Des. Cha. 454; *Cooper v. Henderson*, 6 Bin. 192; *Lining v. Peyton*, 2 Des. 375; *Travell v. Danvers*, Finch. 880; *Swan*, 1001; *Com. v. Barnitz*, 9 Watts, 252; *Ebert*, 9, 800; *Carlisle*, Ib. 332; *Snyder v. Snyder*, 1 Md. Ch. 295; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *McCartney v. Bostwick*, 32 N. Y. (5 Tiff.) 53; *Graff v. Bennett*, 32 N. Y. (6 Tiff.) 9.

<sup>2</sup> *Uvedale v. Ettrick*, 2 Cha. Cas. 20; *Lake v. Delambert*, 4 Ves. 592-5. See *Wright v. Miller*, 3 Barb. Ch. 382; *Craig*, 1 Barb. 83; *Gibbes v. Smith*, 2 Rich. Eq.

181; *Sloo v. Law*, 1 Blatch. 512; *Berry v. Williamson*, 11 B. Mon. 245; *Jones &c.* 4 Sandf. Ch. 615; *Rigler v. Cloud*, 2 Harr. (Pen.) 361; *Childe v. Willis*, 2 Eng. L. & Equ. 356; *Watts*, 4 Ib. 67; *Tunstall*, 5 Ib. 113; *Turner v. Maule*, Ib. 222; *Plyer &c.* Ib. 232; *Robert*, 2 Strobb. Equ. 86; *Bayles v. Staats*, 1 Halst. Ch. 513; *Davidson &c.* 7 Eng. L. & Equ. 161; *Davies &c.* Ib. 8; *Farrant*, Ib. 47; *Lill v. Neafie*, 31 Ill. 101; *Fisk v. Stubbs*, 30 Ala. 385; *Smyth v. Oliver*, 31 Ala. 39; *Bush's &c.* 33 Penn. 85.

(a) Where real estate is conveyed to the grantee and his successors, in trust, with no specific power to appoint a successor, such power cannot be legally exercised by the grantee. *Wilson v. Towle*, 36 N. H. 129.

Where a trustee is appointed by deed, with a provision that, in case of his decease or legal incapacity, the chancellor shall be vested with all the trusts and confidences reposed in the trustee named; the chancellor may appoint a trustee without acquiring jurisdiction over the heirs and personal representatives of the *cestui que trust*. *Morrison v. Kelly*, 22 Ill. 610.

The trust estate is held to vest in the new trustee. *Parker v. Converse*, 5 Gray. 336.

A testator, by his will, appointed A and B to be his trustees. He then directed that, "if the trustees hereby appointed, or to be appointed, as hereinafter is mentioned, should die," &c., it should be lawful for other trustees to be appointed as therein mentioned. A died in the lifetime of the testator. Held, that under the power a new trustee could be appointed in the place of A. *Hadley's Trust*, 9 Eng. L. & Eq. 67.

A testator, by his will, appointed A and B to be his trustees, and directed that, if they should die or desired to be discharged from, or refused or declined to act, it should be lawful for the surviving or continuing trustee or trustees, or, if there should be none such, then for the trustee so desiring to be discharged,



Court of Chancery will appoint a new trustee after a release from the former one. This may be done upon a bill filed against the remaining trustees, and by reference to a Master.<sup>1</sup> And Chancery will appoint a new trustee, notwithstanding, by the will creating the trust, such appointment seems to be confided to the original trustee. So, if one trustee declines, Chancery will appoint a receiver for an infant *cestui*.<sup>2(a)</sup>

§ 48. All persons are capable of being trustees. In England, the king, who cannot be seised to a use, may be a trustee, and the remedy against him is in the exchequer. So, in this country, a State may be a trustee. So a corporation may hold in trust for its own members or others, and is subject to the

<sup>1</sup> *Buchanan v. Hamilton*, 5 Ves. 722; *Stuyvesant*, 3 Edw. 299; *Cape Sable, &c.* 8 Bland, 627; *Winder v. Diffenderfer*, 2, 167; *Berry*, Ib. 322; *Jones v. Stockett*, Ib. 434; *Clay*, Ala. 850; *Leggett v. Hunter*, 25 Barb. 81; *Abernathy v. Abernathy*, 8 Flori, 248; *Ross v.*

*Crockett*, 14 La. An. 811; *Leggett v. Hunter*, 19 N. Y. 445; *Gamble v. Dabney*, 20 Tex. 69.

<sup>2</sup> *Dunscomb v. Dunscomb*, 2 H. & Mun. 11; *Tait v. Jenkins*, 1 Y. & Coll. Cha. 492. See *Goodwin v. Hubbard*, 15 Mass. 210.

or refusing or declining to act, to appoint new trustees. A died. Held, that B, declining to act, except for the purpose of appointing new trustees, had the power of appointing new trustees in the place of A and B. Ib.

In South Carolina, in case of the substitution of one trustee for another, no deed is necessary from the one to the other, but the statute of 1796 executes the transfer by the order of the court making the substitution. *McNish v. Guerard*, 4 Strobb. Eq. 66.

When a trustee retires, and new trustees are appointed by the court, the retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, 1 Eng. Law & Eq. 125.

A demise of lands was made to trustees for 1,000 years on certain trusts. On a petition for the appointment of new trustees, it was held, that the reversioner ought to be served with the petition. *Farrant's Trust, in re*, 7 Eng. L. & Eq. 47.

Trustees are not to be removed from part of their trust, leaving them burdened with and responsible for the remainder; nor will such a trust be discharged until fully performed, or the *cestuis que trust* are in a condition to

manage it themselves. *Sturges v. Knapp*, 31 Vt. 1.

Devise to H and R, their heirs and assigns, and the survivor of them, upon certain trusts. R died before the trusts were fully executed. Held, it was the duty of the probate court, under Rev. Sts. ch. 69, sec. 8, the will being silent on the subject, to appoint a co-trustee. *Dixon v. Homer*, 12 Cush. 41.

So long as a trustee is willing to execute a power of sale, the court will not, in a suit to which he is not a party, appoint another to execute it. *Williams v. Conrad*, 30 Barb. 524.

If the acts or omissions of the trustee or executor are such as to endanger the property, or to show want of capacity or reasonable fidelity, equity may remove him or require security. *Holcomb v. Coryell*, 1 Beas. 289.

(a) In Kentucky, where there is a devise to two in trust, without mentioning the survivor, upon the death of one, one-half the trust estate passes to his heirs. So a trustee may devise his estate, and, if the devisee renounce, the trust will pass to the heirs. *Sanders v. Morrison*, 7 Mon. 56; *Waggener v. Waggener*, 8, 545. See *Waltons v. Coulson*, 1 McL. 182.

jurisdiction of Chancery.<sup>1</sup> So a person, although in debt, or even totally insolvent, is not thereby disqualified from taking and holding real estate as a trustee. The fact is not of itself evidence, that the trust was introduced to shield the property from his creditors.<sup>2(a)</sup>

§ 49. A trust, once created, is said to fasten itself on the estate.(b) Chancery never wants a trustee. Hence, when the trustee dies or becomes incapable of acting, the court will provide for the continuation of the trust, by compelling the legal owner of the estate to perform it. So, also, where no trustee is appointed, if the object of the grant or devise cannot be otherwise effected, the court will appoint or imply a trustee. Thus, where land is devised upon certain trusts, to a company which is incapable of taking it, the heir-at-law of the testator shall be held a trustee.(c) So, where land is devised to a married woman, for her separate use, her husband shall be a trustee for her.(d) And the same has been held in Tennessee, in the gift of a slave to a woman and the heirs of her body. So, where no trustee of the wife is appointed by an ante-nuptial marriage settlement, by which the husband stipulates that the wife shall enjoy her own property, the husband will be treated as trustee in equity, and compelled to account to his wife, as such. So, where the only obstacle to the execution of a trust created by a will, is the refusal of trustees to accept the trust, the court will supply the defect by appointing new trustees.

<sup>1</sup> Penn v. Lord Baltimore. 1 Ves. 458; 8 Comm. 488; Mayor, &c. v. Att'y Gen. 7 Bro. Parl. 235; Att'y, &c. v. Governors, &c. 2 Ves. 46; Green v. Ruther-

forth, 1, 468; 1 Cruise, 322. See Williams v. Conrad, 30 Barb. 524.

<sup>2</sup> Shryock v. Waggoner, 4 Cas. 480.

(a) In Pennsylvania, under the act of 14th June, 1836, discretionary powers given to a trustee by deed will, upon his removal, pass to the trustee appointed by the Court of Common Pleas; not to his heir or personal representative, nor to the survivor of several trustees, nor to a trustee appointed by a court of equity, nor by assignment. Wilson v. Pennock, 3 Cas. 288.

(b) The mere possession of trust property is held to involve a trust. Coffee v. Crouch, 28 Mis. 106. See 2 Head, 67.

(c) Hence, if all the trustees disclaim a devise in trust, the legal estate will vest in the heir. If he is also the *cestui que trust*, and applies to a court, and has a trustee appointed, in whom the legal estate is vested, coupled with the trusts; the legal estate is by necessary implication divested out of the *cestui*. Goss v. Singleton, 2 Head, 67.

(d) It has been held otherwise in South Carolina. Hunter, Rice, 298. See Baskins v. Giles, Ib. 315.

Generally it may be stated, that, where property has been bequeathed in trust, without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee<sup>1</sup>(a) But if the terms of a devise show a manifest intent to charge with the trust only the party to whom the estate is expressly given; upon his refusing to accept the estate, it vests in the heirs, discharged of the trust; and they are not liable to reimburse any moneys expended for the benefit of the *cestui que trust*, who is a minor, by his guardian.

§ 50. Though a trust will not be suffered to fail for want of a trustee; yet, it is said, that being an *incident* merely, it will be suspended or destroyed by the suspension or destruction of the legal estate, as by escheat, disseisin, &c. But it has been held, that, where the estate of the trustee devolves upon the State by escheat, the State holds subject to the trust. A trust will escheat for want of heirs; but the trustee may maintain ejectment against one claiming under the State.<sup>2</sup> On the other hand, if all the purposes of a trust, as to any share of the property, cease, or are illegal, the estate of the trustee ceases *pro tanto*.<sup>3</sup>

<sup>1</sup> 2 Story on Equ. 896; Cloud v. Calhoun, 10 Rich. Equ. 358; Wilson v. Towle, 36 N. H. 129; Tainter v. Clark, 5 Allen, 66; Blanchard v. Blood, 2 Barb. 352; Burrill v. Sheil, 2 Barb. 457; Harkins v. Coalter, 2 Port 463; Souley v. Clockmakers, &c., 1 Bro. 81; Rogers v. Ross, 4 John. Cha. 888; Bennet v. Davis, 2 P Wms. 816; Hamilton v. Bishop, 8 Yerg. 83; Stagg v. Beekman, 2 Edw. 89; Ray v. Adams, 3 My. & K. 237; Hoxie v. Hoxie, 7 Paige, 187; Couch v. Couch,

9 B. Mon. 160; Duffy v. Calvert, 6 Gill, 487; Suarez v. Punpelly, 2 Sandf. Cha. 386; Willis on Trustees, 56.

<sup>2</sup> Benzein v. Lenoir, Dev. Equ. 225; Marshall v. Lovelass, Cam. & Nor. 217; Ward v. Matthews, 10 Gill & J. 448; St. 4 & 5 Wm. 4, ch. 23. See Com. v. Blanton, 2 Monr. 893.

<sup>3</sup> Lorillard v. Coster, 5 Paige, 178; Parks v. Parks, 9 Paige, 167; McMullin v. McMullin, 8 Watts, 236.

(a) By the Maryland act of 1881, ch. 311, sec. 11, mere naked trusts, when the trustee has no beneficial interest or estate whatsoever in the lands, descend to the heir at common law. Duffy v. Calvert, 6 Gill. 487.

But, in a special case, the right of the trustee to reimburse himself, out of the

trust in his hands, the heavy expenses incurred in the attempt to sustain the will, and the ulterior limitations in his favor in the codicil, were held to create such beneficial interests as must exclude this trust from the operation of this act. Ib.

## CHAPTER XXVI.

## TRUST TERMS. TRUSTS IN NEW YORK.

## 1. Trust terms.

## 9. Trusts in New York.

§ 1. TERMS for years are either vested in trustees *for the use of particular persons, or for particular purposes*; or else upon trust, *to attend the inheritance*.

§ 2. Those of the former class are called terms *in gross*. The *cestui que trust* of such a term is entitled to the rents and profits, and may also demand an assignment of the term to himself. His estate is transferable; passes to his executors and administrators; and is equitable, though not legal assets, not being within the statute of frauds. The husband of a female *cestui* has the same interest as in any other term.

§ 3. Terms *attendant on the inheritance*, though constituting a title equally intricate and important in the English law, are practically almost unknown in the United States, and therefore demand only a very brief notice.

§ 4. The attendancy of terms is *the creation of a court of equity*, invented partly to *protect* real property, and partly to *keep it in the right channel*.

§ 5. If a term has been created for a particular purpose, which is satisfied, and the instrument does not provide for a *cesser* of the term, on the happening of that event, the beneficial interest in it becomes a creature of equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When the purposes of the trust are satisfied, the ownership of the term belongs, in equity, to the owner of the inheritance, whether declared by the original conveyance to attend it or not. The trustee will hold the

term for equitable incumbrancers, according to priority; and it is a general rule, that, in all cases where the term and the freehold would, if legal estates, merge, by being vested in the same person, the term will, in equity, be construed to be attendant on the inheritance, unless there be evidence of an intention to sever them.

§ 6. If a *bona fide* purchaser happen to take a defective conveyance, he may remedy the defect and perfect his equitable title, by taking an assignment of an outstanding term, which will give him priority over the intermediate legal estate.

§ 7. As a conveyance of the legal estate in fee of a trustee may be often presumed, so in many cases the surrender of a trust term may be presumed.

§ 8. The equitable interest in a term attendant devolves in the same channel, and is governed by the same rules, as the inheritance. The term becomes consolidated with the inheritance, and follows it in its descent or alienation. On the death of the ancestor, it vests technically in his personal representatives, but in equity it goes to the heir. It must be devised with all the formalities of real estate.<sup>1(a)</sup>

§ 9. By the New York Revised Statutes, uses and trusts are abolished, except as therein authorized and modified; and every estate and interest in land converted into a legal right, with the same exception.<sup>2(b)</sup>

<sup>1</sup> 4 Kent, 86, 94; 1 Cruise, 834, *et seq.*

<sup>2</sup> 4 Kent, 294. See *Beekman v. People*, 27 Barb. 260; *Livingston*, 84 N. Y. (7 Tiffa.) 555; *Post v. Hover*, 33 N. Y. (6 Tiffa.) 593; *Dry. &c. v. Stillman*, 31 N. Y. (4 Tiffa.) 174; *Hone v. Van Schaick*, 20 Wend. 564; *Darling v. Rogers*, 22. 488; *Jackson v. Edwards*, *Ib.* 498; *Rogers v. De Forest*, 7 Paige, 272; *Gott v. Cook*, *Ib.* 521; *Hone v. Van Schaick*, *Ib.* 221; *De Peyster v. Clendening*, 8 Paige, 295; *Van Vechten v. Van Vechten*, *Ib.* 104; *Vail v. Vail*, 7

*Barb.* 226; *Leggett v. Perkins*, 2 Comst. 297; *Tucker v. Tucker*, 5 Barb. 99; *Selden v. Vermilya*, 8 Comst. 525; *Yates v. Yates*, 9 Barb. 824; *Sterrick v. Dickinson*, 9. 516; *Craig v. Craig*, 8 Barb. Ch. 76, 9; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 84; *M'Cosker v. Brady*, *Ib.* 329; *Mason v. Jones*, 2 Barb. 229; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Mason v. Mason*, 2 Sandf. Ch. 432; *Arnold v. Gilbert*, 8; 531; *Bellinger v. Shafer*, 2 Sandf. Ch. 293.

(a) I have been able to find no case in the American Reports, upon the subject of attendant terms. I am informed by one of the counsel in a case in Massachusetts. (*Salisbury v. Bigelow*, S. J. C. March, 1838,) that the subject was there

much discussed—probably by way of analogy and illustration merely. By St. 8 and 9 Vict. ch. 112, sec. 2, terms attendant are abolished as soon as satisfied. 1 Wash. R. P. 309.

(b) In Wisconsin, (Rev. Sts. ch. 57,

§ 10. In relation to trusts, these statutes abolish passive trusts, where the trustee has only a naked and formal title, and vest the whole beneficial interest, or right in equity to the possession and profits, in the *cestui que trust*. The latter takes a legal, corresponding with his beneficial interest; and no estate or interest vests in the trustee.<sup>1</sup>

§ 11. Trusts are confined to two classes. 1. Trusts arising or resulting by implication of law. But the payment of the purchase-money by one man, for land conveyed to another, creates no trust in favor of the former, (a) except in relation to his creditors existing at the time, and excepting also a conveyance made to the latter without the consent of the former, in violation of some trust. But no resulting trust is valid against a purchaser for valuable consideration, without notice. 2. Certain classes of *active* or *express* trusts, where the trustee is clothed with some actual power of disposition or management, which requires a legal estate and actual possession. Express trusts are allowed: 2. To sell lands for the benefit of creditors; 3. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 4. To

<sup>1</sup> 4 Kent, 303; *Cushney v. Henry*, 4 Paige, 345; *Yates v. Yates*, 9 Barb. 324.

p. 318.) uses and trusts are abolished, except as expressly provided.

§ 2. Estates now held to use are confirmed.

§ 3 and 5. Any one entitled to possession of land by virtue of an agreement, &c., shall be deemed to have the legal estate.

§ 4. The last section is not to apply to *active* trusts where the trustees have the management and responsibility.

§ 6. The above sections not to apply to resulting trusts.

§ 7. A trust shall not result to the party who pays the purchase-money, another taking the deed; but the deed shall be deemed fraudulent, and a trust shall result to the creditors of the former.

§ 10. A purchaser without notice of a resulting trust shall not be affected by it.

§ 11. Express trusts may be created to sell for creditors; to sell, mortgage or lease for legatees, or pay a charge on

land; to receive income and apply to the use of any person, subject to chap. 56; and in some other cases.

§ 12. A devise to sell, without power to receive rents, &c., shall be construed a power merely.

§ 13. The surplus of rents of trust property, beyond what is necessary to the support of the *cestui que trust*, is subject to his debts.

§ 14. Trusts shall not be deemed powers, when they can be lawfully executed as such.

(a) But see *Ross v. Hegeman*, 2 Edw. Chan. 378, that, where there is a joint advance of money upon a purchase by two in the name of one, a trust results to the other, though he did not pay the money till after completion of the purchase. If A purchases with money of B, and the deed is made to A by consent of B, no trust results to B. *Norton v. Stone*, 8 Paige, 222.

receive rents and profits, and apply them to the support and education of any person, or to accumulate them for the purposes and within the limits mentioned. In these cases, the trustee takes the whole estate in law and equity, subject only to the execution of the trusts. If an express trust is created for any other purpose, no estate vests in the trustee; but if the act authorized is lawful *under a power*, the trust is valid as a *power in trust*. Every estate and interest not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust, and he may dispose of the lands, subject to the trust, or in the event of its failure or termination; and the grantee or devisee will have a legal estate, as against all persons but the trustee. The conveyance to the trustee must contain a declaration of the trust; otherwise it will be absolute against subsequent creditors of, or purchasers from, the trustee without notice. When thus declared, any act of the trustee in contravention of the trust is void. Upon the death of all the trustees, the trust vests in the Court of Chancery, and does not pass to the representatives of the surviving trustee.<sup>1</sup>

§ 12. Where some of the trusts provided for are valid, and others invalid, the trustee will take a legal estate for the fulfilment of the former only, unless the whole are so blended together, that it is impracticable to execute one without the other, in which case all will be void. And any subsequent limitation, which is invalid as creating a perpetuity, shall be deemed wholly void, in determining the validity of the legal estate itself, or other preceding trusts.<sup>2</sup>

§ 14. An *annuity* is a *legacy* of several annual sums in gross; and, if payable from the rents and profits of land, a *charge* upon such land. Hence, an express trust to lease lands and receive the rents, &c., for payment of such annuity, is valid under section 55 of the statute.<sup>3</sup>

§ 14. In such case, there is a resulting trust in the surplus

<sup>1</sup> 4 Kent, 803-4-5.

<sup>2</sup> Hawley v. James, 5 Paige, 818; Dupre v. Thompson, 4 Barb. 279; 8, 587;

De Kay v. Irving, 5 Denio, 646; Tucker v. Tucker, 5 Barb. 99.

<sup>3</sup> Ib.



rents, &c., in favor of the person presumptively next entitled to the estate.<sup>1</sup>

§ 15. Where certain property is to be invested in land, in trust to receive the rents and profits for the use of a *cestui que trust*, and the interest of the latter is inalienable, (under the Rev. Statute, sec. 63,) even the consent of the parties and of the Court of Chancery also will not authorize any act which is virtually an alienation. But, if the property is directed to be invested in lands in a certain place, the court may authorize an investment in other lands, with the consent of parties, and may itself consent on behalf of infants.<sup>2</sup>

§ 16. A trust to receive rents and profits, and *pay them over*, was a familiar one at common law; but at first was held not to be valid under the Revised Statutes. The phrase used in describing the third class of express trusts, "apply them to the use," was decided to mean that the trustee should *provide means and pay debts*; that he is to judge of the propriety of the expenditures, and has the whole legal and equitable estate; that the *cestui* has no estate, but only a right to enforce the trust in equity. This class of express trusts was said to be intended for the cases of minors, *femes covert*, lunatics and spendthrifts. But in a later case it has been held, that one who creates a trust, to receive rents and profits or income for the use of another, may direct the manner of their application, and that they be periodically paid over to the *cestui*, to provide him with necessities.<sup>3</sup>

§ 17. In order to receive rents and profits for the use of another, the trustee must have a legal title to the land. If such title is vested in the *cestui* himself, no valid *power in trust* can be reserved to the trustee.

§ 18. A testator directed that his property should be invested in lands, to be conveyed to his children, but in trust for their guardian to receive the rents and profits for their use, both during and after their minority, so long as he should think proper. Held, the trust was void under the Revised Statutes; that

<sup>1</sup> *Ib*; *Irving v. De Kay*, 9 Paige, 521.

<sup>2</sup> *Wood v. Wood*, 5 Paige, 596.

<sup>3</sup> *Coster v. Lorillard*, 1835. 4 Kent, 809, n.; *Gott v. Cook*, 7 Paige, 521.

the guardian took no estate as trustee, but could hold the fund only as guardian.<sup>1</sup>

§ 19. A trust for the accumulation of rents, &c., or income, is invalid, unless it is for the sole benefit of an infant, and he to be paid absolutely on coming of age.<sup>2</sup>

§ 20. Trusts of real property for charitable uses are within the prohibition of the statute, unless authorized by the act of 1840, respecting grants and conveyances to colleges and other literary institutions, and made to such trustees as are therein authorized to hold.<sup>3</sup>

§ 21. A religious society may purchase and hold land in trust for any use within the general objects of its incorporation. Where a grant was made to a religious society in trust for the support of the minister; held, this use was within the "other pious uses" for which religious societies were empowered to purchase and hold real property by the general act for their incorporation.<sup>4</sup>

§ 22. An annuity, arising from the proceeds of real and personal estate in the hands of trustees, is beyond what is necessary for the support of the party and his family, subject to the claims of his creditors; and the Court of Chancery will not, under the provision empowering them to exonerate from creditor's suits such funds created by third persons, insert in an injunction a qualification excepting trust funds so created.<sup>5</sup>

§ 23. A trust created by will to executors, to sell and convey gores of land to straighten lines; to rent houses and collect rents; to repair; to pay taxes and assessments; to effect insurance, and pay over the surplus to the devisees thereof; such trust to continue until the death of the widow of the testator, and one year afterwards—is illegal under the statute, which prohibits the alienation of trust estates, and the creation of trusts to extend beyond two lives in being.<sup>6</sup>

§ 24. It cannot be objected to the validity of a trust, that it

<sup>1</sup> Wood v. Wood, 5 Paige, 597.

<sup>2</sup> Hawley v. James, 5 Paige, 818.

<sup>3</sup> Yates v. Yates, 9 Barb. 324.

<sup>4</sup> Tucker v. St. Clement's Church, 3 Sandf. 242.

<sup>5</sup> Rider v. Mason, 4 Sandf. Ch. 351.

<sup>6</sup> Tucker v. Tucker, 5 Barb. 99.

unduly suspends the alienability or absolute ownership of the property, where the execution of the trust by selling is unlimited as to time, if the time is not made to depend on an event which might carry it beyond the duration of two lives.<sup>1</sup>

§ 25. A general power in trust, the execution or non-execution of which does not depend on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity.<sup>2</sup>

§ 26. A husband, by post-nuptial settlement, conveyed all the property acquired by his marriage to trustees, "to hold and to keep the principal and interest thereof during the said marriage, exempt from his debts, contract or control; to be managed and disposed of on her separate orders or receipts, or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister, or may hereafter in any manner accrue to her in all respects as if she were unmarried." Held, the deed passed to the trustees all the interest which the husband had acquired by the marriage, and created a good and valid trust, and not a mere nominal trust, nor did it contemplate a duration greater than was allowed by statute.<sup>3</sup>

§ 27. Held, also, that such deed did not pass, as the husband had no power to convey, the fee, or the right to dispose of the real estate of the wife, nor the rents and profits thereof beyond his lifetime.<sup>4</sup>

§ 28. Held, also, that the power of appointment by the deed to the wife extended to the absolute disposal by her of the principal and income, or of any part thereof.<sup>5</sup>

§ 29. The Revised Statutes do not apply to a will, creating a trust which was executed before they were passed.<sup>6</sup>

§ 30. Where a testator, by a will made in 1815, devised his estate to his three grandchildren, directing that it should not be sold or alienated, but that his executors should from time to time lease or rent it, on such terms and for such rent as they might deem most advantageous to the heirs, keep certain portions of it in

<sup>1</sup> Arnold v. Gilbert, 5 Barb. 180.

<sup>2</sup> Ib.

<sup>3</sup> Cruger v. Cruger, 5 Barb. 225.

<sup>4</sup> Ib.

<sup>5</sup> Ib.

<sup>6</sup> Stewart v. McMartin, 5 Barb. 438.

repair, and pay the rents and profits annually to the heirs, in equal proportion; held, notwithstanding the absence of express words of devise, an active trust, not a mere leasing power, and that the executors took the legal estate during the lives of the grandchildren.<sup>1</sup>

<sup>1</sup> Brewster v. Striker, 1 Smith, 821.

## CHAPTER XXVII.

## ESTATE ON CONDITION. NATURE AND KINDS OF CONDITIONS.

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|---|---|
| 1. Definition.  | 14. Repugnant conditions; cannot be made void by a change of the law. |
| 2 & n. <i>Implied</i> or <i>express</i> ; <i>charge</i> . | 15. Repugnant obligations.  |
| 3. <i>Precedent</i> or <i>subsequent</i> .                | 16. Conditions against assignment of lease.                           |
| 6. May belong to any estate.                              | 20. Confession of judgment, whether a transfer.                       |
| 7. Things <i>executed</i> and <i>executory</i> .          | 21. For re-entry in case of insolvency.                               |
| 8. Must determine the whole estate.                       | 23. In restraint of marriage.   |
| 9. To whom reserved.                                      |   |
| 12. Impossible conditions.                                |   |
| 18. Illegal conditions.                                   |   |

§ 1. A *condition* is said to be a qualification or restriction annexed to a conveyance, by which, upon the happening or not happening of a particular event, or the performance or non-performance of some act by the grantor or grantee; an estate shall commence, be enlarged, or be defeated.<sup>1</sup> Lord Mansfield remarked, that at common law the only modification of estates was by condition.<sup>2</sup>

§ 2. A condition is either *implied* or *express*. Implied conditions are those created by law, and not by any express words; that is, *the legal incidents* of estates. For instance, at common law, a tenant for life held his estate upon the implied condition, that any attempt by him to convey in fee would be a forfeiture of his interest; and also upon the implied condition, not to commit waste.<sup>3</sup>(a) Express conditions are those created by

<sup>1</sup> 2 Cruise, 4.

<sup>2</sup> Co. Lit. 233 b.

<sup>3</sup> Doe v. Hutton, 3 B. & P. 654, n.

(a) A condition is to be distinguished from a *charge*. The general difference seems to be, that any breach of condition involves a forfeiture of the estate to which it is attached; while a charge, though constituting for the most part a

lien or burden upon the estate, and not a mere personal contract, cannot be enforced by forfeiture. The cases upon the subject are numerous, and the distinctions somewhat nice; involving, as will be seen, the construction of language

in creating the estate, and the precise effect of violating the obligations thereby imposed.

Most of the cases are those of a grant or devise of land, to be used for certain *public purposes*. Such a disposition is held to create an estate, and not a mere future reversion or possibility. *Sherwood v. Waller*, 20 Conn. 262.

Some of the leading decisions are subjoined.

Grant, in 1640, by the assembly of the colony of New Haven, of certain land, "for the purpose of planting," to be located by the grantees in separate lots, and held in severalty. Held, these terms did not make a condition or qualification that the lots should be *planted*, in the modern sense of the word, but the grant was for the purpose of a *settlement*. *East Haven v. Hemmingway*, 7 Conn. 186.

A grant of land which has been used as a burying-place to a town. "for a burying-place forever, in consideration of love and affection," and divers other valuable considerations, is not a grant upon condition subsequent. *Rawson v. Inhts., &c.*, 7 Allen, 125.

Grant of land in fee to A and others, in trust for B and others, and their associates, "for the purpose of the public worship of God, and the erection on said premises granted of a church or meeting-house for said worship, as also a house for a clergyman and a school-house." The deed contained the following conditions: "that the grantees, or *cestuis que trust*, or some of them, shall build and finish, within two years from the 9th day of November, 1832, on the lot hereby conveyed, a church or meeting-house for the public worship of God, and shall build and finish, within three years from the said 9th day of November, a suitable dwelling-house for the clergyman, and a school-house. all on the lot hereby conveyed; and in case the said church or meeting-house, and parsonage-house and school-house, shall not be built on said lot, and finished within the respective times above mentioned, then the land hereby granted, with its appurtenances, is to revert to 'the grantors.' And this grant is upon the further condition, that the land, &c., shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as hereinbefore specified, and to no other uses or purposes whatever; otherwise, the same to revert to said corporation of the Canal Bridge, as above mentioned." Afterwards, the grantors extended

the time within which the school-house might be built. A and others conveyed said lot to B and others, in trust for a religious society that had been incorporated, to be held on the trusts and conditions expressed in the deed of the original grantors, made to A and others. The meeting-house, parsonage-house, and school-house, were built on said lot, and were finished, to the satisfaction of the original grantors, within the times mentioned in their deed, and afterwards extended by them. Afterwards another house, connected with the school-house, was built on said lot, for the use of the preceptor of the school; a vestry and two shops were made in the basement of the meeting-house, and the shops leased for secular business; the land, on which the parsonage house was built, was mortgaged for a debt incurred in building on the whole lot; the land, on which the school-house and preceptor's house were built was leased for a long term to an incorporated academy; and said academy mortgaged the same. The original grantors entered upon the land originally granted by them to A and others, for breaches of the conditions in their deed, and brought writs of entry to recover the whole land, as forfeited by such breaches. Held, the second condition in said original deed was repugnant to the previous parts of the deed, and was void; and that the actions could not be maintained. *Proprietors, &c. v. Methodist, &c.*, 18 Met. 385.

A person conveyed to trustees a piece of ground, for the purpose of having a public school-house erected thereon; and the house was accordingly built. Held, the grant was not forfeited, merely because the trustees had permitted religious, political, and temperance meetings to be held in the house, at times when such meetings did not materially interfere with any school taught therein. *Broodway v. The State*, 8 Blackf. 290.

Under the New York statute (1 Rev. Sts. 346), providing that a diversion of salt-works to other purposes than the manufacture of salt should work a forfeiture of the leasehold; the *partial* diversion of a lot, as for the erection of a dwelling-house, &c., was held not to have this effect. *Hasbrook v. Paddock*, 1 Barb. 685.

And, if it did, a subsequent holder of the leasehold estate, under an agreement for an exchange of it for other lands, cannot take advantage of it for the purpose of avoiding such agreement, after he had quietly occupied for several

years, and the other party had made large improvements on the land received by him in exchange; such partial diversion being known to him at the time of making the agreement, and the statute, making a diversion a forfeiture, being a public law, of which he was bound to take notice; and where such forfeiture, if any, had been waived by the people and a renewal of the lease granted. *Ib.*

Whether a deed of land, "for the purpose of a court-house and jail," involves an implied condition against using it for any other purpose, *qu.* If it does, the erection of a stable on the land is no breach of the condition, nor of a dwelling for the jailor, with proper outhouses and a garden. *Jackson v. Pike*, 9 Cow. 69. Grant of land, on condition that certain public buildings should be there erected. By an act passed afterwards, the seat of justice was removed. Held, the land reverted. *Police, &c. v. Reeves*, 18 Mart. 221. See *Austin v. Cambridgeport, &c.*, 21 Pick. 215; *Braithwaite v. Skinner*, 6 Mees. & W. 313.

A granted, for a nominal consideration, a lot of land to certain persons, in trust for those who had subscribed, or might thereafter subscribe, towards the erection thereon of a school house and house of public worship, and towards the support of a school, or of the gospel, in said building; providing, that, if the premises should be converted to any other use than as aforesaid, and for a burying-ground, the lot should revert to the grantor and his assigns. One of the trustees permitted a female, in distress, to occupy the premises temporarily, as tenant at will, without rent, though she and her family remained there seven years. Held, no forfeiture. *McKissick v. Pickle*, 16 Penn. 140.

Lands were sold to the city of New York for the purposes of a public square, upon condition that they should forever be used and appropriated for such purposes exclusively, and that the corporation should immediately proceed to regulate the land granted, and enclose and improve it in the manner specified in the conveyance. The corporation joined in such deed, under the corporate seal, and covenanted to stand seised of the premises for the purposes of a public square exclusively, and that such corporation would abide by, observe and perform the conditions imposed upon it by the acceptance of such agreement and conveyance. Held, the corporation was bound to perform the conditions specified in the

deed, and liable in damages to the grantor for the non-performance thereof. *Stuyvesant v. Mayor, &c.* 11 Paige, 414.

Held, also, that the grantor might, at his election, re-enter for breach of the conditions, bring an action for damages sustained by the breach of the covenants of the corporation, or file a bill in equity for specific performance. *Ib.*

Conveyance to the commissioners of a county and their successors, in fee-simple, for the purpose of erecting a court-house, jail, &c. The county was subsequently divided, and the seat of justice removed, and trustees were appointed to sell the lots and public buildings, and divide the proceeds between the two counties. Held, the lots did not revert to the heirs of the grantor. See *Seibold v. Shitler*, 84 Penn. 138; acc. *Harris v. Shaw*, 18 Ill. 456.

Where A and B made a parol agreement with the inhabitants of a town and its neighborhood, that they would give the ground for a church and a graveyard for the use of two congregations, if the members of the congregations and the neighbors would erect the house of worship and open a graveyard on the premises; and the church or meeting-house was erected in consequence, and the graveyard opened at the expense of said congregations and other charitable neighbors: held, that the agreement was not within the statute of frauds; that A and B stood seised of the premises as trustees for the use of the two congregations; and, upon a sale by the sheriff under a judgment against A, the sheriff's vendee acquired the title of A, subject to the trust, and became himself a trustee for the original uses. *Beaver v. Filson*, 8 Barr. 827.

Where land was conveyed to trustees to erect a Roman Catholic church, and lay out a place of burial, with a condition that, if the church was not erected, and the remainder of the lot appropriated for burial purposes, the deed should be void, &c., and no church was ever erected on the lot, but a church was erected, by the same society of Christians, upon a lot in the neighborhood, and the lot in question was used exclusively as a place of sepulture; and, the corporation of Baltimore being about to sell the lot for non-payment of a paving tax, the pastor of the church and one of the congregation filed a bill for an injunction: held, neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the interposition of a court of



equity. *Dolan v. The Mayor, &c.*, 4 Gill, 394. See *Rawson v. Uxbridge*, 7 Allen, 125.

Contributors to a fund, on condition that a literary and theological seminary shall be located permanently in a specified place, and in consideration thereof, which is accordingly done, have a right to apply for an injunction to prevent an illegal and unauthorized removal of the seminary to another place. *Hascall v. The Madison, &c.* 8 Barb. 174.

The question has also often arisen, whether certain terms of limitation create merely a charge upon land given to one person for the benefit of another, or a condition, by breach of which the estate is forfeited. Thus, a testator devised all his real estate to his sons, by *their paying* to each of his daughters so much "out of the estate." This payment not being made, one of the daughters brings a writ of entry for a part of the land, as forfeited by breach of condition. Held, the sons took an absolute estate in fee, charged with the legacies, not an estate on condition; that this charge would follow the property into the hands of any purchaser with notice; but that the present action could not be sustained. *Taft v. Morse*, 4 Met. 523; acc. *Moraney v. Buford*, 1 M'Lean, 195. See *Fox v. Phelps*, 17 Wend. 393; *Crawford v. Severson*, 5 Gill, 448; *Hackadorn, &c.* 11 Penn. 86; *Wright, &c.* 2 Jones, 256. Devise to a son of the testator, *he paying* his younger brother £100. Held, a charge. *Lockett v. White*, 10 Gill & J. 480.

Devise—"I will that A shall be supported out of my estate—and shall have the use of the north room in my house," while single. If she marries, "I give her \$150, to be paid her by my son B, in full of all demands." B, being devisee of the whole estate, gave bond for payment of debts and legacies, and afterwards conveyed the land to C, who had notice of the above devise. Held, a charge upon the real estate (A having never married) if the personal was insufficient, to be enforced either by a suit on the bond or against C. *Sheldon v. Purple*, 15 Pick. 528.

Devise to A, son of the testator, of three lots of land, "by his paying the other children, towards their share of my estate, \$300;" and of the residue of his estate, to his children. Held, a charge on the land of A. *Ward v. Ward*, 15 Pick. 511. See *Button v. Button*, 2 Beav. 256; *Veazey v. Whitehouse*, 10 N. H. 409.

A will contained legacies and a devise

to A, with a condition annexed; proceeded to give legacies to B; and, by a subsequent clause, ordered that A should pay all debts. Held; this was not a mere personal charge upon A, but, with the legacies to B, a charge upon the real estate. *Sands v. Champlin*, 1 Story, 876. A devise, in respect thereof charging the devisee with debts and legacies, is in rem, and a charge upon the property. *Ib.*

A testator, in one clause of his will, directed that his wife should "have a decent and comfortable support to be derived from all his lands and tenements." In a subsequent clause, he devised to his son A, in fee-simple, a part of his lands, "subject, nevertheless, to a charge of five hundred dollars, to be paid by him, his heirs, &c., to his brother B, as soon as he, the said B, shall have completed his studies, &c.; a good and sufficient voucher for the payment of the said sum of five hundred dollars, &c., shall vest in him, his heirs or assigns forever, a good, pure and absolute estate of inheritance in the said lands and tenements." Held, notwithstanding this charge in favor of B, the land so devised was also subject to its proportionate share of the charge in favor of the wife. *Baird v. Baird*, 7 Ired. Eq. 265.

Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where an intention to make an estate, specifically devised, the fund for the payment of a legacy, is clearly exhibited; such legacy is a charge upon the estate; and equity may decree that the person in whom the estate is vested shall execute the trust, although he be an heir of the testator, who has taken the estate upon the devisee's declining to accept it. *Bugbee v. Sargent*, 27 Maine, 888.

Conveyance, in consideration of certain profits and advantages, contained in a bond of even date, by which the bargainer was to be supported for life by the bargainee, and to which bond a *nota bene* was added, that the land was not to be sold, made way with, or disposed of. Held, not a defeasance, but the bargainor's sole redress rested in the bond. *Hart v. Dougherty*, 6 Jones, 86.

That the grantee shall support the grantor for life, is not a personal condition in a deed, and the grantee may alienate the estate and transfer the charge. *Wilson v. Wilson*, 38 Maine, 18.

Where a testator devised a farm to his son, "he paying thereout unto my other children, hereinafter named, the several sums of money to them respectively be-

express words; as, for instance, a condition in a lease, that, if the rent shall not be paid at the day, the lessor may re-enter.<sup>1(a)</sup>

§ 3. Conditions are either *precedent* or *subsequent*; the former must be performed before the estate will vest, the latter enlarge or defeat an estate already created. Whether a condition shall be regarded as precedent or subsequent, depends not on any form or location of words, but on the fair construction of the contract, and plain intention of the parties.<sup>2</sup> More especially if, in case of a will, the particular clause in question, or the whole will, indicates that the condition must be performed before the estate can vest, the condition is precedent. If the act prescribed does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent.<sup>3</sup> Where covenants go to *the whole* of the consideration on both sides, they are conditions precedent; where only to a part, otherwise;

<sup>1</sup> Lit. 828.

<sup>2</sup> *Thompson v. Thompson*, 9 Ind. 323; *Chapin v. Harris*, 8 Allen, 594; *Lowell, &c. v. Hilton*, 11 Gray, 407; *Thorp v. Thorp*, 12 Mod. 464; *Rollins v. Riley*, 44 N. H. 9; *Newkirk v. Same*, 2 Caines, 352; *Barruso v. Madan*, 2 John. 148; *Brockenbrough v. Ward*, 4 Rand. 352; *Green v. Thomas*, 2 Fairf. 818; *Finlay v. King*, 3 Pet. 374; *Tompkins v. Elliott*, 5 Wend. 496; 7 Gill & J. 240; *Gardiner*

*v. Corson*, 15 Mass. 500; *Barry v. Alsbury*, 6 Lit. 151; *Passmore v. Moore*, 1 J. J. Mar. 591; *Dallman v. King*, 4 Bing. N. 105; *Turner v. Tebbult*, 2 Y. & Coll. Cha. 225; *Thompson v. Bright*, 1 Cnsh. 420; *McCullough v. Cox*, 6 Barb. 386; *Houston v. Spruance*, 4 Harring. 117; *Shinn v. Roberts*, 1 Spencer, 435.

<sup>3</sup> 3 Pet. 374; *Underhill v. Saratoga, &c.*, 20 Barb. 455.

queathed;" such pecuniary legacies are a charge upon the land. *Swoope's*, 3 Cas. 58.

The following are some other cases of conditional devises. "I will—that loth to offend by the word *pay*, &c., to H and his wife I wish their acceptances of twenty-five acres of land," &c. The testatrix lived in H's family, who afterwards sued the executor for her board, but without success. Held, a conditional devise, which H elected to relinquish by bringing the suit. *Hapgood v. Houghton*, 22 Pick. 480. Devise to A and B, sons of the testator, of all his real estate, on condition, if either made any claim on the estate, he should have no right under the will. A made such claim, and received payment from the executor. Held, a forfeiture of his moiety, which passed to the heirs. *Sackett v. Mallory*, 1 Met. 355. Devise

of a fractional part of certain land, "to be taken by the devisee where he shall choose or select," &c. Held, not a condition precedent to the vesting of the estate, but the devisee became a tenant in common, with a right of selection. *Brown v. Bailey*, 1 Met. 254.

Devise on condition of maintaining the testator's widow for life. If the devisee refuse to accept and perform the condition, the devise is void, and the heirs may enter. *Stone v. Huxford*, 8 Blackf. 452.

(a) Conveyance, "subject to the conditions and obligations contained in an agreement between the parties." Held, a valid legal condition was thereby created, upon breach of which the grantor could recover the land even from an execution purchaser of the grantee's estate. *Bear v. Whisler*, 7 Watts, 144.

and each party must resort to his separate remedy, because the damages might be unequal.<sup>1</sup>(a

<sup>1</sup> Boon v. Eyre, 1 H. Blackf. 278, n. See Barry v. Alsbury, 6 Lit. 151; Minister, &c. v. Bradford, 8 Cow. 457; 20

John. 12; Johnson v. Reed, 9 Mass. 78; Brockenbrough v. Ward, 4 Rand. 852; Clopton v. Bolton, 23 Miss. 78.

(a) Conveyance in fee, reserving a life estate in a part of the land. "This deed is made and to have effect on the following conditions;" viz., payment of money at divers times to several persons. The fee passes, upon condition subsequent. Howard v. Turner, 6 Greenl. 106.

A testator gave a large amount of lands to his wife for life, and all his real estate at her death to A, on condition of his marrying a daughter of B and C, who at the making of the will had no child. Held, the words of gift being in *presenti*, "I give," &c., imported an immediate interest; that, in regard to the portion devised to the wife, inasmuch as B and C were childless at the making of the will, the testator evidently did not contemplate that A would marry, according to the condition, during the life of the wife, and therefore intended that he should take at her death, whether he had thus married or not; that there was no ground for any distinction, with respect to the condition, between this and the other part of the estate; and, therefore, that the devise of the whole was on condition subsequent, and took effect immediately, subject, as to a part of the land, to the wife's possession for life. Finley v. King, 8 Pet. 374. See Taylor v. Mason, 9 Wheat. 825. It would have been otherwise, it seems, if the devise had been, "I devise my lands to A on his marrying B." *Ib.*, 375.

A deed from the trustees of a town contained the stipulation, that the grantee should "allow all people to pass and repass, to fish, fowl and hunt," &c., on the granted premises. Held, this was not a *reservation* or *exception*, but a condition subsequent, upon breach of which the title might, by proper proceedings, be divested. Parsons v. Miller, 15 Wend. 564.

Devise of land to a town, to use and improve forever, and not be sold, but rented out, and the rents applied to support the ministry in the town. Held, a condition subsequent. Brigham v. Shattuck, 10 Pick. 309. Devise to a son in fee, "on condition that, after my decease, he becomes a perfectly sober

man;" if not, the property to *descend* to his wife and children in fee. Held, a condition precedent. Lewisburg v. Augusta, 2 W. & Serg. 65.

A, having an absolute appointment by deed or will over an estate, devised it to her husband B, with power to sell and dispose of the same, or to raise any sum of money thereon by mortgage, as he should think proper, "provided that such part of all and every sum and sums of money, so as aforesaid raised by the said B, either by sale or mortgage, as shall be unexpended at my (his) decease, shall be charged upon the houses belonging to B. situate, &c., to be disposed of immediately after the decease of the said B, that sum to be paid to my four nieces." She also devised the reversion of the estate to her four nieces, in case it should be in mortgage; and, if the estate should not be sold or mortgaged by B, then she devised the same to her said four nieces, as tenants in common in fee. B mortgaged the estate, and died, never having charged the houses with any part of the mortgage-money. Held, the condition was not a condition precedent, and the mortgage was valid. Watkins v. Williams, 10 Eng. Law and Equ. 28.

A, and B his wife, conveyed real estate to C and D, on condition that the grantors should be permitted to continue to occupy the house on the premises, and that the grantees, their heirs, executors and administrators, should furnish the grantors a decent and comfortable support during their (the grantors') lives. Held, the condition was a condition subsequent; and, if the possession of said house and a suitable support were furnished to B, after the death of A, she might claim her dower in the premises. Hefner v. Yount, 8 Blackf. 455.

Where land is devised to A, on condition that he shall pay debts and a legacy, the estate vests in A immediately on the testator's death, and such payment is a condition subsequent. Horsey v. Horsey, 4 Harring. 517.

In a deed, the words "providing they (the grantees) fence the land and keep it in repair," create a condition subse-

§ 5. There is one case, where the distinction between conditions precedent and subsequent becomes very important, the same event producing, in the two cases, directly opposite effects. It will be seen that, if a precedent condition becomes *impossible*, by act of God, no estate can vest; whereas, if the condition is a subsequent one, the estate becomes absolute. So, if the condition be *illegal*.<sup>1</sup>

§ 6. A condition may be annexed to any estate whatsoever.

§ 7. It is said that, as to things *executed*, a condition must be created and annexed to the estate, at the time of making it. Hence, when a condition is made by a separate deed, this must be sealed and delivered at the same time as the principal deed. This point arose in the reign of Edward III, who, having conveyed lands to certain noblemen, attempted, subsequently, to annex a condition to such conveyance. But the condition was held void by all the judges and sergeants.<sup>2</sup> But things *executory*, such as rents, annuities, &c., may be restrained by conditions annexed to them after their creation.<sup>3(a)</sup>

§ 8. A condition must *determine the whole estate* to which it is annexed. Thus, if a feoffment is made on condition that, upon the happening of a certain event, the feoffor may re-enter and hold *for a time*, or the estate shall be void *for a part of the time*; or, if a lease be made for ten years, on condition that in a certain event it shall be void *for five*: these conditions are void. So where there was a conveyance of an estate tail, conditioned to be void in a certain event, as if the tenant in tail were dead; held, inasmuch as the death of the tenant would not

<sup>1</sup> *Infra* ch. 28, sec. 15. See Taylor v. Mason, 9 Wheat. 825; Myers v. Davloss, 10 B. Mon. 394.

<sup>2</sup> Co. Litt. 236 b; Touch. 126; 2 Cruise, 5.

<sup>3</sup> Co. Litt. 237 a.

quent, which is to be taken most strongly against the grantor to prevent a forfeiture. And where the land has remained more than fifty years unfenced, there is a breach of such condition. Hooper v. Cummings, 45 Me. 359.

A conveyance to a railroad corporation, upon the express condition that the company should construct its railroad within the time prescribed by the act of incorporation, is a grant upon a condition

subsequent. Nicoll v. New York, &c., 2 Kern. 121.

(a) This distinction seems to be now of no practical importance, however well founded in the technical rules of the ancient common law. Things *executed* may undoubtedly be modified, subsequently to their creation, by the consent of *both parties*; and things *executory* cannot be without such consent.

terminate the estate, but only his *death without issue*, this condition was void.<sup>1</sup> But a condition may legally be confined to a *portion of the land* which is conveyed. Thus, there may be a conveyance of six acres, with a condition that, upon a certain event, it shall be void as to three. So, also, in case of a lease, it has been seen (ch. 16) that there may be a condition for the lessor to re-enter for non-payment of rent, and *hold till he is satisfied*.<sup>2</sup>

§ 9. A condition can be reserved only to the grantor or lessor, or his heirs, not to a third person. This rule is founded upon the general principle of law, which forbids *maintenance* or the purchase of disputed titles. (See *Maintenance*.) But heirs shall have the benefit of a condition, though not specially named.<sup>3(a)</sup>

§ 10. It is a legal maxim, that nothing which *lies in action, entry or re-entry*, can be granted over. Upon this principle, at common law, a condition, in a lease, for re-entry upon non-payment of rent, did not pass to an assignee of the reversion, even though the tenant attorned to him. This rule, however, is changed by statute.<sup>4</sup>

§ 11. There are many circumstances which may render a condition *void*.

§ 12. *Impossible* conditions(*b*) are void. So those which

<sup>1</sup> Jermin v. Arscott, 1 Rep. 85; 6 Ib. 40.

<sup>2</sup> Corbet's case, 1 Rep. 86 b.

<sup>3</sup> Kellam v. Kellam, 2 Pat. & H. 857; Fonda v. Sage, 46 Barb. 109; Jackson v. Topping, 1 Wend. 388; Co. Lit. 214

a; Winn v. Cole, Walk. 419; King's &c. v. Pelham, 9 Mass. 501. See Parker v. Nichols, 7 Pick. 111; 7 Conn. 201.

<sup>4</sup> Lit. sec. 347; Trask v. Wheeler, 7 Allen, 109.

(a) For, as they are the persons prejudiced by the grant or lease, they ought to have the same means as their ancestors, of recovering the estate. See chap. 28. Devise to a son of the testator of a farm in fee-simple, on condition that his daughters should have the use and occupation of a room in his house, food, &c., while they remained unmarried. Held, upon breach of condition, the daughters might recover their shares of the estate, as heirs to their father. Hogeboom v. Hall, 24 Wend. 146.

So a residuary devisee may avail him-

self of a condition annexed to a specific devise. Hayden v. Stoughton, 5 Pick. 528; Brigham v. Shattuck, 10. 306; Clapp v. Stoughton, Ib. 468.

In Pennsylvania, a right of entry may be reserved to the grantor's assigns; under which a purchaser on execution may claim for a forfeiture, though subsequent to the purchase. McKissick v. Pickle, 16 Penn. 140.

(b) "Impossible conditions mean a *physical impossibility*, and not the want of power in the party." 1 Swift, 98

A legacy to a married woman, upon condition that she and her husband ab-

become impossible by the act of the grantor. Thus, where the King of Great Britain granted a charter of a town in Vermont, (then New Hampshire,) in part to the defendants, an incorporated society, reserving a rent of one shilling for every hundred acres, after the first ten years, *to be paid annually to the grantor, in his council chamber in Portsmouth*, or to such officer as should be appointed to receive it; held, the separation of the two countries, an act of the grantor, rendered impossible a payment at the place named; and no other place having been appointed, nor any officer to receive it, the people of Vermont, as successors to the king, could not claim a forfeiture.<sup>1</sup>

§ 13. *Illegal* conditions are void. These are: 1. To do something that is *malum in se* or *malum prohibitum*. 2. To omit some duty. 3. To encourage such act or omission.<sup>2</sup>(a) They

<sup>1</sup> People &c. v. Soc'y, &c. 1 Paine, 652; U. S. v. Arredondo, 6 Pet. 691; Hughes v. Edwards, 9 Wheat. 489;

Whitney v. Spencer, 4 Cow. 89. See Pindar v. Upton, 44 N. H. 358.

<sup>2</sup> Mitchel v. Reynolds, 1 P. Wms. 189.

absolutely convey, or cause to be conveyed, their interests in a portion of certain estates vested in trustees upon trust for herself for life, without power of anticipation, with remainder to her children; cannot be paid to her, as she is unable to comply with the condition. Robinson v. Wheelwright, 35 Eng. Law & Equ. 292.

(a) "There are three sorts of conditions to be rejected: 1. Such as are repugnant. 2. Those impossible in their creation. 3. Those *mala in se*." Harvey v. Aston, 1 Atk. 361; Com. R. 726; Willes, 88.

A testator devised, in trust for his son, to vest upon his attaining twenty-one years, and then directed that, in case his son should not live to attain that age, or, "having attained that age, shall not have made a will," the property should go over. The son attained twenty-one, and died intestate. Held, the gift over was void for repugnancy, and the son took absolutely. Holmes v. Godson, 35 Eng. Law & Equ. 591.

See Rochford v. Hackman, 10 Eng. L. & Equ. 64. Devise of real estate to a wife for life, and "the remainder of the testator's estate, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending that none

of his children shall dispose of their part of the real estate in reversion, before it is legally assigned to them." Held, the children took a vested remainder in the real estate given to the wife for life, and the above restriction upon alienation was void. Hall v. Tufts, 18 Pick. 455.

Lease in perpetuity, with a condition and covenant that, upon every sale of the land, the tenant or his assigns should obtain the written consent of the reversioner, and offer him the right of pre-emption, and, if sold after such offer, that one-tenth of the purchase-money should be paid to the lessor. Held, this provision was a restraint and a fine upon alienation, against the policy of the law, upon which the remedy, if any, was at law, but which equity would not aid in enforcing. Livingston v. Stickles, 8 Paige, 398. A condition in a lease, that the tenant shall not sell any wood or timber without permission, is valid. Verplanck v. Wright, 23 Wend. 506.

But, in a lease for two years, a proviso that the lessee occupy but one, is void. Scovell v. Cabell, Cro. Eliz. 107. So, in the grant of a house, a condition not to meddle with the shops, which are part of the house. Hob. 170. See, as to insensible and absurd conditions, Doe v. Carew, 2 Ad. & Ell. (N. S.) 317.



are simply nugatory, and leave an absolute estate in the grantee.<sup>1(a)</sup>

§ 14. It is said that a condition is *a divided clause* from the grant, and therefore cannot, either expressly or by implication, frustrate the grant, in regard to any of its inseparable incidents. Hence, conditions *repugnant* to the nature or essential incidents of the estate are void. (See p. 80.) As, for instance, a condition in a conveyance in fee, or even a devise of a life estate, that the grantee shall not take the profits, or alienate; or a condition in a lease to three persons, that one of them shall not demand the profits or enter upon the land during the lives of the others.

<sup>1</sup> *Barkdale v. Elam*, 80 Miss. 694.

The owner of lots of land on the East river, opposite New York, improved one of them at a great expense for a cottage residence and garden, and sold a part of the other, with the agreement that the grantee should only use it for a place of residence; and the conditions in the deed were, that the grantee should not use the lot in any way, or for any business, which might be offensive to the occupant of the adjoining lot, or that would tend to deteriorate or lessen its value; and the grantee was not to use the lot as a stone quarry. The grantee leased a part of the lot, for a railroad to carry stone from a neighboring quarry to a wharf, which he gave the lessees leave to build opposite the lot. Held, on a bill by the grantor for an injunction, that such a use of the lot would be a breach of the conditions of the deed, and that the grantee and his lessees could be restrained by an injunction. The erection of a wharf was held to be especially a breach, as it would be a temptation to nocturnal debauchees to frequent the neighborhood. *Seymour v. McDonald*, 4 Sandf. Ch. 502.

A conveyed land to B and C, his wife, with the conditions that each should take an undivided moiety, and that C should not incumber her part or sell it without B's consent, and that she should have the power to devise the same. Held, these conditions were not void, and the appointment made by C in her will was a valid one, and could not be set aside by her or B's heirs. *Hicks v. Cochran*, 4 Edw. Ch. 107.

A condition annexed to a devise, that

the person who may have the right is to procure an act of the legislature for change of name, "together with his taking an oath before he has possession, that he will not make any change during his life" in the will, relative to the real estate, is repugnant and void. *Taylor v. Mason*, 9 Wheat 825.

A condition in a conveyance, that the grantee shall keep a saw and grist mill on the land, doing business, is valid; and a breach thereof forfeits the estate. *Sperry v. Pond*, 5 Ohio. 389.

A condition was annexed to a devise to children, in these words: "In case they continued to inhabit the town of H. otherwise not." In this case only one of the devisees lived at H. at the date of the will, or the death of the testator. The word *continue* was therefore held unmeaning. Another ground was, that, the devisees being themselves heirs at law, there was no one to take advantage of a breach of condition; inasmuch as the residuary devise to two sons of the testator expressly excepted this portion of the estate. The devise was declared repugnant, unreasonable, uncertain and nugatory. But Thompson, J., dissented, on the ground that the condition was a precedent one. *Newkerk v. Newkerk*, 2 Calnes, 845.

(a) Grant of slaves to A on condition that he cause H, a slave girl, to be educated like a free white person, retain all the proceeds of her labor, &c., &c. Held, an illegal attempt to emancipate H, so that the condition was void, and the title to the slaves absolute. 80 Miss. 694



So a condition, annexed to an estate tail, that the donee shall not marry; because, without marriage, he could not have an heir of his body;—or that he shall not suffer a recovery.<sup>1</sup> But conditions prohibiting only what is contrary to law are valid.(a) Thus, a condition against alienation in *mortmain*, or against alienation in any mode which is invalid in law. And a condition against the exercise of a power, which is not *incident* to the estate granted, but only *collateral*, and conferred by a special statute, is valid; as, for instance, a condition in a gift in tail, that the donee shall not lease for three lives or twenty-one years, as authorized by statute 32 Henry VIII.<sup>2</sup>(b)

§ 15. It was formerly held, that a bond against exercising the powers incident to an estate was valid. (See *supra*, chap. 2, p. 80.) Thus, where a son, receiving lands from his father in tail, gave bond that he would not dock the entail, and afterwards applied to Chancery for relief against the bond; held, it was a

<sup>1</sup> Lit. 860-1; Hob. 170; Doe v. Carter, 8 T. R. 61; Co. Lit. 206 b, 228 a; Moore v. Savil, 2 Leon. 182; Jenk. 248; Dyer, 348 b; Co. Lit. 228 b; Newton v. Reid, 4 Sim. 141; Hodges v. Hodges, 2 Cush. 455; McCullough v. Gilmore, 11

Penn. 370; Blacket v. Lamb, 10 Eng. L. & Equ. 5; McDowell v. Brown, 21 Mis. 57.

<sup>2</sup> 2 Cruise, 7; Gray v. Blanchard, 8 Pick. 289.

(a) A condition in a deed, "that in case any ardent spirits, cordials or wines shall be kept or sold on any part of the premises, or in any building erected or to be erected thereon, the deed shall become void," is valid. Collins, &c. v. Marcy, 24 Conn. 242.

And the public sale of such articles by a tenant, with the assent of the grantee, or with his knowledge, and without reasonable diligence to prevent it, will work a forfeiture. *Ib.*

But not an unauthorized sale by a third person. *Ib.*

The questions of knowledge and of negligence are wholly of fact, on which any evidence ordinarily applicable to such a question is admissible. *Ib.*

Where, in an action to recover the premises, it appeared that the person selling held under a lease from the defendant, which contained an agreement that the lessee would not sell any article, the sale of which would injure the defendant's title, but no condition that the lease should be rendered void by such

sale, and that the defendant, as soon as he discovered such sales, had in some manner procured the tenant's removal from the premises; held, the defendant was not chargeable with negligence for making a lease without such condition. inasmuch as the plaintiffs had suffered no injury thereby. Collins, &c. v. Marcy, 24 Conn. 242.

(b) It is held that a condition, valid at the time of creating it, cannot be affected by any change in the law pertaining to its subject matter.

Conveyance on condition the grantee shall not aliene till he reaches the age of twenty-five years. Before this time he alienes, and makes a second conveyance after reaching the age prescribed. The first deed is void, and the last valid. When this condition was imposed, twenty-five was the age of majority in this State (Missouri). A subsequent act changed it to twenty-one. Held, the condition was still binding. Dougall v. Fryer, 8 Misso. 40.

valid instrument.<sup>1</sup> But this doctrine is said to be extremely questionable, and has been denied in subsequent cases.<sup>2</sup> Thus, where successive tenants in tail, according to the direction of the donor, entered into mutual obligations not to aliene; held, in Chancery, and by the advice of Lord Coke, that, as these agreements tended to a perpetuity, they should be delivered up to be cancelled. The same decree was made, in case of a bond from a tenant in tail, not to commit waste.<sup>3</sup>

§ 16. In regard to estates for life and for years, it is held, that, if a lease is made to one *and his assigns*, a condition against assignment is repugnant and void. But where assigns are not named, such condition is valid, though not favored, but *looked nearly into* by the courts.<sup>4</sup> As a general principle, the landlord, having the *jus disponendi*, may annex whatever condition he pleases to his grant, provided it is not illegal, unreasonable, or against public policy. It is held reasonable that a landlord should exercise his judgment, with respect to the person to whom he trusts the management of his estate. It is a matter of personal confidence, founded on a knowledge of the tenant's honesty, or skill and diligence in farming.<sup>5(a)</sup>

§ 17. A condition against assignment, either by the lessee or his assigns, without the lessor's consent, is waived and put an

<sup>1</sup> Co. Lit. 206 b; Freeman v. Freeman, 2 Vern. 238; acc. Turner v. Johnson, 7 Dana, 488.

<sup>2</sup> 2 Cruise, 7.

<sup>3</sup> Poole's case, Moo. 810; Jervis v. Bruton, 2 Vern. 251.

<sup>4</sup> Stukeley v. Butler, Hob. 170; Co. Lit. 204 a, 223 b; Crusoe v. Bugby, 8 Wils. 287; Hargrave v. King, 5 Ired. Equ. 480. See p. 250.

<sup>5</sup> Roe v. Galliers, 2 T. R. 188-40.

(a) Lease for years, on condition the lessee, his executors or assigns should not aliene without the lessor's consent. After the lessee's death, his administrator assigned without leave of the lessor. Held, as the administrator was an assignee in law, this was a breach of the condition. More's case, Cro. Eliz. 26; (Pennant's case, 3 Rep. 64.)

So a condition, that, if the lessee for years, his executors or assigns demised the land for more than from year to year, the lease should cease, was held valid, and to be broken by a devise of the term. Berry v. Taunton Cro. Eliz. 231.

But it was subsequently decided, that,

where a lessee covenanted not to assign his term without consent, a devise was no breach. Fox v. Swann, Styles, 488.

A condition is to be distinguished from a covenant against assigning, &c. The latter is merely a ground for damages, not for forfeiture; more especially where the lease expressly provides a forfeiture for waste, non-payment of rent, &c. Spear v. Fuller, 2 N. H. 174.

Whether a lessee, with such a covenant in the lease, can pass any title to the assignee, *qu.* As between him and such assignee, the transfer is valid, and sufficient consideration for a note. *Ib.*

end to by an assignment with his consent; so that a subsequent assignment by the first assignee is valid, and not within the condition. So if a license is obtained, it remains in force, and an alienation is valid, after the landlord's death.<sup>1</sup>

§ 18. An *under-lease* is not within a condition against assigning over the lessee's estate.(a) So held, where a lessee for twenty-one years covenanted "not to assign, transfer or set over, or otherwise do or put away the said indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the license and consent of the lessor;" and afterwards leased for fourteen years. So where the condition was, that the lessee would not assign over or otherwise part with the indenture or the premises thereby leased, or any part thereof, to any person, &c. But in case of a lease to one, his executors, &c., a proviso that the lessee, his executors, &c., shall not set, let or assign over the premises or any part thereof, embraces an under-lease by the lessee's administrator. The term, for the purposes of assignment, is not legal assets. If the proviso applied in its terms only to the lessee himself, it might be held not to embrace a transfer by the administrator.

§ 19. Where the condition requires consent in writing, a parol consent will not be sufficient. It is doubted, whether a consent by the lessor to a transfer of a part of the premises is a waiver of the condition as to the whole.<sup>2</sup>

§ 20. Where there is a condition against any transfer of the lessee's estate, if he confess judgment, through a warrant of attorney, upon which execution is taken out and levied upon the term; this is no breach of condition, but the term will pass to an execution purchaser, even with notice of the proviso. A judgment is held to be "*in invitum*," and the case is merely

<sup>1</sup> Dumper's case, 4 Rep. 119; Whitchcot v. Fox, Cro Jac. 898; Co. Lit. 52 b. R. 766; Jackson v. Harrison, 17 John. 66; Roe v. Harrison, 2 T. R. 425.

<sup>2</sup> Crusoe v. Bugby, 8 Wils. 234; 2 Bl.

(a) So it is held, that the lessee may associate others with himself in the enjoyment of the term. Hargrave v. King. 5 Ired. Equ. 480.

that of a fair creditor, using due diligence to enforce payment of a just debt.<sup>1</sup>(a) But, in a new action between the same parties, the verdict found, that "the warrant of attorney was executed for the express purpose of getting possession of the lease," in which purpose the tenant concurred; and it was held that the lease was forfeited. Lord Kenyon remarked, "it would be ridiculous to suppose, that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies, that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not by any assignment, under-lease or mortgage, have conveyed his interest to a creditor. Consequently, he cannot convey it by an attempt of this kind."<sup>2</sup>(b)

§ 21. A condition, that the lessor may re-enter in case of bankruptcy on the part of the lessee, has been held valid.(c) It was objected, that such a principle would enable the lessee to hold out false colors to the world, and that the condition was equivalent to a proviso, that the lease, though absolutely granted, should not be seized under a commission of bankruptcy. But the court held, that there was the same reason for making this provision, as for providing against voluntary assignments; that there was even more danger of the estate falling into bad hands in the former case than in the latter; that public policy favored the security of landlords; that the mere possession of land was

<sup>1</sup> Doe v. Carter, 8 T. R. 57.

<sup>2</sup> 8 T. R. 800-1.

(a) A provision in a will, that the interest of a devisee for life shall cease on the recovery of a judgment by creditors to reach it, is valid. *Bramhall v. Ferris*, 4 Kern. 41.

(b) A lease gave the lessee power to sell his interest, on obtaining the lessor's written consent, and paying him one-tenth of the purchase-money. The lessee contracted to sell his interest, and received the principal part of the purchase-money; and the purchaser went into possession under the contract, but received no actual transfer of title. Held, the condition must be construed strictly against the lessor; and, as the legal estate of the lessee was not divested,

the right of the lessor to the tenth of the purchase-money was incomplete, and he was not entitled to relief in equity. *Aliter*, however, if it appear that the legal estate is continued in the lessee, for the mere purpose of evading the covenant or condition, the equitable title having been transferred. *Livingston v. Stickles*, 7 Hill, 258; *Stansfeld v. Portsmouth*, 4 C. B. (N. S.) 120.

(c) It is waived by the receipt of subsequent rent. *Doe v. Rees*, 4 Bing. N. 884. An agreement that the lessee may remove fixtures applies to a termination on account of bankruptcy. *Stansfeld v. Portsmouth*, 4 C. B. (N. S.) 120.

no proof of ownership, but a creditor was bound to look into the lease if he would ascertain the title; and that although, if the lease were granted absolutely, such proviso would be void for repugnancy, yet here there was an express limitation to terminate the estate upon the lessee's becoming bankrupt—a stipulation against his own act. The case was compared to that of a lease for twenty-one years, on condition that the tenant should continue to occupy personally, which would be a valid proviso. It was also suggested, that such a condition in a very long lease would be liable to the objection of creating a perpetuity.<sup>1</sup>

§ 22. Some cases have occurred, in which leases have contained a condition against the lessee's allowing other persons to occupy, except under certain restrictions.(a)

§ 23. It is the doctrine of the ecclesiastical court and court of chancery in England, derived from the civil law, that conditions *in restraint of marriage*, annexed to bequests of personal property, are void as against public policy, except where there is a devise over upon breach of condition.(b) But such conditions, annexed to devises of real estate, have generally been held valid, whether they were, precedent or subsequent. It is said there can be but one true legal construction of these conditions; and therefore it must be the same in the Court of Chancery, and all the other courts in Westminster Hall. The meaning of the testator, or the control which the law puts upon his meaning, cannot vary in what court soever the question

<sup>1</sup> *Roe v. Galliers*, 2 T. R. 188. See *v. Carew*, 2 Ad. & El., N. S. 817; — *Butterfield v. Baker*, 5 Pick. 522; *Doe v. Rees*, 6 Scott, 161.

(a) Thus where there was a stipulation in the lease, that, "if the lessee suffer more than one person to every 100 acres to reside on, use or occupy any part of the premises, the lease shall be void;" held, a breach of condition for the lessee to let parts of the premises to persons for a year, to cultivate for shares, in the proportion of more than one for each 100 acres. *Jackson v. Brownell*, 1 John. 267.

But where 185 acres were leased, and the lessor covenanted not to permit more than one tenant to each 100 acres to reside on or occupy the premises; held, it

was no breach to allow one tenant besides himself to occupy. *Jackson v. Agan*, 1 John. 278.

(b) This rule, however, seems applicable only to a *general* restraint of marriage; not to such conditions as merely prescribe provident regulations and sanctions; as, for instance, in regard to time, place, age or person, the consent of other parties, due ceremonies, &c.—unless they are used evasively for the purpose of general restraint. *McCullough's Appeal*, 2 Jones. 197. See *Rogers v. American*, &c. 5 Allen, 69.

chances to be determined.<sup>1</sup>(a) Such a condition has also been held valid, when annexed to a devise of money, charged upon and to be raised from land; and in the case of a trust term, created for the purpose of raising portions for daughters, which arise out of land, are not subject to the ecclesiastical jurisdiction, but are governed wholly by the common law.<sup>2</sup> But where lands are charged only as auxiliary to personal estate, such condition is invalid. Thus, a testatrix gave to her daughter a sum of money, provided she should marry with the written consent of trustees given before marriage, and not otherwise, and

<sup>1</sup> *Reves v. Herne*, 5 Vin. Abr. 848.

<sup>2</sup> Per *Ld. Mansfield*, *Long v. Dennis*, 4 Burr. 2056. See *Craig v. Watt*, 8

*Watts*, 498; *Hoopes v. Dundas*, 10 Barr, 75.

(a) Devise to the testator's wife for life, then to his granddaughter, A, in tail, provided, and upon condition, that she married with consent of the wife of B, and C; and, if she married without consent, devise to D. A married without consent. The master of the rolls held the condition as "*in terrorem*" and void; but the decree was reversed on appeal. *Fry v. Porter*, 1 Cha. Ca. 188; 1 Mod. 300.

A testator devised the whole of his real estate to A and B, "during their natural lives, that is, if they remain single; but if either of them shall marry, then his claim and benefit of the aforesaid land to be void; or if they both shall marry, then the land to be sold as hereinafter described." Held, that on the death of A, unmarried, B took the whole of the land, to hold so long as she continued unmarried. *Fawver v. Fawver*, 6 Gratt. 286.

A settled his estate to the use of himself for life, remainder to trustees for a term of years, upon trust, to raise £2,000 for each of his daughters, if they married with their mother's consent; and if either of them died before marrying with consent, her portion to cease, and the premises to be discharged; or, if raised, to be paid to the owner of the premises. A gave to his daughters, by will, an additional £2,000 each, on the same condition. Having married without the consent of their mother, but both they and their husbands knowing of the condition, the daughters filed a bill in equity against the trustees and executors, to have their portions raised.

Sir Joseph Jekyll decreed that the conditions were void. Upon appeal, Lord Hardwicke, aided by Lord Chief Justice Willes and Lee, and Lord Baron Comyns, reversed the former judgment. The chief grounds of decision were, that the restraint was a condition precedent, till the performance of which no estate could vest; or else a limitation of the time of payment, which, in this case never arrived; that the condition was neither repugnant, impossible, nor *malum in se*, the only conditions to be rejected; that although, where a compensation was possible, there was no material distinction between conditions precedent and subsequent, yet in this case, which did not allow compensation, a much clearer intent, expressed by a devise over, would be required to divest an estate once created, than to prevent the vesting of the estate; and that the direction to have the estate exonerated was equivalent to a devise over. *Harvey v. Aston*, 1 Atk. 361; Com. R. 726; Willes, 88.

But in case of a devise to trustees and their heirs, in trust for A for life, if within three years from the testator's death, she should marry B; if not, devise to C; upon the death of the testator, the friends of A made proposals for her to B, which he declined, and A then married D. A decision in chancery, that this was a good condition precedent, without performance of which A could gain no title, and one which, in its nature, admitted of no pecuniary compensation; was reversed in the House of Lords. *Bartie v. Falkland*, 3 Cha. Ca. 129; 16 Jour. 230-36-38-40-1.



charged all her real estate with debts and legacies. The daughter married without consent, but this was obtained after marriage. Held, the devise took effect.<sup>1</sup>

§ 24. A condition, restraining a female from marrying a Scotchman, has been held good.<sup>2</sup>

§ 25. Conditions of this kind, however, being in the nature of *penalties* or *forfeitures*, are construed strictly in favor of the devisee. If the substantial part and intent be performed, equity will supply small defects and circumstances. They are said to be odious, and contrary to sound policy.<sup>3(a)</sup>

<sup>1</sup> Reynish v. Martin, 8 Atk. 330.

<sup>2</sup> 4 Burr. 2052.

<sup>3</sup> Perrin v. Lyon, 9 E. 170.

(a) Devise to trustees, in trust for the testator's daughter, A, till her marriage or death; if she should marry with their consent, then to her and her heirs; if without their consent, to the sisters of A. There were also other devises to A and her sisters. A married during her father's life, with his consent and approval, and he settled upon the marriage a part of the property devised to her. Held, such marriage was a waiver of the condition, and made the devise absolute; and that to treat the estate as forfeited would defeat the manifest intention, because it would pass, not to the other sisters, but to the heirs at law. Clark v. Lucy, 5 Vin. Abr. 87.

So, where the condition was that the devisee should marry the testator's granddaughter; held, an offer of marriage and a refusal on her part were a waiver of the condition. Robinson v. Comyns, For. 164; Daley v. Desbouverie, 2 Atk. 261.

Devise to trustees, to the use of the testator's son, A, for life, remainder to his wife for life, remainder to A's first and other sons in tail; provided, if A should marry any woman not having a competent marriage portion, or without the trustees' consent. &c., in writing, under hand and seal, the trustees should hold, after A's death, to the use of the testator's daughters. The testator further declared, that the proviso was not meant to be construed *in terrorem*, but a condition, for want of performance of which, in every respect, the estate should not vest in his son's wife, or the heirs of that marriage. A married a woman

having a portion, but without the consent of the trustees, one of whom became one of the devisees in remainder. Lord Mansfield, in rendering judgment, remarked, that the forfeiture was so cruel as to begin with the innocent issue of the offender, who was to have the estate for his own life at all events; and that the testator considered money as the only qualification of a wife, but still meant to leave it to the judgment of trustees, whether there might not be some equivalent for money. It was accordingly held, that, although the condition was undoubtedly a precedent one, yet it was to be taken in the alternative, there being a mere error in the penning; or was to be construed *and*; either a portion, or the consent of the trustees, fulfilled the condition; and such consent was probably withheld by one of them from self-interest. Long v. Dennis, 4 Burr. 2052

Devise, on condition that the devisee should marry with the consent of trustees; if not, devise over. The trustees, being applied to, offered to agree if a proper settlement were made. The devisee married without their knowledge, and a proper settlement was afterwards made. Held, a good compliance with the condition. Daley v. Desbouverie, 2 Atk. 261.

Devise to A, on condition she married with the consent of B, in writing; if not, devise over. A married without B's knowledge, but B consented as soon as he heard of it. Held, a fulfilment. Bolton v. Humphries, 2 Cruise, 24.



§ 26. A condition restraining a widow from marrying again, is held valid; especially if there is a devise over.<sup>1</sup>(a)

<sup>1</sup> Fitchet v. Adams, 2 Stra. 1128.

(a) A testator devised his real and personal estate to his wife, provided she remained his widow for life; but, in case she married again, she was to leave the premises; and, if she remained a widow for life, the testator devised all his property, after her death, to his father and mother, if living, if not, to others. The land was sold for the payment of debts, and the widow married. The testator's father died before the marriage of the widow, leaving the mother surviving. Held, the testator's mother was entitled to the surplus proceeds of the real estate. *Commonwealth v. Stauffer*, 10 Barr, 850.

Property was devised to a wife, during life or widowhood, charged with the maintenance of her children, and, in the event of her marriage, to be equally divided amongst the children, except that one slave was given absolutely to the widow. Held, this devise was not void, as in restraint of marriage; that it was not a devise for life, to be void on condition that the widow married, but a devise during widowhood, charged with the education and maintenance of the children; and that it was valid. *Hawkins v. Skeggs*, 10 Humph. 81.

Devise to "my wife of one-third of the profits arising off of my real estate, only so long as she remains my widow;" followed by legacies to her and children, payable from the land. "Each of the foregoing legacies, that is to come out of my real estate, shall be liens thereon, until paid." Held, a devise of one-third of the land; a devise upon condition; that no entry was necessary to take advantage of it; and that equity would not relieve. *Bennett v. Robinson*, 10 Watts, 848.

It is held in Massachusetts, that a de-

vises to the testator's wife of an annuity, during her life and widowhood, is a devise on condition subsequent, subject by its terms to be defeated by the second marriage of the wife; but that the condition is void as being merely *in terrorem*, there being no devise over except to the residuary legatee, who was the heir at law. *Parsons v. Winslow*, 6 Mass. 169. In a late case in England, it is held, that a general condition in restraint of marriage is good, with respect to the testator's widow, but not any other woman. *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 189. The same general doctrine has been adopted in Missouri.

Devise to a son and daughter of the testator, with a provision that, if his said daughter should marry or die, the land should belong exclusively to the son. Held, the condition was void, being in restraint of marriage. *Williams v. Cowden*, 18 Mis. 211.

In Maryland, unqualified restrictions on marriage are discouraged, and construed strictly, even in case of widowhood; more especially, where there is no devise over. *Binnerman v. Weaver*, 8 Md. 517.

A deed of leasehold property, in trust for the sole use of a *feme covert*, contained a provision, that, in case the husband should survive the wife, he and his assigns should have the rents, &c., "during his natural life only, to and for his own use and benefit, provided he should continue unmarried after the death of his wife then living, and from and immediately after his decease" then over. Held, this proviso was void, and the life estate was not terminated by a second marriage. *Waters v. Tazewell*, 9 Md. 291.

## CHAPTER XXVIII.

## ESTATES ON CONDITION. PERFORMANCE, BREACH, DISCHARGE, ETC., OF CONDITIONS.

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|---|---|
| 1. Performance—conditions precedent and subsequent. | 11. Breach and forfeiture at law; condition and covenant, &c. |
| 2. Performance as far as possible.                  | 14. Relief in equity.   |
| 3. Copulative condition.                            | 16. Breach, how taken advantage of.                           |
| 4. Who may perform.                                 | 20. Breach, who may take advantage of.                        |
| 5. When performed.                                  | 24. Effect of entry.  |
| 7. Place.   | 25. Waiver of condition.                                      |
| 8. Who bound by.                                    | 27. Release of condition.                                     |
| 9. Impossible conditions.                           | 28. Accord and satisfaction.                                  |
| 10. Refusal to accept performance, &c.              | 29. Condition and limitation—distinction.                     |

§ 1. WITH regard to *the performance* of conditions, a distinction is made between conditions precedent and subsequent, in both cases, however, by way of favor to the grantee or devisee; the former, which create an estate, are construed liberally, according to the intent; the latter, which destroy an estate, are construed strictly. Thus, where a forfeiture of land is claimed by the grantor for breach of a condition subsequent, in the performance of which he has no interest, having parted with the estate for the accommodation of which it was created; the terms of the condition are to be construed with great strictness.<sup>1</sup>

§ 2. But where literal performance of a condition subsequent becomes impossible, it should be performed as nearly according to the limitation as practicable. Thus, if A convey to B, on condition that B re-convey to A and his wife in tail, remainder to A's heirs, and before such reconveyance A die; B shall convey to the wife for life without impeachment of waste, remain-

<sup>1</sup> Co. Lit. 219 b; 18 Ill. 481; Hogeboom v. Hall, 24 Wend. 146; Merrifield v. Cobleigh, 4 Cush. 178.

der to A's heirs on her begotten, remainder to A's right heirs.<sup>1</sup> And the same rule has been applied to a condition precedent. Thus where land is conveyed to a trustee to be conveyed to a third person, on condition that a dam and head-race, for hydraulic purposes, is made by such person, in a certain place, and at a specified time; this condition is a condition precedent, and is fulfilled by the substantial *bona fide* completion of the dam for the purposes intended, at the time, &c., specified.<sup>2</sup>

§ 3. When a condition copulative, consisting of several branches, is made precedent to an estate, the entire condition must be performed; else the estate can never arise or take place.<sup>3</sup>(a) Thus, where a settlement provided that trustees should be seised of land to the use of A and his issue, if he should be married to B after the age of sixteen and they should have issue; and they were married before she was sixteen, and she lived to that age, but died without issue; it having been decided that A took the estate, this decree was reversed in the House of Lords, a part of the condition not being fulfilled.<sup>4</sup>

§ 4. The general rule is, that any person interested in the condition or the estate may perform the former. Thus, if a conveyance is made on condition the grantee shall pay a certain sum at a certain time, a grantee of such grantee may perform

<sup>1</sup> Lit. 352. See ch. 27, sec. 12.

<sup>2</sup> Wilson v. Gatt, 18 Ill. 481.

<sup>3</sup> Harvy v. Dame, &c., Com. R. 782;

Van Horne v. Dorrance, 2 Dall. 817;  
Clark v. Trinity, &c., 5 Watts & S. 266.

<sup>4</sup> Wood v. Southampton, 2 Freem. 186; Show. Parl. Ca. 88.

(a) A similar principle has been applied to a condition subsequent. Under the New York statute. (1 Rev. Sts. 346) providing that a diversion of salt works to other purposes than the manufacture of salt shall work a forfeiture of the leasehold estate, the partial diversion of a lot, as for the erection of a dwelling-house, &c., will not work a forfeiture, but only a diversion of the whole. Hasbrook v. Paddock, 1 Barb. 685.

If the condition of a mortgage is to indemnify the mortgagee against the support of a third person, it is a sufficient breach that the mortgagee was compelled to pay for such support for a part of the time. Whitton v. Whitton, 38 N. H. 127.

Conditions in a deed, to use the premises solely for a railroad depot, not to use other premises within a mile for similar purposes, not to erect any public house or any other building, except for the ordinary purposes of a railroad depot, and for accommodating, victualing and lodging passengers and others, and for the sole accommodation of the railroad company, as aforesaid, are not broken by selling refreshments and lodging passengers on the premises. Nor by permitting merchants in the village to load and unload their own goods upon their own premises on the line of the road. Southard v. Central, &c., 2 Dutch. 18.

it.<sup>1</sup> So, also, the heirs of a grantee may perform the condition, though not named, if a time is fixed for the performance. The possibility of performing the condition is an interest, right or *scintilla juris*, which descends to the heir. (See ch. 27, sec. 15.) Thus a devise was made to A for life, remainder to B in fee; provided, that, if within three months from A's death, C should pay B, his executors, administrators, &c., a certain sum, the land should go to C and his heirs. C died during the life of A. Held, after A's death, the heir of C might perform the condition.<sup>2</sup> But if no time is appointed for performance of the condition, the performance of it is a right personal to the party himself. Thus, it is said, in case of a feoffment from A to B, upon condition that, if A pay B a certain sum, A *and his heirs* may enter; the heir cannot perform the condition. This principle, however, seems inconsistent with the modern law of mortgages, as will be seen hereafter.<sup>3</sup>

§ 5. Where no time is fixed for performance, a condition shall be performed either during the life of the party who is to fulfil it, or in reasonable time, according to the circumstances of the case. Thus, where the condition is that the grantee shall pay a certain sum, he is bound to pay it in reasonable time, because he has the use of the land. But if the grantor is to regain the estate on payment of a certain sum, he has during his life to pay it; because until payment he cannot take possession.<sup>4</sup> So, if one devise land to A, "on condition he shall marry B," the devise takes effect immediately, and the devisee has his lifetime to perform the condition.<sup>5</sup> The former of these rules is applicable, where an immediate performance by the grantee is necessary to effect the evident purpose of the grantor in making the conveyance.<sup>6</sup> Thus lands were devised to a town for a school-house, "provided it be built within one hundred rods of the place where the meeting-house stands." Held, this was a valid condition subsequent, and the vested estate was forfeited

<sup>1</sup> Vermont v. Soc'y, &c. 2 Paine, 545; Co. Lit. 207 b; Simonds v. Simonds, 8 Met. 558.

<sup>2</sup> Marks v. Marks, 1 Ab. Eq. 106.

<sup>3</sup> Lit 837.

<sup>4</sup> Crummel v. Andros, 2 And. 78; 14 Mass. 428.

<sup>5</sup> Finlay v. King, 8 Pet. 876.

<sup>6</sup> Hamilton v. Elliott, 5 Ser & R. 375.

and passed to the residuary devisee as a contingent interest, upon non-compliance with the condition in reasonable time.<sup>1</sup> So, in case of a conveyance, on condition the grantee shall discharge a mortgage on the land, made by the grantor, but not fixing any time for such discharge; held, it must be done in reasonable time.<sup>2</sup>

§ 6. The time of performing a condition precedent in a deed cannot be enlarged by parol, so that an action will lie upon the deed.<sup>3</sup>

§ 7. Where a certain *place* is appointed for performance of a condition, the party who is to perform must be at the place at the time appointed, and the other party is not bound to accept performance elsewhere. But, if he does accept, the performance will be good. Where no place is appointed for performance, a grantee, who is to perform the condition by payment of money, must seek for the other party, if he is in the realm (country), but not if he is abroad. If the condition is to deliver specific and cumbrous articles, such as wheat or timber, the grantee is not bound to seek the grantor, but the latter must go to the former and appoint a place of delivery.<sup>4</sup>

§ 8. One who accepts an estate upon condition is absolutely bound to perform it, even though the performance be attended with a loss, and though the party be incapable of incurring a mere personal obligation. Thus, it seems, the acceptance of an estate charged with a charity binds the party receiving it to fulfil the charity, though the rents prove insufficient.<sup>5</sup> So the acceptance of a deed, expressed to be upon condition to support the grantor, amounts to an agreement on the part of the grantee to perform that condition.<sup>6</sup> So an infant heir or married woman is bound to perform a condition; which charges not the person, but the land. So an infant mortgagee is bound by the condition. "The deed must be good in the whole, or void in the whole."<sup>7</sup>

<sup>1</sup> *Hayden v. Stoughton*, 5 Pick. 528. See *Brigham v. Shattuck*, 10 Pick. 309.

<sup>2</sup> *Ross v. Tremain*, 2 Met. 495. See *Austin v. Cambridgeport, &c.*, 21 Pick. 215.

<sup>3</sup> *Porter v. Stuart*, 2 Aik. 417.

<sup>4</sup> Lit. 340; Co. Lit. 210 b; 3 Leon. 260; 1 Rolle's Abr. 444.

<sup>5</sup> *Att'y Gen. v. Christ's Hos.*, 3 Bro. Cha. 165.

<sup>6</sup> *Spalding v. Hallenbeck*, 30 Barb. 292.

<sup>7</sup> *Fonda v. Sage*, 46 Barb. 109; *Parker v. Lincoln*, 12 Mass. 18; *Badger v. Phinney*, 15, 859. See *Robertson v. Stevens*, 1 Ired. Equ. 247; *Garrett v. Scouten*, 3 Denio, 834; *Cross v. Carson*, 8 Blackf. 138.

So, where an infant agreed that a judgment with condition should be rendered in his favor; held, after coming of age, he could not avail himself of the former, without the latter. Upon the same principle, a condition binds the estate to which it is annexed, into whose hands soever it may come.<sup>1</sup>(a)

<sup>1</sup> Lowry v. Drake, 1 Dana, 47; Hogeboom v. Hall, 24 Wend. 146.

(a) The following case illustrates this, with some other principles, relating to conditions:

A provision in a will, "that if either of my said daughters shall be distressed, and come to want, and be unable to support themselves, then my will is, that she or they be maintained, in a decent and comfortable manner, out of the income and profits of the whole of my real estate," constitutes a legacy or bequest, charged upon the income of the real estate, and through that upon the whole of the land itself; and, on the happening of the contingency, the maintenance is chargeable upon such income, in the hands of any one to whom the land may come. *Pickering v. Pickering*, 15 N. H. 281.

The land being devised to several persons jointly, an implied promise arises on the part of the devisees, accepting the devise, to appropriate the income to the support of the daughters, or any of them, on the happening of the contingency, while the devisees hold the land. *Ib.*

Should the income not be sufficient for the support of all the daughters who may need, it may be apportioned. *Ib.*

The devisees taking jointly, the implied promise is joint. *Ib.*

Where there is an implied promise by a devisee, to pay a legacy charged upon the land, an action will lie against his executor or administrator, for any breach in the time of the devisee, and perhaps for a subsequent breach, if the legacy is given in such a manner that it constitutes *debitum in presenti*. *Ib.*

If the charge upon the land be of a gross sum, payable presently, or at a future day, a conveyance of the land would neither discharge the land, nor the devisee from his implied promise to pay the debt. No personal promise of the grantee would be implied, but he would take the land charged with the duty. *Ib.*

Where the charge depends upon a con-

tingency, as, for instance, where the legacy is charged upon the income of the land, in case the legatee shall be in need, the implied promise of the devisee, on the acceptance of the devise, extends only to an appropriation of the income, if the contingency happens while he holds the estate. The law raises no implication of a promise, beyond the time that he will have the ability to perform it; and the estate he takes is assignable. *Ib.*

It seems that in such case, upon every transfer of the whole estate, the grantee who takes the estate, charged with a duty which is to be performed upon a contingency, or a continuing duty which does not constitute a debt, or a duty which occurs from time to time, might be held, by implication, to promise performance of the duty, or payment of the charge which accrues in his time, and that his personal representatives might be chargeable for his default. *Ib.*

But, where the devisee or devisees sell the estate in parcels at different times, (although any one of the grantees might perform the duty, or make the payment, and have his remedy for contribution,) upon ordinary principles of law, neither could exonerate his land by performing or paying a *pro rata* proportion, nor could a several promise of performance of the whole duty be implied. *Ib.*

If a joint promise, upon which an action at law may be sustained, can be implied, it must be of such a shifting character, upon the happening of subsequent sales, as to show that it can only be raised from the necessity of the case, for the sake of a remedy. No such implication can be raised, if the legatee can have any other relief; and the appropriate remedy is in equity, where equitable jurisdiction over the subject matter exists. *Ib.*

The duty devolving upon the holders of the land, in this case, would be performed by an appropriation of the income, or so much of it as is necessary, at a reasonable place, by either of

§ 9. Where performance of a condition becomes *impossible*, by act of God; if precedent, no estate vests; if subsequent, the estate becomes absolute. Thus, in case of a devise to A, on condition of her marrying B when or before A should be 21; B having died, before A refused or was requested to marry him; held, the condition was excused.<sup>1</sup> So in case of a devise of land to A, "on condition of his marrying a daughter of B and C;" B dies, without having had a daughter. The condition being *subsequent*, and having become impossible, A's estate is absolute.<sup>2</sup> So where performance of a condition becomes impossible by act of the party who imposes it, the estate is rendered absolute. Thus a testator devised to A for life his estate at B, and also the income of certain other property, while A should live and reside at B. He afterwards revoked the former devise. Held, A should hold the latter devise absolutely.<sup>3</sup> Where a condition is double, and one part of it is possible at the time, and the other not, performance of the former is sufficient. And, if the condition is disjunctive, giving an election to the party, and one part becomes impossible by act of God, the whole is excused. It seems, however, that this rule is subject to exceptions.<sup>4</sup>

§ 10. Where the party, who is to have the benefit of a condition, prevents or refuses to accept performance; or absents himself when he ought to be present; or neglects or disables himself to do the first act on his own part, as he was bound to do: the condition is discharged.<sup>5</sup> Thus tender and refusal of a mortgage debt discharges *the land*, though *the debt* remain.<sup>6(a)</sup>

<sup>1</sup> Co. Lit. 206 a, 218 a; Mosely v. Baker, 2 Sneed, 362; Thomas v. Howell, 1 Salk. 170; Merrill v. Emery, 10 Pick. 507; Van Horne v. Dorrance, 2 Dall. 317. See 19 John. 69; Taylor v. Bullen, 6 Cow. 627; M'Lacklan v. M'Lacklan, 9 Paige. 584.

<sup>2</sup> Finlay v. King, 3 Pet. 374.

<sup>3</sup> Darley v. Langworthy, 8 Bro. Parl. Cas. 359.

<sup>4</sup> Wigley v. Blackwal, Cro. Eliz. 780; Laughter's case, 5 Rep. 21; Studholme v. Mandell, 1 Lord. Ray. 279; Da Costa v. Davis, 1 B. & P. 242.

<sup>5</sup> 2 Cruise, 38. See Camp v. Barker, 21 Verm. 469.

<sup>6</sup> Jackson v. Crafts, 18 John. 110; Merritt v. Lambert, 7 Paige, 844.

them. But an offer of support by a devisee who had parted with his title, and was not liable, would not bar the remedy. *Ib.*

(a) In New York, even after condition broken. *Farmers' &c. v. Edwards*, 26 Wend. 541.

A and B mutually agreed, that B



§ 11. A court of law cannot relieve against a breach of condition, or restore the consideration paid by the party, upon whom such breach operates as a forfeiture. Thus, where one conveys land upon condition subsequent, which the grantee fails to perform, and the grantor enters for the breach; the grantee cannot recover back money paid by him as part of the consideration.<sup>1</sup>

§ 12. But on the other hand, after such entry, the grantor cannot recover the balance of the price.<sup>2</sup>

§ 13. A court of law, however, will sometimes construe that which is in form a *condition*, a breach of which forfeits the whole estate, into a *covenant*, on which only the actual damage sustained can be recovered. Conditions and limitations are not readily to be raised by mere inference and argument. The words usually employed to create a condition, are *on condition*. But the phrases *so that*, *provided*, *if it shall happen*, are of the same import. *Provided always* may constitute a condition, limitation, or covenant, according to the circumstances. And if words both of condition and covenant are used, both may take effect.<sup>3</sup> But where the explicit words which denote a condition are used, they will not be construed into a covenant. Thus, where one conveyed a house, "*on condition* that no windows should be placed in the north wall within thirty years," and windows were made within that time; held, this could not be construed as a covenant, and the estate was wholly forfeited. And even where, for breach of *covenant*, a forfeiture is incurred, a court of law has no power to stay proceedings.<sup>4</sup>

<sup>1</sup> Frost v. Frost, 2 Fairf. 285.

<sup>2</sup> Ibid.

<sup>3</sup> 4 Kent, 181-2, and n.; Woodruff v. Water, &c., 2 Stockt. 489; Chapin v. Harris, 8 Allen, 594; Doe v. Phillips, 9

Moore, 46; Doe v. Watt, 8 Barn. & Cress. 308.

<sup>4</sup> Gray v. Blanchard, 8 Pick. 284; Doe v. Asby, 10 Ad. & El. 71. See chaps. 65-6.

would purchase a farm of A, and as a part of the consideration convey to A another farm of less value; and that all timber, trees, &c., upon each estate, should be valued and paid for by them respectively; and, unless A should be able to make a good title before a certain day, the agreement to be void. A cut down divers trees. In a suit for the

penalty annexed to the agreement, held, A had disabled himself to perform his part of the agreement by this act; that such performance was a condition precedent, and therefore A could not maintain the present action. St. Albans v. Shore, 1 H. Bl. 270; Hard v. Wadham, 1 E 619.

§ 14. Where a forfeiture has been incurred at law, by breach of condition, a Court of Chancery will sometimes afford relief. It was formerly held, that this could be done only where the condition is a subsequent one; but it seems to be now settled, that in all cases a forfeiture shall not bind, where the thing may be done after the time. or a compensation made for it, and where the breach resulted from inevitable accident. And Chancery will relieve, even in favor of the heir of the party who was to have performed the condition, and after a recovery of the land, at law, by the heir from whom it was devised away, on condition.<sup>1</sup>(a) So, where one devises lands on condition to pay cer-

<sup>1</sup> 4 Kent, 120, 125; Popham v. Bampf-  
feld, 1 Vern. 88; Cage v. Russel, 2  
Vern. 352; Barnardistone v. Fane, 2  
Vern. 366; Wells v. Smith, 2 Edw. 75;  
City, &c. Smith, 3 Gill & J. 265; Bax-

ter v. Lansing, 7 Paige, 350; Bacon v.  
Huntington, 14 Conn. 92; Lockett v.  
White, 10 Gill & J. 480; Washburn v.  
Washburn, 23 Verm. 576. See Clark v.  
Martin, 49 Penn. 289.

(a) Chancery relieves from the condition of payment in a bond. Leach v. Leach, 4 Ind. 628. Or for support, a breach having occurred from inadvertence. Henry v. Tupper, 8 Wms. 358.

Equity will relieve remainder-men against a forfeiture under the provisions of a will, by a tenant for life, through non-payment of a sum of money required by the will to be paid by such life tenant, as a condition subsequent; there being no limitation over in case of forfeiture, and full compensation being possible, and being required by the court to be made by the remainder-men to the residuary devisees under the will, by the payment of the sum required, with interest. Carpenter v. Westcott, 4 R. I. 225.

Such relief was given upwards of fifteen years from the time of condition broken, and notwithstanding a rise in the value of the land, where the life tenant had been suffered, during her life, and for nearly the whole fifteen years, to continue in possession, and to receive the rents and profits, without enforcement of the forfeiture by the residuary devisees; and where, the life tenant being a *feme covert*, the residuary devisees had never apprised the trustee for her sole and separate use of the trust, and he had only been casually informed of it about four months before her death, and about six months before the filing of the bill for relief. *Ib.*

A married woman, having power to

dispose of lands, devised them to her executors, to pay £500 out of them to her son; provided, that, if the father did not release certain goods to the executors, the devise of the money should be void, and it should go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to sign. The son brings a bill in equity against the executors and the father, and the father answered that he was then ready to release. It was decreed that the £500 should be paid. 4 Kent, 120, 125. It is said, equity interposes only in case of accident, and where the damages can be measured in money, or where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. 1 Washburn on Real Prop., 2d ed. 478. See p. 528.

Chancery relieves in case of failure to pay rent, though the lease was thereby to become void. In equity, it seems, an equitable agreement, though in form of a charge, does not forfeit without change of possession. But no relief is afforded to a lessee who commits a breach of covenant. Bowser v. Colby, 1 Hare, 109.

It is said, *time* fixed for performance of a condition precedent is of the essence of the contract, whether it be an *hour* or a *day*. Shinn v. Roberts, 1 Spencer, 435.

Whether the Supreme Court in Maine

tain sums at specified times to his heir, and for non-payment of one of them the heir enters, Chancery will restore the land, on payment of the sum with interest.<sup>1</sup> And even where land is devised on condition of paying a sum of money at a certain time, and upon non-payment devised over on the same condition, Chancery will relieve.<sup>2(a)</sup>

§ 15. But chancery will not relieve against a breach of condition, in those cases where there is no rule for the measure of damages, and where the breach consists in a positive act directly in the face of the condition; as, for instance, where a lease contains a condition against assignment, which the lessee violates. Nor will it relieve where, by performing a condition precedent, the party would have the right to sue at law; though he has offered so to perform.<sup>3</sup> It is said, equity cannot control the lawful contracts of parties, or the law of the land. And, in one case, Lord Eldon held, that relief could be granted only where the condition was *to pay money*.<sup>4(b)</sup> So chancery will not

<sup>1</sup> Grimston v. Bruce, 1 Salk. 156.

<sup>2</sup> Woodman v. Blake, 2 Vern. 222.

<sup>3</sup> Wafer v. Mocato, 9 Mod. 112; Rolfe v. Harris, 2 Price. 207 n.; Bracebridge v. Buckley, Ib. 200; City, &c. v. Smith,

3 Gill & J. 265; Gouverneur v. Bibby, 3 Edw. 848.

<sup>4</sup> Hill v. Barclay, 18 Ves. 68. See Blake v. Shrive, 5 Dana, 878.

can afford equitable relief for breach of condition see Mavrick v. Andrews, 25 Maine, 525.

By the civil law, a mere non-performance, within a stipulated time, does not *ipso facto* annul a contract, unless time is of the very essence of the contract. So where the grantor of the defendant obtained an alcalde's grant to a town lot, in 1848, and was put in possession, and commenced building thereon, (his grant containing the usual condition of building within one year,) and was compelled to suspend the erection of his house and the lot remained unoccupied till 1849, when he went again into possession and built a house, which possession was maintained till the bringing of this suit; and the plaintiff's grantor obtained a grant of the same lot in 1847, but never went into possession; held, that there was no forfeiture of the grant of defendant's grantor, on the ground of non-performance within the time. Holliday v. West, 6 Cal. 519.

The grantee of an estate upon condition, who mortgages to his grantor, and,

after a foreclosure, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the condition. Stone v. Ellis, 9 Cnsh. 95.

(a) Devise to the two sons of the testator, "they jointly and severally paying to my two daughters \$800 each, within one year from my death." Held, this was not a legacy, but a condition—the breach of which forfeited the estate at law; but also that Chancery would relieve, notwithstanding the effect of the disposition was to make an unequal distribution of the estate. Wheeler v. Walker, 2 Conn. 196-299. Hosmer, J., seems to place the decision upon the ground that the condition was a subsequent one. Ib. 801.

(b) Where an order was passed upon a mortgagor to pay the debt between the hours of eleven and twelve, and the mortgagee came to the place at twenty minutes past eleven and waited an hour, the mortgage was held foreclosed. 1 Coll. Cha. 278.

relieve against forfeiture of an estate, declared at law, where the condition consists in the performance of services and attentions, for the personal comfort and convenience of the party claiming the forfeiture. In such case, the time for the performance of the service is of the essence of the contract; it can never be performed afterwards; and it is impossible to put the party in the precise situation in which he would have been if the condition had been performed.<sup>1</sup> And, even if the forfeiture were declared, for breach of a condition admitting of compensation, the court will not relieve, when the party has been guilty of other breaches, for which a forfeiture might be enforced at law, and when the court cannot feel confident that the party would thereafter faithfully perform his covenant.<sup>2</sup> So the insolvency of the party asking the relief affords a strong reason why the relief should not be granted, where such insolvency might, and probably would, prevent the due performance of the covenants.<sup>3</sup> And when the covenants are for the performance of personal services, and the delivery, from time to time, of specific articles of produce and provisions, for the comfort and support of the covenantees, and a forfeiture has been declared at law for a breach of conditions; the court of chancery have no power, upon a bill brought for relief, to change the contract of the parties, and direct a certain sum to be paid periodically, in lieu of the performance of the covenants stipulated.<sup>4</sup> And where the forfeiture, in such case, was taken for breach of covenant to keep a suitable horse for the use of the covenantees, and there had been no subsequent performance, or acceptance of performance; held, a subsequent acceptance, by the covenantees, of the performance of other covenants, essential to their support, would not operate as a waiver of the forfeiture, it appearing that a litigation was pending at the time between the parties, in which the covenantees were constantly insisting upon the forfeiture.<sup>5(a)</sup>

<sup>1</sup> Dunklee v. Adams, 20 Verm. 415.  
See Austin v. Raymond, 9 Verm. 420.

<sup>2</sup> Ib.

<sup>3</sup> Ib.

<sup>4</sup> Ib.

<sup>5</sup> Dunklee v. Adams, 20 Verm. 415.  
See Austin v. Raymond, 9 Verm. 420.

(a) A covenanted, in 1799, to convey to B certain land, being government

§ 16. Breach of a condition, annexed to a freehold, can be taken advantage of by the grantor or his heir, only by means of an *entry* upon the land, for this express purpose, or, in some cases, a *claim*, which is equivalent to entry; and it matters not, whether there is any express provision for re-entry or not. In case of incorporeal or reversionary rights, a claim is the only practicable mode. Where there is a forfeiture to the government, an *office*, or writ of *scire facias* or *quo warranto*, is equivalent to entry.<sup>1</sup> But the bringing of an action of *disseisin* has no effect as a *claim*.<sup>2(a)</sup> In some instances of condition

<sup>1</sup> *Fonda v. Sage*, 46 Barb. 109; Co. Lit. 218 a; *Fitchet v. Adams*, 2 Stra. 1128; *Wigg v. Wigg*, 1 Atk. 883; *Gray v. Blanchard*, 8 Pick. 284; *Finch v. Riseley*, Poph. 58; *Doe v. Watt*, 1 Mann. & Ry. 694; *Canal &c. v. Railroad, &c.*, 4 Gill & J. 121; *Willard v. Henry*, 2 N. H.

120; *People v. Brown*, 1 Caines, 426; *Spear v. Fuller*, 8 N. H. 174; *Thompson v. Bright*, 1 Cush. 420; *Cross v. Carson*, 8 Blackf. 188; *Bowen v. Bowen*, 18 Conn 485.

<sup>2</sup> *Chalker v. Chalker*, 1 Conn. 79; *Lincoln, &c. v. Drummond*, 5 Mass. 821.

land, "on B being at one-half the expense, in land or otherwise, for procuring a title," &c. This condition was the sole consideration. A incurred the expenses in 1800, and gave notice to B in 1802, but B paid no regard to it till 1806. In the meantime, the value of the land increased tenfold. B brings a bill in equity against A for specific performance. Held, the condition was a condition precedent, and, upon various considerations, equity would not relieve. 1. B was not bound by any contract; and, therefore, if A had performed his part of the agreement, he would have had no remedy against B. 2. As the title to the land was in the government, and a survey necessary, the expenses must necessarily be incurred; and they must also be paid in *procuring* the title; merely *reimbursing* might defeat the whole object. 3. Hence this condition was not intended as a *mere security*; and the breach was not a mere default in *time*, but it destroyed the *substance of the contract*. 4. The act provided for was to be done for the benefit of a third party, the owner of the land, and therefore the damage was not susceptible of compensation. 5. The word "expenses" included *time and labor*, which, from their very nature, could not be paid at any subsequent period. *Hutcheson v. Heirs, &c.*, Ohio Cond. R. 10. See *Longstreet v. Ketcham*, Coxe, 170.

(a) It has been seen (p. 336) that, in

many of the States, bringing a suit is made equivalent to re-entry, in case of *non-payment of rent*. In Ohio, the same provision applies to all breaches of condition. (Walk. Intro. 207; *Sperry v. Pond*, 5 Ohio, 387.) In Massachusetts, (Rev. St. 610,) in all cases a title may be enforced by action alone, without entry. In Vermont, where A conveyed to B for the life of B and his wife, reserving to himself the right to possess and cultivate the premises for the purpose of enabling him to perform certain covenants upon his part for the support of B and his wife; and B subsequently recovered judgment in ejectment against A, for breach of those covenants, upon which no writ of possession was taken out: held, the judgment terminated A's right to possession, and, if he still undertook to manage the farm, directly or indirectly, without some new license, he did so as a wrong-doer, and acquired no right to the crops as against B, or the holders of B's title. *Adams v. Dunklee*, 19 Verm. 382.

Where a right of re-entry was reserved for breach of covenant, upon giving notice of avoiding the conveyance; held, a notice that there would be a re-entry, *unless* the other party should do certain acts, was insufficient, being prospective and conditional. *Muskett v. Hill*, 5 Bing N. 694.

In case of a mortgage to provide certain support, no notice need be alleged

subsequent, Chancery will decree a reconveyance of the land. Thus, where a marriage settlement was made, on condition that if the wife, on coming of age, should not charge her own estate with a certain sum, the settlement should be void, and she refused so to do; a reconveyance was decreed, with an account of the rents and profits from the time of refusal.<sup>1</sup>

§ 17. Even where the condition provides that the estate shall be *void* on non-performance, the estate is not defeated without some act or declaration of the grantor.(a) (But see sec. 19.)

<sup>1</sup> Hunt v. Hunt, Gilb. 48; Prec. in Cha. 387.

that the mortgagee has been compelled to pay, because the other party has the means of knowing if he has paid or made provision for the support. *Whitton v. Whitton*, 88 N. H. 127.

No demand of performance is in general required, unless provided for in the condition. 88 N. H. 127.

(a) But a deed of land upon condition that, unless the grantee should make certain payments, the deed should be "void, so far as to make good any non-fulfilment of said conditions;" will entitle the grantor, on breach of condition, to recover possession of the land, to hold as security for the performance of the conditions. *Fisk v. Chandler*, 80 Maine 79.

A granted to B a license to enter upon his lands, and search for and dig ores for twenty-one years, provided, that, if he should cease to work the mine for six months, or break any of his covenants, the said indentures, and the liberties, powers, &c., thereby granted, should cease, determine and be utterly void and of no effect. Held, the word *void* should be construed to mean *voidable*; that, although no *entry* was necessary to avoid the license, because it did not pass the land. yet, by analogy to the rule in case of a freehold lease, the grantor should give notice of his intention to avoid it; and that, until such notice, the right of possession, certainly as against any one not claiming under the grantor, remained in the occupant. *Roberts v. Davey*, 4 Barn. & Ad. 664; *Bowser v. Colby*, 1 Hare, 109; *Phelps v. Chesson*, 12 Ired. 194; *Western, &c. v. Kyle*, 6 Gill, 348.

So where a patent is granted, with the provision that, on failure to clear or pay rent, it shall *ipso facto* cease; still the condition is subsequent, and an adverse

claimant is bound to prove a forfeiture. And notwithstanding this form of expressing a condition, to save a forfeiture, it will be fairly and liberally construed; and a distinction made between slight or accidental breaches, and those which are important and wilful. *Sneed v. Ward*, 5 Dana, 187; *Cross v. Coleman*, 6, 446.

Conveyance by father to son, of one-third of his farm, upon which both resided, conditioned to be void if the grantee should refuse to pay the grantor \$80 each year if the grantor should call for it. Held, the annual payments could not be consolidated and demanded together, after several years, but each must be demanded separately at or about the close of each year, and, if not, was waived or relinquished, and no forfeiture incurred by non-payment. *Buckmaster v. Needham*, 22 Verm. 117.

The son, having been in possession with the father several years, removed, and left the latter in sole possession, and afterwards mortgaged one-third of the farm. Held, the father's possession should not be presumed to be adverse, even though so intended, as against the validity of the mortgage, unless the mortgagee had notice of the adverse possession. *Ib.*

The plaintiff conveyed to the defendant, with condition to pay her debts and to support and maintain her through life. Afterwards the plaintiff left the defendant's house, refusing to live with him longer. Held, that she could not recover the land in ejectment for breach of condition in not continuing her support, without showing a request to furnish maintenance, or at least notice that she was in need thereof. *Lamb v. Clark*, 8 Wms. 278.

In case of condition, till entry for



§ 18. There are some cases, where an entry for breach of condition is impracticable, or inconsistent with other rights, and therefore the law does not require it. Thus, where A grants land to B, with livery of seisin, for five years, on condition that, if he pay a certain sum within two years, he shall have the fee, and B fails to make payment at the time; inasmuch as A has no right of entry till the five years expire, the fee reverts in him without entry or claim. So, where one grants a rent-charge from his own land on condition, the rent becomes void, upon breach of condition, without entry or claim, because the grantor is already in possession. For the same reason, if a grantee on condition, before a breach, lease the land to the grantor, no entry is required to revert the title in the latter. So a party, for whose benefit a condition subsequent is attached to a devise of real estate, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture. Such party may waive the forfeiture; and acts inconsistent with the claim of forfeiture are sufficient evidence of a waiver.<sup>1</sup> And, in general, a grantor in possession cannot enter for breach of condition, nor his devisee; though he may defend against a suit for the land.<sup>2</sup> But where the party who is to perform a condition, and the party for whom it is to be performed, are jointly in possession, it is said the latter must make *claim* for a breach, by acts and words, or either of them, such as will distinctly admonish the grantee that possession will be retained for the breach, and not waived. *Complaints* are mere *statements of a breach*, not expressions of an intent to claim a forfeiture.<sup>3</sup> Upon the same principle, a breach of condition must, in general, consist in some *act*, not in a mere declaration. Thus, where the condition is that certain persons shall have the use and

<sup>1</sup> Lit. 350; Co. Lit. 218 a; Lincoln, &c. v. Drummond, 5 Mass. 321; Hamilton v. Elliot, 5 S. & R. 375. See Waten-

by v. Moran, 3 Call. 491; Andrews v. Senter, 82 Maine, 894.

<sup>2</sup> Thompson v. Thompson, 9 Ind. 323.

<sup>3</sup> Willard v. Henry, 2 N. H. 122.

breach, claimants under a devisee hold the estate. Throp v. Johnson, 3 Ind. 343; Thompson v. Thompson, 9 Ib. 323.

Where the widow of a devisee, on condition subsequent, claims dower, but not of the heirs, it is no defence that the condition has not been performed Ib.



occupation of a room; mere denial of the right is no breach—there must be a shutting up of the room, or some similar act.<sup>1(a)</sup>

§ 19. Where the estate to which a condition is annexed is for years only, and is to cease on the lessor's doing a certain act, no entry is required to determine it. Thus if A lease to B for years, on condition that, if he pay B £10, the estate shall cease, upon such payment the term *ipso facto* comes to an end.<sup>2</sup> But where a lease is made, upon the condition that the lessee, at the end of each year, should give bond, with surety, for the rent of the succeeding year; a failure to comply with the condition will not work a forfeiture, unless the landlord make a demand of performance at the end of the year.<sup>3</sup>

§ 20. As the benefit of a condition can be reserved only to the grantor or lessor and his heirs, so no person could enter for breach of an express condition, at common law, except parties and privies in right and representation—that is, the heirs, devisees, executors, &c., of individuals, or the successors of corporations. Neither privies nor assignees in law, as the lord by escheat, nor privies in estate, as reversioners and remaindermen, had a right of entry. This rule, however, did not apply to implied conditions—as, for instance, that against a tenant's conveying a greater interest than he had; of which an assignee might take advantage.<sup>4(b)</sup> Nor has a *creditor* of one of the

<sup>1</sup> Hogeboom v. Hall, 24 Wend. 146.

<sup>2</sup> Plow. 142; Bro. Abr. Condition, 88.

<sup>3</sup> Tate v. Crowson, 6 Ired. 65.

<sup>4</sup> Lit. 847; Co. Lit. 215 a. See *infra*, sec. 23; 2 Cruise, 81; Vermont v. Soc'y,

&c., Paine C. C. 545; Smith v. Brannan, 18 Cal. 107; Hooper v. Cummings, 45 Maine, 859; Southard v. Central, &c., 2 Dutch. 13; Cornelius v. Ivins, Ib. 376; Norris v. Milner, 20 Geo. 588.

(a) This rule is altered by the New Jersey act of March 14, 1851, authorizing the transfer of estates in expectancy, only as to wills or deeds, executed after its passage. Southard v. Central, &c., 2 Dutch. 13; Cornelius v. Ivins, Ib. 376.

Conveyance upon condition, with a mortgage back. The mortgage debt being unpaid, the mortgagee enters for foreclosure, and while he is in possession a breach of the condition in the deed occurs. Held, the estate of the mortgagor was not thereby absolutely divested, without some further notice or act on the part of the mortgagee. Stone v. Ellis, 9 Cush. 95.

(b) A reversion was granted to A, upon the express condition that at a particular time he should pay £150 to B, and, in case A failed to pay the £150 at the time specified, B should take possession of the reversionary interest of A in the land. Neither A nor B was a party to the deed. After the death of B, upon a bill in equity by his executor, to charge the land with the payment of the £150; held, the condition for the benefit of B, a stranger, was void, and, even if it had been valid, his executor could not enforce it. Kellam v. Kellam, 2 P. & H. 857.

In the case of a condition subse-

heirs of the grantor any remedy against the land, unless it be by an execution at law, against that portion of it which may belong to such heir, after the right of entry shall have been exercised.<sup>1</sup> Nor can a trespasser avail himself of a condition.<sup>2</sup>

§ 21. A condition may be of such a nature that, although relating only to the grantor himself, and not broken during his life, there may be a breach after his death, of which the heir may take advantage.(a)

§ 22. A condition, by means of a descent, may be disannexed from the estate with which it was originally connected. Thus, although the land itself may descend to such special heirs, as claim through the ancestor, from whom it came to the deceased; the condition, being reserved to heirs generally, will pass to the heirs at common law. But, after the latter have entered for

<sup>1</sup> *Cross v. Carson*, 8 Blackf. 138.

<sup>2</sup> *Buckalew v. Estell*, 5 Cal. 108

quent unperformed, a general assignment, by the grantors, of all their property, rights, claims and demands, deprives the condition of all force and effect, the grantees acquire an absolute estate, and are discharged from the condition, and all claim to damages for the breach of it. The omission of the grantees to perform the condition vests in the grantors, or, if dead, in their heirs, the right of entry; but an assignee of the grantors acquires no right to recover the land. *Underhill v. Saratoga, &c.*, 20 Barb. 455.

The charter of Trinity Church was confirmed, in 1704, by an act which limited its clear income from lands to £500 a year. In 1705, a tract of land was granted to it by the queen, which was leased for £30 a year, for five years from that time. The land rapidly increased in value, and the income and value became enormous. Held, on a bill in which the church's title in fee was denied, that such an increase of the income of the land would not divest the church of its title under the grant, and, if it did, it could only be taken advantage of by the sovereign, and not by one claiming a title hostile to the corporation, and to the sovereign. *Bogardus v. Trinity, &c.*, 4 Sandf. Ch. 638.

A statute provided, that a diversion of salt-works, to other purposes than the manufacture of salt, should work a

forfeiture of leasehold estate. Held, a partial diversion of a lot could not be taken advantage of by a subsequent holder of the leasehold estate, under an agreement for an exchange of it for other lands, for the purpose of avoiding such agreement, after he had quietly occupied the premises for several years, and the other party had made large improvements on the land received by him in exchange; such partial diversion being known to him at the time of making the agreement, and the statute making a diversion a forfeiture being a public law, of which he was bound to take notice, and where such forfeiture, if any, had been waived by the people, and a renewal of the lease granted. *Hasbrook v. Paddock*, 1 Barb. 635.

(a) Thus a man granted land to A, his child, on condition that A should support him, pay his debts, and save him from any trouble or cost on account of them, with a clause of re-entry. After the father's death, B, another child, presented a debt of the father to A for payment, which was refused. Whereupon B brings ejectment for a share of the land as an heir at law. Held, the action would lie, though this debt had subjected the father to no cost, &c.—that clause in the condition being operative only during his life. *Jackson v. Topping*, 1 Wend. 388.

condition broken, the former may re-enter upon them. Where the condition descends to one heir only, as heir at common law, but the estate descends to several—as in the English *gavelkind*—after entry by the former, the rest shall enjoy the estate with him.<sup>1</sup>

§ 23. At common law, as has been stated, (sec. 20,) where a reversioner assigned his reversion, the assignee could not avail himself of any conditions annexed to the particular estate. The conditions were regarded as *rights in action*, which, by the policy of the law, were not assignable. But, by St. 32 Hen. VII, ch. 34, the assignees of reversions are placed on the same footing, in regard to conditions and taking advantage thereof, as the original lessors.<sup>(a)</sup> An assignee of *part of the land* is not within the statute; but an assignee of *part of the reversion* is. Thus, if a lease be made of three acres, and the reversion of two of them granted away, although the rent will be apportioned, the condition is destroyed, being entire and against common right.<sup>2</sup> But if the reversion is granted for years, the grantee may avail himself of a condition.<sup>3</sup> The statute does not apply to one who comes to the estate *by law*, as, for instance, by escheat; because the language of it implies that the assignee must be either an assignee *to* or *by* the reversioner, claiming either in the *per* or the *post*—that is, one who comes in by act and limitation of the party. It seems, however, that a tenant by the curtesy, or in dower, although claiming by law, is within the statute; being in *by* the wife or the husband. Although the words of the statute are “for non-payment of rent, or for doing waste, or other forfeiture,” yet an assignee can take advantage of such conditions only as are incident to the reversion—like those pertaining to rent, or such as are for the benefit of

<sup>1</sup> *Paine v. Samms*, 1 And. 184; *Clerc v. Pecock*, 2, 22; *Rob. Gav.* 119; *Godb.* 8.

<sup>2</sup> 2 Cruise, 22.

<sup>3</sup> *Co. Lit.* 215, a. See *Fisk v. Chandler*, 80 Maine, 79.

(a) Lease from a company with condition of re-entry. The company being afterwards incorporated, with a provision that all contracts, &c., with the

company should be valid; held, the corporation might avail itself of the condition. *Doe v. Knebell*, 2 Carr. & K. 66.

the estate—like those relating to waste and repairs, and not those merely personal—as for the payment of a sum in gross.<sup>1</sup>

§ 24. In general, entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the same title, which he had before the conveyance was made. It constitutes a paramount claim, and operates *by relation*, so as to avoid all intermediate rights and incumbrances. Thus, although the widow of a conditional grantee has dower, yet an entry for breach of condition will destroy this right. And whether made before or after the husband's death, it seems, will make no difference.<sup>2</sup> So where lands bought from the government are forfeited by breach of condition, the widow has no dower.<sup>3</sup> So where one holding a life estate leased to the remainder-man for the life of the lessor, on condition to be avoided for non-payment of rent, and afterwards entered for breach of condition; held, this defeated any claim for dower by the lessee's widow.<sup>4</sup>

§ 25. A condition may be *waived* by the acts of the party for whose benefit it was created, and, after being once dispensed with, can never afterwards be enforced. Thus where the land has remained more than fifty years unfenced, it is a breach of a condition in the deed to "fence the land;" but if the grantor, with full notice, does not complain, enter, or take any action to reclaim the land, it will be evidence tending to show a waiver.<sup>5</sup> So where land was conveyed on condition of paying a certain annuity, and, after a failure to pay, the annuitant accepted the annuity; held, a perpetual waiver of the condition. So a receipt by the lessor of rent, accruing after acts of forfeiture by the lessee, which are known to the lessor, is a waiver of the

<sup>1</sup> Co. Lit. 215 a; Hill v. Grange, Plow. 167.

<sup>2</sup> Lit. 825; Co. Lit. 202 a; Ann May-owe's case, 1 Rep. 147 b; 1 Rolle's Abr. 474

<sup>3</sup> Rodgers v. Rawlings, 8 Por. 326.

<sup>4</sup> Beardslee v. Beardslee, 5 Barb. 324. But see Co. Lit. 202 a. See also Litchfield v. Ready, 1 Eng. L. & Equ. 460.

<sup>5</sup> Hooper v. Cummings, 45 Maine, 359.

forfeiture.<sup>1(a)</sup> So one tenant in common devised to another, on condition that he would convey to his daughter a part of the land. No conveyance was made, but the daughter for a long time occupied the land. Held, there was no forfeiture.<sup>2</sup> But it has been held that forfeiture of condition is not waived by parol assent or silent acquiescence, nor by an offer to accept immediate payment.<sup>3</sup> So it is only where rent is paid which accrued after a forfeiture, that the acceptance of such payment is considered an affirmation of the lease, and a waiver of the forfeiture.<sup>4</sup> And a condition cannot be waived by the reversioner, after he has parted with his reversion.<sup>5</sup>

§ 26. Performance of a condition may be *presumed* from lapse of time.<sup>6</sup>

<sup>1</sup> Ripley v. Aetna, &c. 30 N. Y. 136; Clarke v. Cummings, 5 Barb. 339; Chalker v. Chalker, 1 Conn. 79. See Enfield, &c. v. Connecticut, &c. 7 Conn. 45; Dickey v. M'Cullough, 2 Watts & S. 100; Bayley v. Homan, 5 Mann. & G. 94; Thompson v. Bright, 1 Cush. 420; Western, &c. v. Kyle, 6 Gill, 843; Conk-

ling v. King, 10 Barb. 372; Mechanics &c. v. Wixon, 46 Barb. 218.

<sup>2</sup> Plummer v. Neile, 6 Watts & S. 91.

<sup>3</sup> Jackson v. Chrysler, 1 John. Cas. 125; Gray v. Blanchard, 8 Pick. 292; Hutcheson v. M'Nutt, 1 Ham. 21.

<sup>4</sup> Hunter v. Osterhoudt, 11 Barb. 88.

<sup>5</sup> Commyns v. Latimer, 2 Flori. 71.

<sup>6</sup> Fox v. Phelps, 17 Wend. 393; 20, 437.

(a) A father conveyed an estate to his son, on condition that, unless the son maintained his parents and brother in a specified manner, and properly cultivated the land, the conveyance should be void, for the whole land during the lives of the parents, and as to one-half of the land forever. The father having died, his widow claimed her dower instead of the support thus provided for her, and the son transferred the land to another person. After the father's death, the mother was well supported, but neither she nor the father was supported in the manner pointed out by the deed, nor was the land well cultivated. The son, however, had always remained in possession, with his parents, and they had accepted the support which he gave them, often complaining that the condition was not fulfilled, but never making formal entry or claim for a breach. Held, these facts showed a waiver of the condition. Willard v. Henry, 2 N. H. 120.

The owner of land made a deed of a small parcel thereof, with a house thereon, reserving to himself the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around the land conveyed; and

whenever the grantee, his heirs or assigns, should neglect or refuse to support the fence, then the deed to be void; and subsequently conveyed the residue to one, who removed the fence without replacing it, and reconveyed such residue to the grantor, who afterwards entered upon the small parcel, claiming a forfeiture thereof for breach of the condition. Held, the condition, if not merely personal, being designed to benefit the grantor, as owner of the residue of the lot, attached to such residue, and passed to the grantee thereof, whose removal of the fence was an extinguishment or waiver of the condition; which, being thus determined, could not be revived by the reconveyance. And, the reconveyance having been in mortgage, held, further, it was immaterial in this respect, whether the removal of the fence took place before or after the execution of the mortgage. Held, also, until reasonable notice given, or request made, and neglect or refusal of the grantee, to replace the fence, there was no neglect or refusal to support the fence, within the terms of the condition. Merrifield v. Cobleigh, 4 Cush. 178.

§ 27. A condition may be destroyed by a *release* or *discharge*, which may be made either to the grantee, or his assignee, if there be one. And where the grantee has limited the estate to one for life, remainder in fee, a release to the tenant for life will enure to the benefit of the remainder-man. It is held, that, if the conditions of a deed have not been performed, the whole estate, legal and equitable, will revert to the grantor or his heirs, unless there is proof of such an agreement, or specific acts amounting to evidence of such an agreement, on the part of the grantor, or his heirs, as would entitle the grantees to a discharge of the condition.<sup>1</sup>

§ 28. *Accord and satisfaction* is a legal equivalent for performance of a condition precedent. So, where an act is to be done at a certain time, or on demand, an acceptance of the act after the time, or on a second demand, as and for a performance, will save the forfeiture.<sup>2</sup>

§ 29. A condition is to be distinguished from a *limitation*. The latter requires no entry to terminate the estate, but terminates it *ipso facto*, by the mere happening of the event referred to. Thus, if A grant an estate to B till the death of C, B's estate immediately comes to an end upon the death of C.<sup>3</sup> So, if a man makes a lease for a hundred years, if the lessee lives so long, upon the lessee's death the estate reverts in the grantor without entry. And a grantee of the reversion might always take advantage of a *limitation*, though not of a condition.

§ 30. Where a condition subsequent is followed by a limitation to a third person, upon non-fulfilment or breach, this is a *conditional limitation*. Words of limitation mark the period which is to determine the estate, but words of condition render it liable to be defeated in the intermediate time. The one specifies the utmost time of continuance; the other marks some event, which, if it takes place during that time, will defeat the estate. A life estate given in the prior part of a will may well

<sup>1</sup> Co. Lit. 291 b. 297 b; *Dolan v. Mayor*, &c., 4 Gill, 894.

<sup>2</sup> *Richards v. Carl*, 1 Ind. 313; *Hogins*

*v. Arnold*, 15 Pick. 259; 5 Mann. & G. 94

<sup>3</sup> Co. Lit. 214 b; *Coppage v. Alexander*, 2 B. Monr. 316.

be determined, by an apt limitation over, contained in a subsequent part.<sup>1</sup>

§ 31. A conditional limitation is of a mixed nature. Thus, if an estate be limited to A for life, provided, that, when C returns from Rome, it shall thenceforth remain to the use of B in fee; this is a condition, because it defeats the estate previously limited, while it is also a limitation, because no entry is required to take advantage of it. Such a disposition can be made, in general, only by will or a conveyance to uses. But in New York it may be made by common law conveyance.<sup>2</sup>(a)

<sup>1</sup> *Ashley v. Warner*, 11 Gray, 48.

<sup>2</sup> 4 Kent, 121-8; 1 N. Y. Rev. St. 725; *Cogan v. Cogan*, Cro. Eliz. 860; *Stearns*

*v. Godfrey*, 16 Maine, 158; *Doe v. Crisp*, 8 Ad. & Ell. 779; *Rochford v. Hackman*, 10 Eng. L. & Equ. 64.

(a) Deed of land in New York, made before the Revised Statutes to two grantees, owners of adjoining property; the estate to cease unless the land should within thirty years be opened and appropriated to a public square; the conveyance being upon the trust, to permit the grantor, his heirs and assigns, to receive the rents and profits until the square should be thus opened, and, after the grantees should have elected so to open and appropriate it, then upon the further trust that it should be forever kept open as a public square. Held, a

conditional limitation, and not a power; that a duty was not thereby imposed on the grantees to open the square; but discretion was given them to do as they thought for their benefit; that their authority could be transferred to other subsequent grantees; and that a grantee, in whom the title of both original grantees became at last vested, had a right to open the square within thirty years, and so, having performed the condition, became seised of the entire estate, subject to the trust. *Mayor, &c. v. Stuyvesant*, 17 N. Y. 84.



## CHAPTER XXIX.

## MORTGAGE. NATURE, FORM AND EFFECT OF A MORTGAGE.

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|--|---|
| 1. Definition and history of mortgages.                      | whether implied in a mortgage, or necessary to constitute one.                                    |
| 2. Right of redemption.                                      |   |
| 5. In fee or for years.                                      | 14. Right of redemption cannot be restrained; mortgage and conditional sale, distinction between. |
| 6. Deed and defeasance.                                      |   |
| 11. What constitutes a mortgage in Chancery. Parol evidence. | 25. Power to sell, given to a mortgagee.  |
| 12. Personal liability of mortgagor;                         |   |

§ 1. A MORTGAGE is a *conditional conveyance* of land, designed as security for the payment of money or performance of some other act, and to be void upon such payment or performance.(a)

(a) For other definitions, also in references to mortgages made to *secure the purchase-money* of land sold, which in some respects are specially favored by the law, see 1 Hilliard on Mort. (3d. ed.) 1, 2 and n. See also Hodgdon v. Shannon, 44 N. H. 572; Neligh v. Mechenor, 8 Stockt. 530; Clark v. Brown, 8 Allen, 509; Lokerson v. Stillwell, 2 Beasl. 857

By the English law there are two kinds of estates held as security for the repayment of money; the one acquired by some legal and compulsory process; the other voluntarily conveyed by the debtor to the creditor. Those of the first kind are called estates by *statute merchant*, *statute staple* and *elegit*. By the feudal law, the lands of a debtor were not liable to be taken by legal process, except in the hands of his heir; upon the ground that he would thereby, as by a voluntary alienation, be disabled from performing his feudal services. But in the reign of Edw. I, in consequence of great complaints from foreign merchants as to the difficulty of recovering their debts, a statute was passed, providing that the debtor of any merchant might be summoned before a certain prescribed tri-

bunal, to acknowledge the debt, under his own and the king's seal, and have a day fixed for payment; and, if payment were not then made, that by an immediate execution all his lands should be delivered to the merchant, to hold until the debt was wholly levied. This species of security was called a *statute merchant*. *Statute staple* is a security of a similar nature to the one above described, and is defined as a bond of record, acknowledged before the mayor of some trading town, (sometimes called *estaple* or *staple*,) and attested by a public seal. Under this sealed obligation, execution might be obtained against the lands of the debtor, in the same manner as under a statute merchant. Although these securities were originally intended for the benefit of merchants only, yet, on account of their cheapness and convenience, they became generally adopted, until, in the reign of Henry VIII, an act was passed restricting statutes staple to merchants. The same statute, however, created a new kind of security, called a *recognizance in the nature of a statute staple*, being a bond acknowledged before certain judges or magistrates, and enrolled; upon which the same advan-

The name is derived from the fact, that by the old law, where land was thus conveyed, unless the condition was performed at the day, the estate became *dead* or extinct.<sup>(a)</sup> A mortgage was in fact a feoffment upon condition, or the creation of a base or determinable fee, with a right of *reverter* attached to it. The debt was required to be tendered at the time and place prescribed; and, in general, the strict rules of law pertaining to *conditions* were rigidly enforced in relation to mortgages.<sup>1(b)</sup>

<sup>1</sup> Wade's Case, 5 Co. 114; Goodall's case, 5 Co. 95; Lit. sec. 382; Co. Lit. 210 b; 4 Kent, 189; Parsons v. Welles, 17 Mass. 421; Pride v. Boyce, Rice, 275; Loyd v. Currin, 8 Humph. 462. See

Sahler v. Signer, 44 Barb. 606; Chapman v. Turner, 1 Call, 252; Coote, 189; Hebron v. Centre, &c. 11 N. H. 571; Montgomery v. Bruere, 1 South. 268; Lull v. Matthews, 19 Vern. 822.

tages may be had as upon a statute staple.

Another compulsory security for payment of debts was provided by St. Westminster, 2, 13 Edw. I, ch. 18, which authorized a judgment creditor to elect, either to have a writ of *fiery facias*, to be levied upon personal property, or else that the debtor should deliver him all his chattels, with certain exceptions, and one-half his lands, until the debt was levied, upon a reasonable price or extent. From this right of *election*, the new execution provided as above derived the name of *elegit*. The effect of the statute was, that a judgment became a lien upon the debtor's lands. So, also, a debtor, upon executing a bond for the debt due, may give a *warrant of attorney*, authorizing some attorney of the court to acknowledge a judgment for the money, upon which acknowledgment an *elegit* may issue, as in case of an adversary suit. Various statutes have been passed, requiring judgments to be docketed, registered or recorded, in order to give them priority of lien over subsequent transfers or incumbrances. When a writ of *elegit* is sued out, the sheriff impanels a jury, upon whose appraisal he sets out and delivers a moiety of the debtor's lands to the plaintiff, by metes and bounds. All estates in fee-simple may be thus taken; so, a reversion, an estate tail, rent-charge, or term for years. This last may also be sold as personal property. Although the estate acquired by the creditor is uncertain as to duration, being determinable only on payment of the debt, yet it is but a chattel interest, which passes to executors. The security follows the claim secured.

These are the general rules of the English law relating to estates held by compulsory process for payment of debts. They are practically of little consequence in the United States, because each State has for itself, by minute statutory provisions, regulated the subject of levying or extending executions upon real property, a summary view of which will be given in a subsequent portion of this work.

The subject of estates, voluntarily conveyed to a creditor as security, is considered in the text.

(a) This is the chief point of distinction between the *mortuum vadium* or mortgage, and the *vivum vadium*, or living pledge, which was used in the early periods of the English law, but is now for the most part obsolete. It was a conveyance of lands by debtor to creditor, to hold till the rents and profits should amount to the sum borrowed, and then revert to the borrower. See Angier v. Masterson, 6 Cal. 61; Rankert v. Clow, 16 Tex. 9; Poindexter v. M'Cannon, 1 Bad. & Dev. Equ. 877; Thayer v. Mann 19 Pick. 588; Coote, 41, 43, 207, 222, 228; Teulon v. Curtis, Younge, 619. As to the form of the condition of a mortgage, see Skinner v. Cox, 4 Dev. 59; Stewart v. Hutchins, 6 Hill, 148; Palmer v. Gurnsey, 7 Wend. 248; Cooper v. Whitney, 8 Hill, 95; Baldwin v. Jenkins, 28 Miss. 206; Cotterell v. Long, 20 Ohio, 464.

(b) The ancient law, however, which may be considered as still in force, was as rigid in protecting the rights of the *mortgagor*, where he was guilty of no neglect, as in decreeing an absolute forfeiture for the slightest non-compliance

§ 2. At an early period,(a) however, the Court of Chancery interfered, to relieve against the hardship of an absolute forfeiture, upon payment of the debt, with interest and costs, if made in a reasonable time after the day appointed. Chancellor Kent remarks, "the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."<sup>1</sup>

§ 3. It was at first held, that the mortgagor had not the right of re-acquiring his estate, as against those holding the estate of the mortgagee *in the post*, as, for instance, the widow having a right of dower, or the lord the right of escheat. But this distinction in favor of parties thus holding the land has long been wholly done away.<sup>2</sup>

§ 4. The mortgagor's right to regain his estate by application to the Court of Chancery, after breach of condition, is called *an equity of redemption*; and the same phrase is generally, though it would seem somewhat inaccurately used, to express the interest remaining in the mortgagor, even before breach of condition.(b)

§ 5. A mortgage may be made by a conveyance, either in fee or for years. The latter form is rarely adopted in the United States.(c)

<sup>1</sup> 4 Kent, 158. See *Clapp v. Titus*, 9 Verm. 211.

<sup>2</sup> 2 Cruise, 79-80.

with the condition of the mortgage. Thus, if a legal tender of the mortgage debt is made at the day and refused, the land is held forever discharged of the incumbrance, though the debt remains. *Swett v. Horn*, 1 N. H. 832, 833. See *Merritt v. Lambert*, 7 Paige, 344; *Edwards v. Ins. Co.* 21 Wend. 476; 26 Ib. 541; *Arnot v. Post*, 6 Hill, 65; *Smith v. Kelley*, 27 Maine, 287.

(a) When this was, see *Roscarrick v. Barton*, 1 Cha. Cas. 219; *Hale's History of Common Law*, ch. 3; *Rot. Parl.* vol. 8. p. 258; *Emanuel, &c. v. Evans*, 1 Cha. Rep. 10; 2 Cruise, 62.

(b) But, in the Statutes of North Carolina and Florida, a distinction between

these two kinds of estate seems to be carefully observed; the former being entitled an equity of redemption, and the latter a *legal right* of redemption. 1 N. C. Rev. St. 266; *Thomp. Dig.* 855; *State v. Laval*, 4 McCord, 840.

(c) In Missouri, mortgages of leaseholds for more than twenty years are treated like mortgages of estates in fee. *Misso. St.* 410. See *Wheeler v. Montoflore*, 2 Ad. & Ell. N. 183; *Edwards v. Jones*, 1 Coll. Ch. 247; *Coote*, 156, 157; *Phipps v. Budd*, 2 Eng. L. & Equ. 187; *Kearney v. Post*, 1 Sandf. 105; *Budeley v. Massey*, 6 Eng. L. & Equ. 856; *Hulet v. Soullard*, 26 Verm. 295; *Barroilhet*

§ 6. A mortgage may be made by an absolute deed, and a *defeasance(a)* back, instead of a single conditional deed. In England, this form of mortgage has been regarded unfavorably by the courts, as indicating fraud, and injurious to the mortgagor; because the defeasance might be lost, and an absolute title set up.<sup>1(b)</sup>

§ 7. It is the general rule, that the defeasance shall be a part of the same transaction with the conveyance. A conveyance must be a mortgage *at the time of its inception*; it never can become such by any subsequent act of the parties. If there

<sup>1</sup> Cotterell v. Purchase, Forr. 68; Sel-Cas. in Ch. 9; Wright v. Bates, 18 Verm. 341; Harrison v. Lemon, 8 Blackf. 52; Kelly v. Thompson, 7 Watts, 401; Holmes v. Grant, 8 Paige, 248; Miller v. Hamblet, 11 Verm. 499; Jaques v. Weeks, 7 Watts, 261; Chambers v. Hise, 2 Dev. &

B. 305; Waters v. Randall, 6 Met. 479; Manufrs., &c. v. Bank, &c., 7 W. & S. 335; Scott v. McFarland, 18 Mass. 809. See Shaw v. Erskine, 48 Maine, 371; Cornell v. Pierson, 4 Halst. Cha. 478; Wing v. Cooper, 37 Verm. 169; Guthrie v. Kahle, 46 Penn. 331.

v. Battelle, 7 Cal. 450; Sheldon v. Ferris, 45 Barb. 124.

A lease for years by indenture, in which the lessor acknowledges the receipt in advance of a certain sum, in full for rent during the term, and the lessee covenants to reconvey on repayment thereof with interest, is a mortgage, and subject to the same privileges with a mortgage of the freehold. Nugent v. Riley, 1 Met. 117. So, also, though executed only by the lessor, if the lessee accepts and takes possession under it. *Ib.*

In such case, though there is technically no covenant by the lessee, upon which an action will lie, yet, if he underlets and receives rent during the term, to the full amount of his payment, with interest, his estate for years thereby ceases, and the lessor is restored to his old title. If he receives more than that amount, the surplus is received by him, not as mortgagee, but for the lessor, who may recover it in an action for money had and received. *Ib.*

(a) See *Defeasance*, vol. 2. The common law rule is, that, to defeat a deed, it must, in general, be itself a deed, or an instrument under seal. See 22 Pick. 526; Parsons v. Mumford, 3 Barb. Cha. 152; Moore v. Madden, 2 Eng. 530. It will be seen that the rule is extensively changed as to mortgages. See s. 11.

(b) The statute law, in many of the

United States, expressly recognizes this form of mortgage; and, as deeds are universally registered, the inconveniences above suggested are less serious here than in England. In Delaware, the statute speaks of "a defeasance, or a written contract in the nature of a defeasance, or for reconveyance of the premises, or any part thereof." In Rhode Island, of a bond of defeasance, or other instrument which creates a mortgage or redeemable estate. Similar terms are used in New Jersey and Illinois; in the former of which States, any *writing* may be a defeasance; but, ordinarily, the word *defeasance* only is used. In New Hampshire, the condition of the mortgage must be contained in the deed itself. By the Revised Statutes, a mortgage is defined, as a conveyance to secure payment of money, or performance of any other thing stated in the condition thereof. (Reference to a bond, made with the deed, and containing the condition, is a substantial compliance with the statute. Bassett v. Bassett, 10 N. H. 64. See Lift v. Walker. *Ib.* 150.) In Florida, all writings of conveyance to secure payment of money are mortgages. Lund v. Lund, 1 N. H. 39; Erskine v. Townsend, 2 Mass. 498; Wright, 44; Del. St. 1829, 91; R. I. L. 204; 1 N. J. L. 464; Illin. Rev. L. 131; N. H. Rev. St. 245; Thomp. Dig. 376; N. J. Rev. Sts. 658.

ever was a moment when it could be considered only as an absolute estate, it must ever remain so. But provided both instruments are parts of one transaction, the defeasance may be dated after the deed. (In Maine, they must bear the same date.)<sup>1</sup> So a condition may constitute a mortgage, if written on the back of an absolute deed, though without signature or seal.<sup>2</sup> So where one conveys land for a certain consideration, and the grantee covenants to reconvey, on payment of that sum, in one year, this is a mortgage, notwithstanding parol evidence that the parties intended otherwise.<sup>3</sup> But a covenant by the grantee, to reconvey at an agreed price, unless certain improvements shall be commenced within a given time, is not a condition.<sup>4</sup>(a)

<sup>1</sup> *Lund v. Lund*, 1 N. H. 41; *Harrison v. Trustees, &c.*, 12 Mass. 456; *Bodwell v. Webster*, 18 Pick. 418; *Kelly v. Thompson*, 7 Watts, 401. Me. Rev. St. 558; 2 Greenl. Cruise, 81, n. See *Pendleton v. Pomeroy*, 4 Allen, 510; *Capen v. Richardson*, 7 Gray, 369; *Bayley v. Bailey*, 5 Gray, 505; *Stephenson v. Thompson*, 18 Ill. 186; *Sahler v. Signer*, 37 Barb. 329; *Wheeler v. Ruston*, 19 Ind. 384; *Steel v. Steel*, 4 Allen, 417; *Freeman v. Baldwin*, 18 Ala. 246; *Kerr*

*v. Gilmore*, 6 Watts, 405; *Brown v. Wright*, 5 Yerg. 57.

<sup>2</sup> *Stocking v. Fairchild*, 5 Pick. 181; *Perkins v. Dibble*, 10 Ohio, 438; *Baldwin v. Jenkins*, 23 Miss. 206; *Graham v. Stevens*, 84 Verm. 166.

<sup>3</sup> *Colwell v. Woods*, 8 Watts, 188; *Hammond v. Hopkins*, 8 Yerg. 525; *Cooper v. Whitney*, 8 Hill, 395.

<sup>4</sup> *Cunningham v. Harper*, Wright, 366. See *Humphreys v. Snyder*, 1 Morr. (Iowa) 263; *Davenport v. Bartlett*, 9 Ala. 179.

(a) A conveys land to B, who, two years afterwards, gives A a bond to convey the land to the wife of A, upon payment of certain notes. Held, no mortgage; and parol proof is inadmissible, that B agreed to A's keeping possession, that the deed was given as security, and the bond not made at the time, merely because the amount due upon the notes was not then ascertained. *Bennock v. Whipple*, 8 Fairf. 846; *Lund v. Lund*, 1 N. H. 39.

A gave to B the following receipt or acknowledgment: "This day received of B a deed of, &c., for and in consideration of — dollars, paid by my recognizance, and other demands against him; if on final settlement a balance shall be due him, I agree to pay it or reconvey to him, on being repaid for my advances and trouble; and I will return all that the land brings, besides repaying me." A afterwards sold the land. Held, this did not constitute a mortgage; that B had no interest, liable to his creditors, or which a court of equity would recognize, inasmuch as A had his election,

either to reconvey the land or pay the surplus balance, and had elected the latter by conveying the land. *Fuller v. Pratt*, 1 Fairf. 197; *Holmes v. Grant*, 8 Paige, 248.

If such a deed recites, as its consideration, an indebtedness of the grantor, which is not discharged; and is given by one trustee to another for the benefit of the *cestui*, to whom the debt is due; and contains a limitation over upon his death; and is subject to being disclaimed by the *cestui* upon coming of age: still it is not a mortgage. *Eckford v. De Kay*, 26 Wend. 29.

Where an absolute deed is given, but intended as a mortgage, it is held void against creditors, &c., though afterwards the parties agree that the grantee have the whole title, and the full value of the land is paid to creditors according to contract. So, although a second delivery is made of the deed; because, the title having once passed, it cannot thus be divested. *Halcombe v. Ray*, 1 Ired. 340. A conveyance signed by both grantor and grantee, and providing that

So a bond, delivered to a third person as an *escrow*, will not constitute a defeasance, unless the condition on which it is to be delivered to the obligee is performed. Thus A, having borrowed money from B, conveys land to him. B signs a bond of defeasance, which, by mutual agreement, is left with C, to be delivered by him to A, if A repay the money borrowed within a certain time. The time having elapsed without repayment, C delivers the bond to B. Held, although, if A had repaid the money within the time, the bond would have operated as a defeasance *by relation to the first delivery*, yet, as B held no security for the money, the transaction did not constitute a mortgage.<sup>1</sup>

§ 8. In general, in the United States, a defeasance must be *recorded* or *registered*. Omission to register the defeasance makes the conveyance absolute as to all persons but the parties and their representatives, and those having actual notice. And, it seems, possession by the grantor will be no equivalent for that registration.<sup>2(a)</sup>

<sup>1</sup> Bodwell v. Webster, 18 Pick. 411. See Carey v. Rawson, 8 Mass. 159; Green v. Cook, 29 Ill. 186.

<sup>2</sup> Grimestone v. Carter, 8 Paige. 421; Whittick v. Kane, 1 Paige, 202; Dey v.

Dunham. 2 John. Cha. 182; Fuller v. Pratt, 1 Fairf. 197; Mass. Rev. Sts. 407. See Friedley v. Hamilton, 17 S. & R. 70; 8 Paige, 421.

the grantee shall sell the property, pay debts due him from the proceeds, and the surplus to the grantor; constitutes a trust, in the nature of a mortgage. Cross v. Coleman, 6 Dana, 446. See Myers', &c., 42 Penn. 518.

An absolute deed was made to a creditor, with the understanding that he should pay his own debt, indemnify himself against his liabilities, and satisfy other creditors, and pay the balance to the debtor's wife and children. Held, the transaction was a mortgage as to the debt of the grantee, and a trust for the balance. McLanahan v. McLanahan, 6 Humph. 99.

A conveyance to a trustee, with power to sell, pay a debt from the proceeds, and deliver the balance to the grantor, upon his failure to pay the debt; is a mortgage. Woodruff v. Robb, 19 Ohio, 212.

But a conveyance, with an agreement that the grantor may have back the

land upon payment of the purchase-money and interest in two years, or before that time, if it should be sold for a larger sum, but both parties speaking of a *sale*, and the price being the full value of the land; is not a mortgage. King v. Kincey, 1 Ired. Eq. 187.

An instrument of defeasance may create a mortgage, though the parties have acquiesced, for a long time after the period of payment stipulated therein, in the conveyance of the property; more especially if it is a reversionary interest. Waters v. Mynn, 14 Jur. 841.

(a) In Delaware and New Jersey the grantee of the land is required to record a note or abstract of the defeasance, with his deed, in order to give validity to the registry of the latter. But, in Delaware, unless the grantor also record the defeasance within a certain time, it will be void against *bona fide* purchasers. By a statute of Illinois, a party "shall not have the benefit" of a defeasance



§ 9. Where a deed is given, accompanied by a defeasance, which is not recorded; a subsequent surrender and cancelling of such defeasance, by agreement, for the purpose of giving the grantee an absolute title, without unfairness between the parties or as to strangers, and before any rights of creditors have intervened, will vest the absolute title in the grantee.<sup>1</sup> Where, after such cancellation, the grantee agreed by another deed to convey on certain terms to the grantor; held, as this deed was subsequent to the original one, not part of the same transaction, nor intended nor understood as a defeasance, it did not either continue the original right of redemption, or constitute with the first deed a new mortgage.<sup>2</sup>

§ 10. Where the obligee in a bond of defeasance has treated it by his acts as constituting a mortgage, he cannot maintain an action upon it as a contract. Thus A conveys land to B. B gives a bond, reciting that the consideration of the deed was to indemnify him from his liability for A upon a certain note, and providing that, if A pays the note at a certain time, and B does not reconvey the land upon demand, the obligation shall be binding. A paid the note within the time and demanded a reconveyance, and then transferred all his interest in the land to C. It seems, this bond made the transaction a mortgage. Held, A could not maintain an action upon the bond.<sup>3</sup>

§ 11. In addition to the class of strictly legal defeasances, being *written and sealed* instruments, and to *written instruments*

<sup>1</sup> Trull v. Skinner, 17 Pick. 218.

<sup>2</sup> Ib.

<sup>3</sup> Hogins v. Arnold, 15 Pick. 259

unless recorded within thirty days. This would seem to render registration necessary even as between the parties. In Pennsylvania, the defeasance must be recorded as against creditors, &c. In Michigan, notice to a purchaser is a good substitute for registration. But not to a judgment creditor or vendee on execution. Ill. Rev. L. 131; Jaques v. Weeks, 7 Watts, 261; Mich. Rev. St. 261. Actual notice dispenses with registration in Massachusetts. The principle applies to the assignee of the grantor

under the insolvent law. Stetson v. Gulliver, 2 Cush. 494.

In Maine, implied notice, existing prior to the Revised Statutes, was binding upon an attaching creditor. McLaughlin v. Shepherd, 82 Maine, 148. The rule as to the recording of a defeasance applies only to a bond from the grantee to the grantor; not to a bond from the grantor to the grantee, secured by the conveyance. Noyes v. Sturdivant, 6 Shepl. 104. See Bailey v. Myrick, 50 Maine, 171; Smith v. Monmouth, &c. 50 Maine, 96.



*not under seal*, which are often allowed the same effect; even *parol evidence* is frequently admitted, for the purpose of converting an absolute deed into a mortgage. This apparent departure from the well-established rule, which excludes parol evidence to control written instruments, has been sometimes restricted to courts of equity, and sometimes to cases of *mistake, accident, surprise, fraud* and *trust*, which constitute peculiar grounds of chancery jurisdiction, and may always be shown by parol evidence. But the prevailing current of decisions now tends to do away these limitations, and to establish the general proposition, that an absolute deed may be proved to be a mortgage by parol evidence. The principle has been earnestly resisted, more especially in courts of law, acting as such, or invested with merely limited equity jurisdiction.(a)

(a) Thus, in Massachusetts and New Hampshire, it is held, that, before the court can exercise Chancery powers, it must decide, *as a court of law, whether there is a mortgage*; and this point cannot be proved by parol evidence. So, in Vermont, New York, Maryland, North Carolina, Kentucky, Tennessee, Mississippi and Missouri, there have been decisions against the admissibility of parol evidence, to prove an absolute deed a mortgage, except under special circumstances; but the prevailing American doctrine is as above stated.

The following may be cited as the leading English cases upon this subject. *Jason v. Eyres*, 2 Cha. Cas. 85; *Joynes v. Statham*, 8 Atk. 387; *Maxwell v. Montacute*, Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 99; *Young v. Peachy*, Ib. 257; *Cottingham v. Fletcher*, Ib. 155; *Hampton v. Spencer*, 2 Vern. 288; *Benbow v. Townsend*, 1 My. & K. 506; *Baker v. Wind*, 1 Ves. 160.

In Massachusetts, *Kelleran v. Brown*, 4 Mass. 448; *Lovering v. Fogg*, 18 Pick. 540; *Fowler v. Rice*, 17, 100; 22, 526; *Boyd v. Stone*, 11 Mass. 842.

In Maine, *Ellis v. Higgins*, 82 Maine, 84; *Bryant v. Crosby*, 86, 562; *Howe v. Russell*, Ib. 115.

In New Hampshire, 1 N. H. 41; *Bickford v. Daniels*, Ib. 271; *Runlet v. Otis*, Ib. 167; *Wendell v. N. H. &c.* 9, 404; *Clark v. Hobbs*, 11, 122.

In Vermont, *Campbell v. Worthington*, 6 Verm. 448; *Baxter v. Willey*, 9,

280; *Wright v. Bates*, 18, 848; *Washburn v. Titus*, 9, 211; *Bigelow v. Topliff*, 25, 278; *Wing v. Cooper*, 37, 169.

In Connecticut, *Bacon v. Brown*, 19 Conn. 29.

In New York, the decisions have been somewhat conflicting; but the prevailing doctrine favors the admission of parol evidence, both at law and in equity. See *Moses v. Murgatroyd*, 1 John. Cha. 119; *Marks v. Pell*, Ib. 599; *Stevens v. Cooper*, Ib. 425; *Strong v. Stewart*, 4, 167; *Jackson v. Jackson*, 5 Cow. 178; *Whittick v. Kane*, 1 Paige, 202; *Martin v. Rapelye*, 8 Edw. 229; *Walton v. Cronly*, 14 Wend. 68; *Patchin v. Pierce*, 12, 61; *Van Buren v. Olmstead*, 5 Paige, 9; *Swart v. Service*, 21 Wend. 86; *M'Intyre v. Humphreys*, 1 Hoffm. 81; *Holmes v. Grant*, 8 Paige, 248; *Roach v. Cosine*, 9 Wend. 227; *Walton v. Cronly*, 14, 68; *Eckford v. DeKay*, 26, 89; *Webb v. Rice*, 1 Hill, 606; *Brown v. Dewey*, 2 Barb. 28; *Taylor v. Baldwin*, 10 Barb. 582; (one of the latest cases, and adverse to the admission of parol evidence;) *Murray v. Walker*, 4 Tiff. (81 N. Y.) 399, (in which such evidence was admitted.)

As to the practice in Pennsylvania, see *Peterson v. Willing*, 3 Dall. 506; *Rhines v. Baird*, 41 Penn. 256; *Wharf v. Howell*, 5 Binn. 499; *Jaques v. Weeks*, 7 Watts, 268; *Todd v. Campbell*, 82 Penn. 258; *Kellum v. Smith*, 88 Ib. 158.

In Delaware, *Wadsworth v. Loranger*, *Harring*, Ch. 118.

§ 12. A mortgage sometimes contains a *covenant* to repay the money borrowed, or to pay the debt secured; which creates a *personal liability* in the mortgagor. In this country, the more common practice is, that the proviso of the deed refers to a bond, note or other *personal security*, made at the same time, upon the payment of which, both the mortgage and the personal security are to become void. In this case, also, the mortgagor is, of course, personally liable for the debt. Whether in the absence of such covenant, bond or note, the mortgage itself creates a personal liability, has been a matter of somewhat varying decision. The prevailing doctrine is, that it does not, unless the deed contains an express or implied admission of a debt due, without any accompanying agreement to rely wholly upon the property for its security or payment. But such an agreement might perhaps be inferred, from the mere fact of the absence of a direct promise, contrary to prevailing usage. In case of *borrowed money*, a mortgage is considered, in England, as a simple contract credit; and assumpsit lies to recover it. So it has been held, that, upon a recital of indebtedness in the mortgage, an action of debt may be maintained as upon a covenant. So, where one person pays money for the benefit of an-

In North Carolina, *Blackwell v. Overby*, 6 Ired. Equ. 38; *Kelly v. Bryan*, 6 Ired. Equ. 283; *Sellers v. Stalcup*, 7 Ired. Equ. 18; *Allen v. McRae*, 4 Ired. Equ. 825; *Elliott v. Maxwell*, 7, 246; *Kemp v. Earp*, Ib. 167; *Mason v. Hearne*, 1 Busb. Equ. 88; *Cook v. Gudge*, 2 Jones Equ. 172; *Glisson v. Hill*, Ib. 256; *Sowell v. Barrett*, 1 Busb. 50; *Steel v. Black*, 3 Jones Equ. 427.

In Maryland, *Watkins v. Stockett*, 6 Har. & J. 435; *Bend v. Susquehannah, &c.* Ib. 128; *Bank, &c. v. Whyte*, 1 Md. Cha. 536; 8 Ib. 508.

In New Jersey, *Vanderhaize v. Hugues*, 2 Beasl. 244; *Lokerson v. Stillwell*, Ib. 857.

In South Carolina, *Arnold v. Mattison*, 3 Rich. Equ. 158.

In Tennessee, *Brown v. Wright*, 4 Yerg. 57; *Perry v. Pearson*, 1 Humph. 481.

In Arkansas, *Blakemore v. Byrnside*, 2 Eng. 505.

In Illinois, *Hovey v. Holcomb*, 11 Ill. 660; *Coates v. Woodworth*, 18, 654; *Shaner v. Woodward*, 28, 277.

In Missouri, *Hogel v. Lindell*, 10 Mis. 483,

In Alabama, *May v. Eastin*, 2 Port. 414.

In Mississippi, *Watson v. Dickens*, 12 Sm. & M. 608; *Prewett v. Dobbs*, 18, 481.

In Texas, *Stamper v. Johnson*, 8 Tex. 1; *Carter v. Carter*, 5 Ib. 98.

In Indiana, *Conwell v. Evill*, 4 Blackf. 67.

In Kentucky, *Thomas v. McCosmack*, 9 Dana. 108.

In Ohio, *Miami, &c. v. Bank, &c.*, *Wright*, 249.

In California, *Lee v. Evans*, 8 Cal. 424; *Hidden v. Jordan*, 21 Cal. 92.

In the courts of the United States, *Morris v. Nixon*, 1 How. 127; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Bank, &c. v. Sprigg*, 1 McL. 188; *Chickering v. Hatch*, 3 Sumn. 474

other, and takes a mortgage to secure its repayment; the former is said to have a remedy either *in rem* or *in personam*.<sup>1(a)</sup>

§ 13. Another point, upon which there has been much discussion and variety of opinion, is, whether a conveyance of land given as security can be considered as technically a mortgage, without an accompanying personal obligation of the grantor. Upon this subject, it is now the prevailing and well-established doctrine, that, although the absence of such personal obligation may raise a presumption that the transaction is a *conditional sale* and not a mortgage; still it is by no means conclusive, and the grantor may have all the rights of a mortgagor as to redemption and otherwise. If the land is put in pledge, on condition, for the payment of money or some other act; the transaction is a mortgage, whether the land is the only security or not.<sup>2</sup>

§ 14. A mortgage being intended simply for *security*, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower; the right of redemption is held, in equity, to be an inseparable incident to a mortgage, and all restrictions or qualifications of this right are deemed utterly void. The maxim is, "once a mortgage, always a mortgage." The right of redemption has been said to be as inseparable from a mortgage, as that of replevying from a distress. Hence, a proviso, limiting the right of redemption to the mortgagor himself, is of no effect, and his heir after his death may redeem. So, although limited

<sup>1</sup> *Ancaster v. Mayer*, 1 Bro. 464; *Floyer v. Lavington*, 1 P. Wms. 268; *Yates v. Ashton*, 4 Qu. B. 182; 8 Mass. 564; *Penniman v. Hollis*, 13 Mass. 430; *Conger v. Lancaster*, 6 Yerg. 477; *King v. King*, 3 P. Wms. 358; *Courtney v. Taylor*, 6 M & G. 851; *Goodman v. Grierson*, 2 Ball & B. 274; *Flagg v. Mann*, 2 Sumn. 534; *Wharf v. Howell*, 5 Binn. 499; *Scott v. Fields*, 7 Watts, 360; *Elder v. Rouse*, 15 Wend. 218; *Hone v. Fisher*, 2 Barb. Cha. 559; *Hall v. Byrne*, 1 Scam. 140; 2 Greenl. Cruise, 88 n.; *New Orleans, &c. v. Hogan*, 1 La. Ann. R. 62; *Yates v. Astor*, 4 Ad. &

Ell. N. 182; *Grinnell v. Baxter*, 17 Pick. 386; *Bacon v. Brown*, 19 Conn. 29; *Lawrance v. Boston*, 8 Eng. L. & Equ. 494.

<sup>2</sup> *Coote*, 50, 61; *Hickox v. Lowe*, 10 Cal. 197; *Murphy v. Calley*, 1 Allen, 107; *Mellor v. Lees*, 2 Atk. 494; *Exton v. Greanes*, 1 Vern. 138; *Conway v. Alexander*, 7 Cranch, 237; *Morris v. Nixon*, 1 How. 119; *Wilcox v. Morris*, 1 Mur. 117; *Porter v. Nelson*, 4 N. H. 180; *Smith v. People's, &c.*, 11 Shepl. 185; *Kelly v. Beers*, 12 Mass. 388, 389; *Lanfair v. Lanfair*, 18 Pick. 299; *Hiester v. Maderia*, 8 W. & S. 384.

(a) As to mortgages for support, see 1 Hill. on Mortg. 118, 3d ed.

by an express covenant to the heirs male of his body, a jointress or assignee claiming under him may redeem.<sup>1(a)</sup>

§ 15. A condition, that if the mortgagee, on failure of the mortgagor to pay the money at the time, pay him a further sum, the former shall become absolute owner, is void; though an agreement to give the mortgagee the right of pre-emption, in case of a sale, has been assumed to be valid. Chancellor Kent, however, suggests that this agreement, like the former, would be void. The mortgagor will not be allowed to use the incumbrance, in obtaining the equity of redemption for less than its value.<sup>2(b)</sup>

<sup>1</sup> Jason v. Eyres, 2 Cha. Cas. 88; Howard v. Harris, 1 Vern. 88, 190; Cherry v. Bowen, 4 Sneed, 415; Baxter v. Child, 89 Maine, 110; Zekind v. Newkirk, 12 Ind. 544; Bayley v. Bailey, 5 Gray, 505; Murphy v. Calley, 1 Allen, 109; Boquet v. Coburn, 27 Barb. 288; Batty v. Snook, 5 Mich. 281; Pell v. Ulmar, 4 Smith. 189; Platt v. Smith, 12 Ohio St. 561; Godfrey v. Rodgers, 8 Cal. 101; Plato v. Roe, 14 Mis. 458; Vanderhaize v. Hugues, 2 Beasl. 244; Henry v. Davis, 7 John. Cha. 40; Clark v. Henry, 2 Cow. 824; Holridge v. Gillespie, 2 John. Cha. 80; Conway v. Alexander, 7 Cranch, 218; Bowen v. Edwards, 1 Rep. in Cha. 221; 2 Sumn. 487; Kunkle v. Wolfersberger, 6 Watts, 126; Jaques v. Weeks, 7 Watts, 261; Wright v. Bates, 18 Verm. 341; Perkins v. Drye, 8 Dana, 176; Ran-

kin v. Mortimere, 7 Watts, 872; Waters v. Randall, 6 Met. 488; Hiester v. Maderia, 8 W. & S. 887; May v. Easton, 2 Port. 414; Spurgeon v. Collier, 1 Ed. 59; Trea. of Equ. lib. v, 1, c. 1, sec. 4; Vernon v. Bethell, 2 Ed. 118; Clench v. Witherby, Cas. Temp. Finch. 876; Sevier v. Greenway, 19 Ves. 412; Kaufman v. Sayre, 2 B. Mon. 205.

<sup>2</sup> 4 Kent. 142; Holridge v. Gillespie, 2 John. Ch. 84; Hammonds v. Hopkins, 3 Yerg. 525; McKinstry v. Cronly, 12 Ala. 678; Hicks v. Hicks, 5 Gill & J. 85; St. John. v. Turner, 2 Vern. 418; Vernon v. Bethell, 2 Ed. 110. See Thompson v. Mack, Harring. Cha. 150; Mills v. Mills, 26 Conn. 218; Tenney v. Blanchard, 8 Gray, 579; Patterson v. Yeaton, 47 Me. 808.

(a) But the rule above stated does not apply to an agreement, contained in the mortgage, that, if the interest shall not be paid when due, the mortgagee may treat the mortgage as due, and sue upon it, and also claim for damages. Such agreement will be enforced. Huling v. Drexell, 7 Watts, 126. See p. 551. The unrestricted right of redemption extends to transactions between the parties in the nature of security for the debt, *subsequent to the original mortgage*. So a third person may sometimes have an unlimited right to redeem, though there is no direct mortgage from him to the party of whom redemption is claimed. Thus an equitable owner sold his title and received part of the price, and then, with the consent of the purchaser, sold to another, on condition that he would advance the balance, and give the first purchaser a certain time to pay it; upon which

payment, the first purchaser was to have the land, otherwise the second purchaser should have it. The first purchaser promised to pay the money to the second, and soon removed from the land, and the second purchaser took possession. Held, after the six months, not having paid the money, the first purchaser might still redeem the land. Bloodgood v. Zeily, 2 Caines' Cas. in Er. 125; Pennington v. Hanbey, 4 Munf. 140.

(b) Mortgage for £200, with a bond, conditioned that, if not paid at the day, and if mortgagee should then pay the mortgagor the further sum of £78 in full for the purchase of the land, the bond should be void. The £200 not being paid, and the mortgagee having paid the £78; held, the infant heir of the mortgagor might redeem. Willett v. Winnell, 1 Vern. 488.

§ 15 a. But although the mortgagee cannot use the incumbrance for the purpose specified in the last section,<sup>1</sup> more especially in virtue of an agreement made at the time of giving the mortgage; yet the weight of authority now is, that the mortgagee may obtain an absolute title by purchasing the mortgagor's estate, or, in case of a bond of defeasance, by obtaining a surrender or discharge of such bond, even though a new one be given.<sup>2</sup>

§ 16. If the mortgagor agree, by a distinct contract, to pay the mortgagee a sum over and above the debt, interest and cost, such contract will be set aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement. Thus A loaned to B a sum of money on mortgage, and at the same time took from him a separate covenant to convey to A, if he thought fit, certain ground-rents of the same value. On a bill for redemption by B, held, he might redeem by paying merely the sum loaned with interest and cost.<sup>3</sup>

§ 17. Equity does not sanction an agreement to turn interest into principal, at the end of a specified period; because it is a stipulation for a *collateral advantage*, and tends to usury, though not actually usurious.<sup>4</sup> But an agreement that the mortgagee shall have the use of the property, instead of interest, is not usurious, unless such use amounts to more than legal interest;<sup>5</sup> and non-payment of interest may give a claim for the principal.<sup>6</sup>

§ 18. An agreement subsequent to the making of the mortgage, between any party interested as mortgagee, and the mort-

<sup>1</sup> Russell v. Southard, 12 How. 189.

<sup>2</sup> Cotterell v. Purchase, Cas. Temp. Tal. 61; Wrixon v. Cotter, 1 Ridg. 295; Trull v. Skinner, 17 Pick. 218; Cameron v. Irwin, 5 Hill, 280; Austin v. Bradley, 2 Day, 466; Batty v. Snook, 5 Mich. 231; Piatt v. Smith, 12 Ohio St. 561. See Frazee v. Inslee, 1 Green Ch. 239; Patterson v. Yeaton, 47 Maine. 308; Perkins v. Drye, 3 Dana, 177; Sheckell v. Hopkins, 2 Md. Ch. 89.

<sup>3</sup> Jennings v. Ward, 2 Vern. 520.

<sup>4</sup> Chambers v. Goldwin, 9 Ves. 271; Coote, 501, 502. See Godfrey v. Rogers, 3 Cal. 101; Davis v. Lemott, 8

Iowa, 226; M'Gready v. M'Gready, 17 Mis. 597; Tiernan v. Hinman, 16 Ill. 400; Ferris v. Ferris, 28 Barb. 29.

<sup>5</sup> Joyner v. Vincent, 4 Dev. & B. 512. See Coote, 511, 512; Marquis, &c. v. Higgins, 2 Vern. 184; Burton v. Slattery, 5 B. P. C. 233; Brown v. Barkham, 1 P. Wms. 652; Stanhope v. Manners, 2 Ed. 199; Haggarty v. Allaire, 5 Sandf. 280; Ottaway, &c. v. Murray, 15 Ill. 836.

<sup>6</sup> Ruebns v. Prindle, 44 Barb. 886; Robinson v. Loomis, 51 Penn. 78; Valentine v. Van Wagner, 87 Barb. 60; Schoonmaker v. Taylor, 14 Wis. 313. See p. 550, n.

gagor or his assignee, to limit the right of redemption to any particular time, will not be enforced. Thus a mortgagee filed a bill in equity, for foreclosure, against the mortgagor, and his creditors, having an interest in the equity of redemption, and obtained a decree. The defendant, one of the creditors, paid and took an assignment of the mortgage, and agreed with the other creditors that they might redeem within a certain time. The defendant having had possession twenty years, the other creditors file a bill for redemption. Held, the other creditors stood in the conditional relation of mortgagor to the defendant; and, as the decree for foreclosure was not assigned to him, the agreement limiting the time of redemption was void, and they might redeem.<sup>1(a)</sup>

§ 19. A mortgage is to be distinguished from a *sale with an agreement to repurchase*. The latter transaction, though narrowly watched, is construed like an independent agreement between strangers; and the seller will not have a mortgagor's right to redeem after the appointed day. But equity will always construe the transaction to be a mortgage, if possible.<sup>2(b)</sup>

§ 20. Where there is an agreement for repurchase within a certain time, by the mortgagor, of the estate mortgaged, and such agreement is made, not at the giving of the mortgage, but afterwards, the right of redemption or repurchase may sometimes be restricted to the time stipulated. Thus A, being a joint tenant with B, made a conveyance to C for £104, absolute in form, but admitted to be in reality a mortgage. This deed was cancelled, and another similar one made for a larger consider-

<sup>1</sup> *Exton v. Greaves*, 1 Vern. 138.

<sup>2</sup> 4 Kent, 148-4 *Plato v. Roe*, 14 Wis. 458; *Davis v. Thomas*, 1 Russ. & M. 506;

*Poindexter v. McCannon*, 1 Dev. Equ. 878.

(a) A, tenant in tail of a reversion, mortgaged it, B, his father, joining. A agreed that, unless he paid by the day, or if B paid the debt, B should have the property, and give A one-seventh. B having died, and devised the land; held, A still had the right of redemption. *Playford v. Playford*, Holt, Equ. 810.

(b) Conveyance in consideration of a certain sum, with a written but unsealed agreement by the grantee to reconvey, upon repayment of the sum within a certain time. Held, an equitable mortgage, not a sale with conditional right to repurchase. *Eaton v. Green*, 22 Pick. 526.



ation, including the £104, and covenanting that A would not make partition without C's consent. The receipts for the money spoke of it as purchase-money. Two years after the last deed, it was agreed that A should regain the land, on payment of principal, interest and costs. B being in possession, C recovered the land in ejectment, and occupied sixteen years. A brings a bill to redeem. Held, though the covenant against partition showed that A was still supposed to retain an interest in the land, and though the first deed was allowed to be a mortgage, yet the case, on the whole, was one of a subsequent agreement for repurchase, and, after the lapse of so long a time, a redemption should not be allowed.<sup>1</sup> So where a mortgagee, having recovered the land for breach of condition, for an additional advance of money obtains a release of the equity from the mortgagor, at the same time giving him a promise to sell and convey on payment of the whole money advanced within a certain time; after this time has elapsed, the estate becomes absolute in the mortgagee; the last transaction being regarded as an original contract to convey the estate upon certain terms. In this case, however, sixteen years had elapsed.<sup>2</sup>

§ 21. Where a mortgage is made *to or for a relation or a wife*; in conformity with the presumed intention of the mortgagor, to make the conveyance beneficial to the mortgagee, the right of redemption will be limited strictly to the time specified. In case of a marriage settlement, an omission to perform the condition will be construed as an election to let the settlement stand, and no redemption will be allowed, especially after the mortgagor's death, and against a purchaser without notice from the wife.<sup>3</sup> Thus where A conveyed to B, to whom he was related by marriage, by an absolute deed, and took back another deed, making the land redeemable during A's life; held, in re-

<sup>1</sup> *Cotterell v. Purchase*, Ca. Temp. Tal. 61; *Wrixon v. Cotter*, 1 Ridgw. 295; *Austin v. Bradley*, 2 Day, 466; 2 N. Y. Rev. Sts. 546; *Waters v. Randall*, 6 Met. 484; *Perkins v. Drye*, 8 Dana, 177; *Russell v. Southard*, 12 How. 139; *Cameron v. Irwin*, 5 Hill, 280; *Trull v. Skin-*

*ner*, 17 Pick. 213; *Harrison v. Phillips*, &c. 12 Mass. 465; *Marshall v. Stewart*, 17 Ohio, 351

<sup>2</sup> *Endsworth v. Griffith*, 2 Abr. Equ. 595; 5 Bro. Parl. 184.

<sup>3</sup> *King v. Bromley*, 2 Abr. Eq. 595.



versal of Lord Nottingham's decree, that the heir of A could not redeem.<sup>1</sup>(a)

§ 22. The distinction between a mortgage and a conditional sale is said to be, that, if a *debt* remains, the transaction is a mortgage; but, if the debt is extinguished by mutual agreement, or the money advanced is not *loaned*, but the grantor has a right to refund in a given time, and have a reconveyance; this is a conditional sale. The true inquiry is, whether the purpose of the parties was to treat of a *purchase*, the value of the commodity contemplated, and the price fixed. And the point is to be settled by *the whole transaction*, not merely the written evi-

<sup>1</sup> Bonham v. Newcomb, 2 Vent. 364; 1 Abr. Equ. 312. See Trull v. Owen, 4 Y. & Coll. 492.

(a) A granted a rent-charge of £48 per annum to B in fee, on condition that, if A should at any time, after notice, pay in the purchase-money by certain instalments, with interest, during his life, the grant should be void. The rent-charge fell short of the interest, and there was no covenant to pay the money. After A's death, B conveyed to C with warranty, and C to D. Sixty years having elapsed, upon a bill for redemption, held, the circumstances of the case showed that the mortgagee had parted with a fair equivalent for purchasing the right of redemption after A's death, and the lapse of time made the case still stronger against the bill, which was accordingly dismissed. Floyer v. Lavington, 1 P. Wms. 268.

A mortgages an estate to B, and B to C, for £200, A and his son D joining in the latter mortgage. To secure payment of the interest, C leases to the son of A for 5,000 years, at the rent of £12 per annum for the first three years, and the rest of the term £10; and, if the £200 and interest were not paid in three years, the land to be reconveyed. Receipts were given, sometimes as for interest, and sometimes for a rent-charge. The last receipt was about forty years subsequent to the lease. Ten years after this receipt, a bill was brought for redemption by the grandson of A, the estate having nearly doubled in value since the mortgage. Held, it would not lie. Mellor v. Lees, 2 Atk. 494.

A having received a patent from the crown for land for a term of years, at a certain rent, a subsequent patent, not

noticing the former, was made to B. The former term having nearly fifty years to run, and being worth £200 per annum, B, in consideration of £200, by lease and release, conveys to A, with the condition that, upon repayment within five years, he might re-enter; but on failure of payment at the time, the estate of A should be absolute and indefeasible, both in equity and law, and B forever debarred from all right and relief in equity. And B hereby released forever his right to redeem, on failure as aforesaid. There was no covenant for payment of the £200. The five years having expired, A brings a bill in equity for foreclosure, to which B never put in any answer or defence, and a decree was made that B should be foreclosed, unless the money were paid upon a certain day. More than thirty years afterwards, the lands having risen in value, the heirs of B bring a bill in equity against the heirs of A, alleging surprise and imposition in obtaining the decree, and praying redemption. The plaintiffs prevailed, but the decree was reversed in the House of Lords. The grounds of argument for the defendants were, the terms of the conveyance from B to A, waiving all right of redemption; the reversionary character of B's estate, yielding no present profit, and worth at the time not more than £200; and the want of any covenant to pay the money, and consequently of any mutuality in the transaction, which is essential to constitute a mortgage. Tasburgh v. Echlin, 2 Bro. Parl. Cas. 265.

dence. Parol evidence is received, not to explain or construe the writings, but to show the true character of the contract. Various and minute circumstances are to be taken into view. If a fair price is advanced, the property liable to injury, such as requires frequent repairs, and of fluctuating fashion and profits; or if the purchaser, though not put into actual possession, leases to the grantor, and receives the rents, &c., without accounting, and the grantor's wife releases her dower; and if the estate consists of a large building, which is subject to fire, and at the grantee's risk, and he has no power to enforce his claim against the grantor, there being no covenant or promise by the latter, while he at the same time has the right of repurchasing within a given time: all these facts go to show a conditional sale.<sup>1</sup> The want of any *personal obligation* against the grantor, though not conclusive, is very strong evidence of a conditional sale; for a *mortgagee* must have a remedy, express or implied, against *the person* of the debtor. But Chancery will always lean in favor of a mortgage.<sup>2(a)</sup>

<sup>1</sup> *Slee v. Manhattan, &c.* 1 Paige, 56; *Murphy v. Calley*, 1 Allen, 109; *Bethlehem v. Annis*, 40 N. H. 89; *Miellish v. Robertson*, 25 Verm. 603; *Hoopes v. Bailey*, 28 Miss. 328; *Bayley v. Bailey*, 5 Gray, 505; *Davis v. Stonestreet*, 4 Ind. 101; *Stomey v. McMurray*, 27 Mis. 118; *Jones v. Jones*, 1 Head, 105; *Williams v. Bishop*, 15 Ill. 558; *Goodman v. Grierson*, 2 Ball & B. 274; *Robinson v. Cropsey*, 2 Edw. 138; *Robertson v. Campbell*, 2 Call, 354; *Chapman v. Turner*, 1. 244; *Sevier v. Greenway*, 19 Ves. 418; *Hicks v. Hicks*, 5 Gill & J. 82; *Bennet v. Holt*, 2 Yerg. 6; *Hickman v. Quinn*, 6, 96; *Hannah, &c. Bland*, 225-6;

*Davis v. Thomas*, 1 Russ & M. 506; 2 Sumn. 487.

<sup>2</sup> *Conway v. Alexander*, 7 Cranch, 287; *Menude v. Delaire*, 2 Des. 564; *Baxter v. Willey*, 9 Verm. 276; *Holmes v. Grant*, 8 Paige, 248; *Chambers v. Hise*, 2 Dev. & B. Equ. 375; *Glover v. Payn*, 19 Wend. 518; *Bacon v. Brown*, 19 Conn. 29; *Dougherty v. McColgan*, 6 G. & John. 275; *Russell v. Southard*, 12 How. 139; *Galt v. Jackson*, 9 Geo. 151; *Gaither v. Teague*, 7 Ired. 460; *Page v. Foster*, 7 N. H. 892; *Verner v. Winstanley*, 2 Sch. & L. 898; *Perry v. Meddowcroft*, 4 Beav. 197; *Williams v. Owen*, 10 Sim. 386; *Baker v. Thrasher*, 4 Denio, 498.

(a) It has been held, that parol evidence, though admissible to prove an absolute deed a mortgage, is not admissible to prove a formal mortgage to be a conditional sale; that, in the one case, the proof raises an equity consistent with the writing, and in the other would contradict it. *Kunkle v. Wolfersherger*, 6 Watts, 130.

On the other hand it has been said, that in examining transactions between borrowers and lenders, courts of equity, aware of the unequal relation of the

parties, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains, when their suspicion is thus excited, to get at the substance of what was done or intended. But it is a conclusion of reason, and therefore must be the presumption of every court, that solemn instruments declare the truth, until error, mistake or imposition be shown. *McDonald v. McLeod*, 1 Ired. Equ. 226.

§ 23. The same general principle, of not restricting the right of redemption, has been applied to the case of a *lease* from mortgagor to mortgagee, which is in the nature of a partial surrender of the equity of redemption. So, also, to a lease from mortgagee to mortgagor, accompanied by a covenant to reconvey the premises to the mortgagor, upon payment of a certain sum by a specified time; in which case a redemption will be decreed, even against a purchaser from the mortgagee, with notice.<sup>1</sup>

§ 24. The rule above stated, as to the right of redemption, and the distinction between a mortgage and a conditional sale, has been applied to the conditional assignment of a mortgage itself. Thus A assigns a mortgage to B, upon condition that, if certain expected receipts shall amount to \$300, B shall re-assign and account for the surplus over that sum; if they shall not amount to that sum, and unless A in one week pay the deficiency, the mortgage to be considered as absolutely assigned. The receipts having fallen short of \$300, held, this was a mortgage or pledge, not a conditional sale, and that A should have relief in equity on making up the \$300.<sup>2</sup>

§ 25. The law seems to be now well settled, though after much doubt and discussion, that a clause may be inserted in a mortgage, empowering the mortgagee, upon breach of condition, to make sale of the mortgaged premises, pay his debt from the proceeds, and account with the mortgagor for the balance; (a) and such sale, made conformably to the terms of the mortgage, and without the mortgagor's joining in the sale, vests in the purchaser all the title conveyed by the mortgage, free from redemption, and turns the mortgagor into a tenant by sufferance. This remedy is generally regarded as merely *cumulative*, and not impairing or impaired by any other legal or equitable

<sup>1</sup> Gubbins v. Creed, 2 Sch. & Lef. 214; Wright v. Bates, 13 Verm. 341. See Slee v. Manhattan, &c., 1 Paige, 48; Fuller v. Hodgdon, 25 Me. 243; Holridge

v. Gillespie, 2 John. Ch. 80; Miami, &c. v. Bank, &c., Wright, 249

<sup>2</sup> Solomon v. Wilson, 1 Whart. 241.

(a) By the civil law, the mortgagee has this power by implication, and even an express agreement will not deprive

him of it. 1 Dom. 360. It is said to be invalid in Virginia. 4 Kent, 148, n.

proceeding to enforce the mortgage, unless more restrictive of the mortgagor's rights than the power itself;(a) and the power passes to an assignee of the mortgage.<sup>1</sup>(b)

<sup>1</sup> *Cheek v. Waldrum*, 25 Ala. 152; *Fanning v. Kerr*, 7 Clarke, 450; *Randall v. Hazleton*, 12 Allen, 412; *Walton v. Cody*, 1 Wis. 420; *Wilson v. Watts*, 9 Md. 856; *Leffler v. Armstrong*, 4 Iowa, 482; *Bloom v. Van Rensselaer*, 15 Ill. 508; *Smith v. Bovin*, 4 Allen, 518; *Roarty v. Mitchell*, 7 Gray, 248; *Bradley v. Chester, &c.*, 86 Penn. 141; *Second, &c. v. Platt*, 5 Duer, 675; *Corder v. Morgan*, 18 Ves. 344. See *Kinsley v. Ames*, 2 Met. 29; *Hobson v. Bell*, 2 Beav. 17; *Gorson v. Blakey*, 6 Miss. 273; *Cameron v. Irwin*, 5 Hill, 272; *Holden v. Gilbert*, 7 Paige, 208; *Gates v. Jacob*, 1 B. Mon. 307; *Dobson v. Racey*,

8 Sandf. Cha. 60; *Stabback v. Leat*, Coop. 46; *Curling v. Shuttleworth*, 6 Bing. 121; *Green v. Tanner*, 8 Met. 428; *Clay v. Willis*, 1 B. & C. 364; *Destrehan v. Scudder*, 11 Miss. 484; *Longwith v. Butler*, 8 Gilm. 82; *Sanders v. Richards*, 2 Coll. 568; *Hobson v. Bell*, 2 Beav. 17; *Hyndman v. Hyndman*, 19 Verin. 9; *Major v. Ward*, 5 Hare, 598; *Wright v. Rose*, 2 Sim. & St. 328; *Moses v. Murgatroyd*, 1 John. Cha. 119; *Countant v. Servoss*, 3 Barb. 128; *Jencks v. Alexander*, 11 Paige, 619; *Coe v. Peacock*, 14 Ohio St. 187; *Sedgwick v. Laffin*, 10 Allen, 480; *Fowle v. Merrill*, Ib. 850; *Bailey v. Aetna, &c.*, Ib. 286.

(a) Thus it may be exercised, though the mortgagee has entered and taken the rents and profits. *Montague v. Dawes*, 12 Allen, 397.

A title passes by the sale, though the debt has been tendered, unless there has been an immediate suit to redeem. Ib.

(b) Such power having been inserted in a deed of defeasance, the proceeds to be first applied to the debt, and the surplus paid to the mortgagor, the mortgagee, on failure of payment, agreed with a third person to convey the land to him. The court decided, that this agreement was not equivalent to an actual sale, but seemed to take it for granted, that such conveyance would be effectual to pass the estate. *Croft v. Powell*, 2 Com. R. 603.

In a similar case, the land having been sold at auction, the purchaser required the concurrence of the mortgagor, who refused to join, alleging that the sale was made at a sacrifice, and without his consent. The purchaser then brings a bill against the mortgagee and mortgagor, which was sustained against the former, but dismissed as to the latter. *Clay v. Sharp*, 2 Cruise, 95; Sug. on Vend., 6th ed., App. 14.

Lord Eldon considered the power in question as a dangerous and extraordinary one, and of modern introduction, and thought it should be vested in some third person as a trustee for both parties. But Chancellor Kent remarks, that the mortgagee himself, under such power, becomes a trustee for the sur-

plus; and that, unless due notice be given of a sale, equity will set it aside. *Roberts v. Bozon*, (Feb., 1825,) 4 Kent, 146. See *Brisbane v. Stoughton*, 17 Ohio, 482.

And it is said, the only doubt as to the validity of such power seems to be, as it affects the rights of subsequent mortgagees. Walk. Intro. 806.

In Maryland, by statute, real estate mortgaged in the city of Baltimore may be sold under such power. Md. Stat. 1836-7, chap. 249. (See Md. Sts.) The validity of a power to sell is also recognized in other States.

If, upon a sale under a power, the mortgagee himself purchases, the sale is voidable in equity, by the mortgagor, for good grounds, though not absolutely void. In New York and Michigan, the mortgagee is authorized to purchase, if it be done fairly; and, in New York, the affidavit of sale, without deed, will perfect his title. In the same State, the power, to be effectual, must be registered or recorded, and the sale is made equivalent to a foreclosure, as against the mortgagor and all claiming by title subsequent to the mortgage. Similar provisions in Maryland and Maine. (See *Powers*.) In Vermont, a late case decides that such power does not exist. *Wing v. Cooper*, 87 Verm. 169. In Michigan, the mortgagee cannot sell, if he has previously commenced a suit, which is pending. In Mississippi, without six months' notice. *Munroe v. Alaire*, 2 Caines' Case in Er. 19; *Davoue*

§ 26. A power to sell, in an instrument which would otherwise be a mortgage, does not change the character of the mortgagee's estate. For, although he may pass an *absolute* title to a third person, by executing the power; yet, until it is executed, he himself has only a *conditional* title. And even a purchaser will not take an *absolute* estate, it seems, if he has notice of the original nature of the transaction, and purchases with some reference to the conditional character of the title.<sup>1</sup>

<sup>1</sup> *Eaton v. Whiting*, 8 Pick. 484. conveyance was here expressly in trust  
(This case seems to recognize the validity of the power in question; though the to sell, and the condition contained in a subsequent clause.)

*v. Fanning*, 2 John. Cha. 252; \* *Slee v. Stat. 1840, 28, 9; Middlesex, &c. v. Manhattan Co.*, 1 Paige, 48; 2 N. Y. Minot, 4 Met. 325; *King v. Duntz*, 11 Rev. St. 546; 4 Kent. 147; *Maine St. Barb. 191.*  
1888, ch. 838; N. Y. Stat. 1842, chap. 277, sec. 8; *Miss. Rev. St. 499; Miss.*

\* These were cases of trust.

## CHAPTER XXX.

## MORTGAGE. WHAT ESTATE IT CREATES IN THE MORTGAGOR AND THE MORTGAGEE.

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|---|---|
| 1. Estate remains in the mortgagor, as to third persons, but not as to the mortgagee. | 8. Cannot commit waste, but not bound to repair.  |
| 4. Mortgagee may take possession, when; agreement for mortgagor's possession.         | 9. Lease by mortgagor before or after the mortgage; rights of the lessee and mortgagee. |
| 7. Mortgagor in possession, nature of his estate—tenancy at will, &c.                 | 20. Waste by mortgagee.   |
|   | 21. Lease by mortgagee.   |

§ 1. ALTHOUGH a mortgage, in form, purports to convey a present estate to the mortgagee, liable to be defeated by performance of the condition named; yet the well settled modern doctrine is, that, notwithstanding the conveyance, the mortgagor, not only in equity, but at law, remains owner of the land, till some further act is done to vest it in the mortgagee. In other words, although the condition of a mortgage is in form *subsequent*, operating to divest an interest once vested; yet it is in substance and practice *precedent*, operating to vest an estate which previously remained in the mortgagor. The *language* of the transaction is, that A conveys to B, reserving the right to take back the estate on doing a certain act; while the *effect* of it is, that A transfers to B a mere *claim* or *lien* upon the land, with the right of gaining the land itself upon A's failing to perform such act.

§ 2. Several considerations seem to show that this is the true view of the relation between mortgagor and mortgagee. Before entry or suit for possession, a mortgagee cannot empower a third person to exclude the mortgagor.<sup>1</sup> The mortgagor is a *free*-

<sup>1</sup> *Silloway v. Brown*, 12 Allen, 80.

*holder* in respect to the estate mortgaged. This estate, in his hands is regarded as real property, and as such is inherited, and must be conveyed, leased, devised or taken upon legal process; while the mortgagee's interest, on the other hand, is merely personal, as will be more fully explained hereafter. The mortgagor may maintain an ejectment or real action for the land, to which the mortgage cannot be set up as a defence. A mortgage is not an *alienation* or *sale* of the land in a technical sense; as, for instance, for the purpose of revoking a devise or forfeiting the rights of a party insured, or violating an obligation not to *sell*, without first offering the land to the obligee. So, it has been held, on the other hand, that a *power* to sell does not involve a power to mortgage. So a mortgagor *gains a settlement* as owner, is required or entitled to serve as juror or member of the legislature, or may be received as bail.<sup>1</sup> And a mortgagee, before taking possession, is not so far an *owner*, as to be entitled to notice of the proposed laying out of a road over the land, or to damages.<sup>2(a)</sup>

<sup>1</sup> Childs v. Childs, 10 Ohio St. 342; Bryan v. Butts, 27 Barb. 505; Elfe v. Cole, 26 Geo. 197; Wood v. Trask, 7 Wis. 566; Hall v. Savill, 8 Iowa, 87; Jenkins v. Quincy, &c., 7 Gray, 373; Woodward v. Pickett, 8 Gray, 117; Pollard v. Somerset, &c., 42 Maine, 221; Brown v. Snell, 6 Flori. 741; Stinson v. Ross, 51 Maine, 556; Bronson v. La Crosse, 2 Wall. 288; Jackson v. Willard, 4 John. 41; Huntington v. Smith, 4 Conn. 285; Willington v. Gale, 7 Mass. 138; M'Call v. Lenox, 9 S. & R. 302; Ford v. Philpot, 5 Har. & J. 312; Wilson v. Troup, 2 Cow. 195; Blaney v. Bearce, 2 Greenl. 182; Astor v. Miller, 2 Paige, 68; Miami, &c., v. Bank, &c., Wright, 249; Den v. Dimon, 5 Halst. 156-7; Winslow v. Merchants', &c., 4 Met. 310; Clark v. Beach, 6 Conn. 142; Wilkins v. French, 20 Maine, 111; Cooper v. Davis, 15 Conn. 556; Doe v. McLoskey, 1 Alab. (N. S.) 708; Doe v. Goldwin, 2 Ad. & El. (N. S.) 148; — v. Day, Ib. 147; Ewer v. Hobbs, 5 Met. 3; Glass v. Ellison, 9 N. H. 69; Smith v. Moore, 11, 55; Ellison v. Daniels, Ib.

274; Perkins v. Dibble, 10 Ohio, 438; Ralston v. Hughes, 18 Illin. 469; Meacham v. Fitchburg, &c., 4 Cush. 291; Davis v. Anderson, 1 Kelly, 176; Mayo v. Fletcher, 14 Pick. 531; Heath v. Williams, 25 Maine, 209; Howard v. Robinson, 5 Cush. 123; Wilson, 2 Ves. & B. 252; Cholmondeley v. Clinton, 2 Jac. & W. 188; Great Falls, &c. v. Worster, 15 N. H. 412; Thorne v. Thorne, 1 Vern. 141-182; Hall v. Dench, 1 Vern. 329; Lovering v. Fogg, 18 Pick. 540; McTaggart v. Thompson, 2 Harr. 149; Neilson v. Lagow, 12 How. 98; Albany, &c. v. Bay, 4 Comst. 9; Conover v. The Mutual, &c., 8 Denio, 254; Howard v. Robinson, 5 Cush. 119; The King v. St. Michael's, &c., Dougl. 682; Rex v. Mattingley, 2 T. R. 12; — v. Chailey, 6 T. R. 755; Montgomery v. Bruere, 1 South. 267; 1 Pow. 170 a; Beamish v. The Overseers, &c., 7 Eng. L. & Equ. 485.

<sup>2</sup> Parish v. Gilmanton, 11 N. H. 298. See Wright v. Tukey, 8 Cush. 290.

(a) In New Hampshire, the old and literal construction of a mortgage seems to be, at least in theory, substantially retained. It is there said, that the

mortgagor retains only a *power to regain the fee*, and that the condition *as to him*. (not as to the mortgagee,) is a precedent one, he being a mere tenant at suffer-



§ 3. It will be at once perceived, however, that all the particulars above named have reference to the relation which a mortgagor sustains to *third persons*. A mortgage being merely security for a debt, there would be little propriety in attributing to it the effect of passing away the estate from the former owner, except so far as is requisite to effect the object of the transaction. But to this extent, or, in other words, as between the mortgagor and the mortgagee, for the purpose of rendering available the security given; a different rule prevails, and the mortgagee has all or most of the rights of a legal owner.<sup>(a)</sup>

§ 4. A mortgage gives to the mortgagee an *immediate right of possession*, which he may assert by entry or action, unless there be an express stipulation to the contrary. But this is often the case, and is said to be a very ancient practice, as early as the time of James I.<sup>1</sup> A *parol* agreement, that the mort-

<sup>1</sup> Powsely v. Blackman, Cro. Jac. 659; Partridge v. Bere, 5 B. & A. 604; Jackson v. Bronson, 19 John. 325; 14 Pick. 530-1; Dickenson v. Jackson, 6 Cow. 147; Wilkinson v. Hall, 4 Scott, 301; Doe v. Giles, 5 Bing. 421; Doe v. Cadwallader, 2 B. & Ad. 478; Doe v. Maisey, 8 B. & C. 767; Partington v. Woodcock, 6 Ad. & Ell. 695; Doe v. McLoskey, 1 Alab. (N. S.) 708; Luckey v. Holbrook, 11 Met. 460; Allen v. Par-

ker, 27 Maine, 581; Miner v. Stevens, 1 Cush. 485; Hobart v. Sanborn, 18 N. H. 226; Harris v. Haynes, 84 Verm. 220; Harmon v. Short, 8 Sm. & M. 488; Walcott v. McKinney, 10 Mis. 229; Smith v. Taylor, 9 Ala. 683; McIntyre v. Whitfield, 13 Sm. & M. 88; Brown v. Stewart, 1 Md. Cha. 87; Reed v. Davis, 4 Pick. 217; Rogers v. Grazebrook, 8 Ad. & Ell. (N. S.) 895; Allen v. Bicknell, 86 Maine, 486.

ance, and having no right of possession. Brown v. Cram, 1 N. H. 171. See also Haven v. Low, 4 N. H. 16; Chamberlain v. Thompson, 10 Conn. 243; 1 Pow. 107, n.; Montgomery v. Bruere; 1 South. 268; Highway v. Pendleton, 15 Ohio, 735; Jameson v. Bruce, 6 Gill & J. 74; Goodwin v. Stephenson, 11 B. Mon. 21; (deciding that a mortgagor cannot sue upon the covenants in the deed to him of the land mortgaged, the mortgagee being legal owner) Gambril v. Doe, 8 Blackf. 140; Meyer v. Campbell, 12 Mis. 603; (holding that a mortgagor cannot recover in ejectment.)

(a) A, by consent of B, a mortgagor in possession, built a house upon the land. The house was sold on execution as A's, and C, the purchaser, brings a suit for it against D, who claimed under a purchase from B. Held, the mortgagee having a mere lien on the property, if any interest in it, D could not defend on the ground that the mortgagee did

not consent to the erection of the house, and forbade its removal; that the rights of the latter would not be affected by the event of this suit, and the house would remain subject, as before, to his claim. Jewett v. Patridge, 8 Fairf. 243. It was intimated by the court, that the mortgagee acquired no lien upon a house thus erected, although he might secure the rents by taking possession; but that it was *the personal property* of A. Ib. 252. See Evans v. Merriken, 8 Gill & J. 89; Richards v. Chace, 2 Gray, 585; Kimball v. Lockwood, 6 R. I. 139; Goodwin v. White, 26 Conn. 322.

The distinction above pointed out seems to have been reversed by an observation of the court in Massachusetts; that "the mortgagee has the whole estate *against all but the mortgagor*, in the same manner as if it were absolute." Fay v. Brewer, 3 Pick. 404. This, however, is a mere *dictum*, and the law seems to be well settled as above stated.

gagor shall remain in possession till breach of condition, is insufficient; though the condition be to support the mortgagee and his wife, which could probably be done only out of the estate mortgaged.<sup>1(a)</sup> But an agreement or understanding, that the mortgagor is to remain in possession, may be *implied* from the terms of the deed or other accompanying instrument. It may operate by *estoppel*, *covenant*, *condition* or *reservation*.<sup>2</sup> Thus A sold to B a mill, took a mortgage back, and gave B a bond, stating the privileges which B was to enjoy in using the water, dam, &c., covenanting to build machinery in the mill, and not follow himself, or suffer others to follow the same occupation, while B continued it; and reserving to himself the use of a room in the mill for a certain time. Held, the bond amounted to a covenant, that B might occupy the mill till breach of condition, and that A could not maintain a writ of entry at common law against B.<sup>3</sup> So where the condition of a mortgage was, that the mortgagor should carry on the farm during the life of the mortgagee, and deliver him one-half of the produce; held, the mortgagee had no right to enter, till condition broken or waste committed; or except for the purpose of taking his share of the produce.<sup>4</sup>

§ 5. Where the mortgagor of a leasehold estate reserves the right to remain in possession till breach of condition, and holds over after such breach, he is not liable *for rent* to the mortgagee, previous to the entry of the latter. And, if a mortgagor have tendered the debt after it fell due, the title to the estate cannot be tried in a suit for rent.<sup>5</sup>

§ 6. A mortgagor, reserving the right to keep possession till

<sup>1</sup> Colman v. Packard, 16 Mass. 89; Blaney v. Bearce, 2 Greenl. 182.

<sup>2</sup> 11 Pick. 477; Dearborn v. Dearborn, 9 N. H. 117; Flanders v. Lamphear, Ib. 201. See Wilkinson v. Hall, 4 Scott, 801; Lamb v. Foss, 8 Shepl. 240; Rhoades v. Parker, 10 N. H. 88; Holmes

v. Fisher, 18 N. H. 9; Coote, 876; Bethlehem v. Annis, 40 N. H. 84; Clay v. Wren, 84 Me. 187.

<sup>3</sup> Bean v. Mayo, 5 Greenl. 89.

<sup>4</sup> Hartshorn v. Hubbard, 2 N. H. 453; Flagg v. Flagg, 11 Pick. 475.

<sup>5</sup> Mayo v. Fletcher, 14 Pick. 525.

(a) Where a mortgage is upon this condition, the mortgagor may be allowed to redeem, upon the terms of a pecuniary compensation for past and future

support. Austin v. Austin, 9 Verm. 420. See Northy v. Northy, 45 N. H. 141.

breach of condition, may allow a stranger to occupy under him; and the latter, having entered before breach, is not a trespasser in continuing to occupy afterwards.<sup>1(a)</sup>

§ 7. Where there is no agreement, express or implied, that the mortgagor shall retain possession, his possession is strictly *at the will of the mortgagee*. It is not *adverse* to the latter. He has often been called a *tenant at will*. But, technically, there is little propriety in this designation. In the first place, a mortgagor wants the chief mark or characteristic of a tenant or lessee, which is the payment of rent; for, while a mortgagor, or any one holding under him, remains in possession, he receives the rents and profits for his own account; and, in the second place, he has none of the privileges of a tenant at will, in regard to notice to quit, but may be immediately turned out without any notice, and without the privilege of emblements, the crop being liable for the debt.<sup>(b)</sup> Lord Mansfield justly denominated him a *quasi* tenant at will;<sup>(c)</sup> at the same time remarking, with reference to the prevailing language of the law on the subject, that "nothing is so apt to confound as a simile." It has been truly observed, however, that, whatever character we may give to the mortgagor in possession by sufferance of the mortgagee, he is still a *tenant*; and that he has sometimes been called an *agent*, but without foundation, for he is not liable to *account*. Nor is he a *servant*, because the mortgagee has no possession.

<sup>1</sup> Mayo v. Fletcher, 14 Pick. 525.

(a) In Vermont and Wisconsin statutes provide that the mortgagor shall have the right of possession till breach of condition, unless the deed clearly show the contrary.

In Massachusetts and Maine, on the other hand, the mortgagee's right of possession is recognized, unless (in Massachusetts) there is an agreement to the contrary. Verm. Rev. St. 215; Mass. Rev. St. 685; Me. Rev. St. 558; Ruby v. Abyssinian, &c. 8 Shepl. 206.

(b) A mortgagee, not in possession, has no *emblements*. Toby v. Reed, 9 Conn. 225. See Childs v. Dolan, 5 Allen,

819; Gillett v. Balcom, 6 Barb. 370; Jones v. Thomas, 8 Blackf. 428; Shepard v. Philbrick, 2 Denio, 174.

(c.) It will be seen presently, that while a mortgagor, in most respects, has a less estate than a tenant at will, he is in one particular treated more favorably than the latter. It has been stated (*Estate at Will*) that the *assignee* of a tenant at will becomes a trespasser by entry upon the land; while the better opinion is, that the assignee of a mortgagor is not a trespasser, but succeeds to all the rights of the mortgagor.

Nor can the mortgagor, or one claiming under him, be a *disseisor*.<sup>1</sup>

§ 8. A mortgagor will be restrained by the Court of Chancery from committing *waste*, even before condition broken, though not liable therefor at law; and thereby diminishing the security of the mortgagee. (*Infra*, s. 12.) But the mortgagor is not bound to make repairs. If he cut down trees before breach of condition, the mortgagee cannot have trover against him. On the other hand, if the mortgagor in possession severs anything from the land, sells it to a third person, and the mortgagee then takes it from such purchaser, the purchaser may maintain an action against him.<sup>2(a)</sup>

§ 9. A mortgagor in possession cannot make a *lease* to bind the mortgagee.<sup>3</sup> His possession cannot be considered as holding

<sup>1</sup> *Moss v. Gallimore*, Doug. 279; 1 T. R. 378; Doug. 21; 14 Pick. 500-1; *Woodward v. Pickett*, 8 Gray, 617; *Conner v. Whitmore*, 52 Maine, 185; *Jackson v. Fuller*, 4 John. 215; *Crews v. Pendleton*, 1 Leigh, 297; *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, Ib. 445; 4 Kent, 155-6; *Blaney v. Bearce*, 2 Greenl. 182; *McCall v. Lenox*, 9 S. & R. 811; *Souders v. Van Sickle*, 3 Halst. 816; *Partridge v. Bere*, 5 B & A. 604; *Christophers v. Sparke*, 2 Jac. & W. 234; *Noyes v. Sturdivant*, 6 Shepl. 104; *Castleman v. Belt*, 2 B Monr. 158; *Hitchman v. Walton*, 4 Mees. & W. 409; *Cooper v. Davis*, 15 Conn. 556; *Joyner v. Vincent*, 4 Dev. & B. 512; *Miner v. Stevens*, 1 Cush. 485; *Doe v. Maisey*, 8 B & C. 767; *Litchfield v. Ready*, 1 Eng. L. & Eq. 460; *Stedman v. Gasset*, 18 Verm. 846; *Doe v. Tom*, 4 Qu. B. 615;

— *v. Olley*, 12 Ad. & Ell. 481; *Fuller v. Wadsworth*, 2 Ired. 268.

<sup>2</sup> *Farrant v. Lovel*, 8 Atk. 723; *Smith v. Goodwin*, 2 Greenl. 178; *Campbell v. Macomb*, 4 John. Cha. 534; *Fay v. Brewer*, 8 Pick. 203; *Peterson v. Clark*, 15 John. 205; 15 Conn. 556; *Salmon v. Clagett*, 3 Bland, 880; *Murdock*, 2, 461; *Usborne v. Usborne*, 1 Dick. 75; *Johnson v. White*, 11 Barb. 194; *Boston, &c. v. King*, 2 Cush. 400; *Van Wyck v. Alliger*, 6 Barb. 507; *Ensign v. Colburn*, 11 Paige, 503; *Gray v. Baldwin*, 8 Blackf. 164; *Brown v. Stewart*, 1 Md. Cha. 87; *Brick v. Getzinger*, 1 Halst. Cha. 391; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hampton v. Hodges*, 8 Ves. 105; *Goodman v. Kine*, 8 Beav. 379.

<sup>3</sup> *Keech v. Hall*, Dougl. 21. See *Haven v. Adams*, 4 Allen, 80; *Kimball v. Lockwood*, 6 R. I. 188.

(a) But it has been held that the mortgagee may bring an action for timber cut by one who entered under the mortgage. *Bussey v. Paige*, 2 Shepl. 132; *Gore v. Jenness*, 1 Appl. 53. See *Frothingham v. M'Cusick*, 11 Shepl. 403; *Langdon v. Paul*, 22 Verm. 205; *Van Pelt v. McGraw*, 4 Comst. 110; *Lull v. Matthews*, 19 Verm. 322. In case of redemption, he is bound to account for what he receives. Ib. If the mortgagee has expressly or impliedly authorized the cutting of timber, it belongs, when cut, to the mortgagor; otherwise, the

mortgagee may either have an injunction in equity, an action at law, or claim the timber itself, unless the rights of third persons have intervened. *Smith v. Moore*, 11 N. H. 55. A mortgages to B, then to C; neither of whom takes possession. A cuts timber from the land after which B's mortgage is discharged. Held, C might maintain trespass against A. *Sanders v. Reed*, 12 N. H. 558. It has been held that a mortgagee has not a sufficiently vested, immediate or direct title to the property, to maintain an action for injuries done to it by a third

out a false appearance, or inducing a belief that there is no mortgage, for it is the nature of the transaction that he should remain in possession, and the mortgagee receive interest; and whoever wants to be secure, when he takes a lease, should inquire after and examine the title deeds. Whenever one of two innocent persons must be a loser, the rule is, "*qui prior in tempore, potior est in jure*." Hence the mortgagee may maintain ejectment for the land against the lessee. Such are the principles laid down by Lord Mansfield on this subject. In the United States they derive additional force from the universal practice of registering mortgages as well as other deeds. If not recorded, a mortgage will be invalid against a subsequent lease; but if it is recorded, the lessee has implied notice, and takes subject to the mortgage. In the case decided by Lord Mansfield, it is said the mortgagee had no notice of the lease, nor the lessee of the mortgage; and that, if the mortgagee had encouraged the tenant to lay out money, he would be bound by the lease. How far this fact would qualify the effect of registration, is perhaps a doubtful question.

§ 10. It is to be observed, however, that an assignee of the mortgage succeeds to all the rights of the mortgagee himself. Hence, if after a lease by the mortgagor the mortgagee assigns the mortgage, the assignee may have ejectment against the tenant.<sup>1</sup>

§ 11. It has been said that the mortgagee may consider the lessee of the mortgagor as a *trespasser*, a *disseisor*, or a *lessee*, at his election. It seems, however, that the mere entry of such lessee does not constitute him a trespasser, but only his refusal to quit when required. In *Keech v. Hall*, the case above cited, it is said, "the tenant stood exactly in the situation of the mortgagor," against whom, clearly, trespass would not lie without

<sup>1</sup> *Thunder v. Belcher*, 8 E. 449.

person, except in case of a direct intent to wrong and defraud him, and the mortgagor's insolvency or inability to pay the mortgage debt. *Lane v. Hitchcock*, 14 John. 218; *Bank, &c. v. Mott*, 17 Wend. 554; *Gardner v. Heartt*, 8 Denio, 282.

previous notice.<sup>1</sup> So the mortgagee cannot recover, in an action of trespass for mesne profits against an assignee of the mortgagor, the rents and profits accruing after commencement of a suit by the mortgagee to obtain possession.<sup>2(a)</sup> In deciding this point, the court remark, "it seems to be admitted that the mortgagor was not a trespasser before he was served with the writ in the action to foreclose." "The question submitted is the same as if the action were between the mortgagee and mortgagor."<sup>3</sup> "He cannot be considered a trespasser until after an entry by the mortgagee."<sup>4</sup> Chancellor Kent is of opinion that the assignee is no more a trespasser than the mortgagor himself; and that this is the better and more intelligible American doctrine.<sup>5(b)</sup>

§ 12. Though mere occupancy does not constitute the mortgagor a trespasser, yet, for any wrongful act on his part relating to the estate, the mortgagee may maintain trespass against

<sup>1</sup> 2 Cruise, 76; 1 Pow. 159 n. 160. See *Evans v. Elliot*, 9 Adol. & El. 842; *Doe v. Barton*, 11, 807. If the mortgagee adopt the lessee as his tenant, he does not thereby affirm the lease, but the lessee holds from year to year. *Doe v. Bucknell*, 8 Carr. & P. 506; *Brown v. Storey*, 1 Scott, N. 9. See *Hill v. Jordan*, 30 Maine, 367; *Dixie v. Davies*, 8 Eng. L. & Equ. 510; *Zeiter v. Bowman*, 6 Barb. 183; *Clark v. Abbott*, 1 Md. Ch. 474; *Henshaw v. Wells*, 9 Humph. 568; *Smith v. Taylor*, 9 Ala. 688; *Doe v. Warburton*, 11 Ad. & Ell. 307; — v.

*Goodier*, 16 L. J. Q. B. (N. S.) 436; *Wilton v. Dunn*, 7 Eng. L. & Equ. 406; *Knowles v. Maynard*, 18 Met. 352; *Doe v. Olley*, 12 Ad. & Ell. 481; *Wheeler v. Brancomb*, 5 Q. B. 378; *Field v. Swan*, 10 Met. 114; *Crosby v. Harlow*, 8 Shepl. 499; *Simers v. Saltus*, 13 Denio, 214; *Turner v. Camerons, &c.* 2 Eng. L. & Equ. 342; *Coke v. Pearsall*, 6 Ala. 542; *Massachusetts v. Wilson*, 10 Met. 128.

<sup>2</sup> *Wilder v. Houghton*, 1 Pick. 87.

<sup>3</sup> *Ib.* 88.

<sup>4</sup> *Ib.* 89.

<sup>5</sup> 4 Kent, 156-7.

(a) But where one in possession, claiming under the mortgagor, refuses possession to the mortgagee upon his entry for breach of condition, the latter may maintain an action against him for mesne profits, though the entry be insufficient for foreclosure. *Northampton, &c. v. Ames*, 8 Met. 8.

(b) Where the mortgagee himself purchases under a sale for foreclosure, after the decree, he may treat an occupant under the mortgagor as a tenant or a trespasser. He is entitled to the rents from the time of demanding possession or obtaining a conveyance. *Castleman v. Belts*, 2 B. Monr. 158.

In Massachusetts, Connecticut and Pennsylvania, the English rule, by which a mortgagor is not entitled to notice to quit, has been adopted. In New York

on the other hand, it has been held, that ejectment would not lie against a mortgagor as a trespasser, without notice; there being a privity of estate and a tenancy at will by implication. But it would lie against an assignee of the mortgagor. It will be seen hereafter, that the action of ejectment by a mortgagee is now abolished. *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, *Ib.* 445; *Groton v. Boxborough*, 6 Mass. 50; *M'Call v. Lenox*, 9 S. & R. 311; *Jackson v. Laughhead*, 2 John. 75; *Jackson v. Fuller*, 4, 215; *Jackson v. Hopkins*, 18, 487; 2 N. Y. R. S. 312. In New Hampshire, the mortgagor may be treated as a trespasser. *Pettengill v. Evans*, 1 N. H. 54. See *Metropolitan, &c. v. Brown*, 4 Hurl. & N. 428.



him; as, for instance, the cutting and carrying away of timber trees. (*Supra*, s. 7.) Where the land mortgaged is wild land, a question has been made, whether a general usage to cut timber upon such land is to be held equivalent to an implied license. Trespass also lies, by an assignee of the mortgage, against an assignee of the mortgagor, for the removal of fixtures, though erected by the latter assignee.<sup>1</sup>

§ 13. A lease by the mortgagor, subsequent to the mortgage, is valid between him and the lessee, and as to all the world but the mortgagee, and entitles the lessee to redeem.<sup>2</sup>

§ 14. Where a lease has been made before the mortgage, the mortgagee takes, of course, subject to the former, and cannot interfere with the lessee's possession, so long as the latter fulfils his own obligations in regard to the land. But a mortgagee, under such circumstances, seems to stand on the footing of any other assignee of a reversion, and, after condition broken, may call on the tenant to pay rent to him instead of the mortgagor. Since the statute of Anne, no *attornment* is necessary to create this liability on the part of the tenant. Although the statute provides that any payment of rent by the tenant shall be effectual until he has notice of the assignment, yet, upon the giving of such notice, the title of the assignee relates back to the time of the assignment. Upon this principle, the mortgagee, in the case supposed, may call on the tenant to pay not only future rents, but those at the time in arrear, and may distrain for them. (P. 568.) This remedy is said to be a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.<sup>3</sup> It has been seen, that in several of the States, by express statutes, a lessee may attorn to a mortgagee after forfeiture. (See *Attornment*.)

§ 15. Hence it appears, that, although the relation of landlord and tenant does not subsist between mortgagee and mort-

<sup>1</sup> *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, 2 Greenl. 178.

<sup>2</sup> See *Bacon v. Bowdoin*, 22 Pick. 401; *Mass. Rev. St. ch. 107, sec. 18*.

<sup>3</sup> *Moss v. Gallimore*, Doug. 279; *Birch v. Wright*, 1 T. R. 384; *Smith v. Shep-*

*ard*, 15 Pick. 147; *Mansony v. U. S. &c.* 4 Ala. N. S. 735; *Castleman v. Belt*, 2 B. Mon. 158. In Kentucky, he may bring an action for use and occupation. *Ib.* See *Rawson v. Eicke*, 7 Ad. & Ell. 451; *Field v. Swan*, 10 Met. 112.



gagor, it may arise between the mortgagee and the lessee of the mortgagor.

§ 16. In the cases above referred to, where the mortgagee's claim of rent was made upon breach of condition by the mortgagor; it is said, the mortgagor previously received the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. Whether this tacit agreement would prevent the mortgagee from claiming rent immediately upon the execution of the mortgage, is a point not distinctly decided; but, on principle, it would seem to have no such effect. The true view of the matter would appear to be, that, where the mortgage is made before the lease, the latter is wholly invalid against the former; but where the lease is made first, it is by priority paramount to the mortgage, and the lessee cannot therefore be disturbed; but still the mortgagee takes the place, and succeeds to all the rights of the mortgagor.(a)

(a) The tenant is held liable to pay the mortgagee rents due at the time of notice, as well as those accruing subsequently. *Pope v. Biggs*, 9 B. & C. 245. (P. 567.)

If a mortgagee enter for breach of condition, and order a lessee in possession to pay him the rent, though the entry be not such as is necessary for foreclosure, it will still give the mortgagee a title to the rent as against the mortgagor. *Stone v. Patterson*, 19 Pick. 476.

A tenant of the mortgagor, if the mortgage be forfeited during his lease, may attorn to, and take a lease from, the mortgagee, and the mortgagor can then maintain no action for the rent. *Jones v. Clark*, 20 John. 51; *Magill v. Hinsdale*, 1 Conn. 464; *Jackson v. Delancy*, 11 John. 365. But mere notice to a lessee by the mortgagee will not make him his tenant. *Johnson v. Jones*, 9 Ad. & Ell. 809; *Evans v. Elliott*, Ib. 342.

A mortgagee remained in possession six years, without acknowledgment of the mortgagor's title, bought out a tenant for life of the equity, and occupied twenty years more. Held, his occupancy was not adverse during the tenancy for life, and the reversioner might redeem. *Hyde v. Dallaway*, 2 Hare, 528.

In connection with the subject of leases made by a mortgagor, may be stated the rule of law applicable to the liability on the part of the mortgagee, created by a mortgage of leasehold property.

It was once held, that, where a leasehold is assigned by way of mortgage, the mortgagee does not, like other assignees, become liable to the covenants of the lease *immediately*, but only after entry. But the law seems to be now settled otherwise. To guard against this consequence of an assignment, it is usual to mortgage a term by way of under-lease. But the mortgagee thereby loses the right of *renewal*, which he would have as assignee. The mortgagee is liable only for rent due after the mortgage is made, not for prior instalments. *Eaton v. Jaques*, Doug. 457; *Williams v. Bosanquet*, 1 Brod. & B. 238; 2 Cruise. 103, n. a.; 1 Pow. on Mort. 197, n. 1; *Blaney v. Bearce*, 2 Greenl. 182; *Astor v. Miller*, 2 Paige, 68; *Morris v. Mowatt*, Ib. 586; *McMurphy v. Minot*, 4 N. H. 251.

Devise to A, B & C, subject to a life estate, and charged with the payment of £200, a legacy to the children of the testator's niece. Before the death of the tenant for life, A and B conveyed their reversion by way of mortgage for 500

§ 17. If the mortgagee himself take a lease from the mortgagor, he shall not set up the mortgage as a defence to a suit for the rent. If the lease be made first, he may refuse to pay rent, which shall go to extinguish the mortgage debt.<sup>1</sup>

§ 18. The lessee of a mortgagor, the mortgage being prior to the lease, if ejected by the mortgagee, is not entitled to emblements.<sup>2</sup>

§ 19. The doctrine that, where a mortgage is *prior* to a lease made by the mortgagor, the mortgagee may claim rent of the lessee as his tenant, has been strongly denied in New Jersey and New York. It is said that the case of *Birch v. Wright*,<sup>3</sup> the only case where the point is pretended to have been settled, does not decide it, but stands upon other grounds.(a)

§ 20. A mortgagee in possession, being the legal owner of the inheritance, has power at law to commit *waste*. (See chap. 31.) But a court of chancery will restrain him from doing it, unless the security is defective; or will decree an account of the trees cut down, and an application of the proceeds to pay,

<sup>1</sup> *Newall v. Wright*, 3 Mass. 188. See *Wolcott v. Sullivan*, 1 Edw. 899.

<sup>2</sup> *Lane v. King*, 8 Wend. 584.  
<sup>3</sup> 1 T. R. 878.

years. Held, an action of debt would lie against the mortgagees for the legacy. *Braithwaite v. Skinner*, 5 Mees. & W. 813.

(a) A mortgaged land to B, but remained in possession, and conveyed to C. C admitted D as his tenant. C's interest in the land was afterwards sold on execution to E. Immediately upon the sale, and before a deed was given, D *attorned* to E, and agreed to occupy at a certain rent. B afterwards notified D to pay rent to him, and D, receiving an indemnity, accordingly paid it. E brings an action against D for the rent. Held, these facts furnished no defence to the suit. A distinction was taken between the case of a lease prior to the mortgage and the present case, where it was subsequent to the mortgage. In the former case, the rent passes as incident to the reversion which is mortgaged, and the mortgagor is estopped

by his own deed to claim it afterwards. But in the present case the defendant was never tenant to the mortgagee; nor even to the mortgagor. Moreover, a statute (Rev. L. 192) provides that a tenant shall not attorn to a *stranger*. Therefore, D could not lawfully attorn to any one but C or his grantee, and E, holding under an execution sale against C, was to be regarded as his grantee; while, on the other hand, B was to be held a *stranger*. Nor was the attornment to B justified by the statutory provision, which excepts mortgagees from the general prohibition of attornment; for this merely leaves attornment to a mortgagee to be valid or void, according to the circumstances of the case, but does not justify attornment to any but the grantee of the landlord. *Souder v. Van Sickle*, 3 Halst. 314; *M'Kircher v. Hawley*, 16 John. 289. See *Cavis v. M'Clary*, 5 N. H. 529.

first the interest, and then the principal of the mortgage debt.<sup>1(a)</sup>

§ 20 a. The mortgagee may also maintain an action at law against the mortgagor for waste. Thus actions of replevin, trespass, case and trover have been sustained.<sup>2</sup>

§ 21. A mortgagee in possession cannot make a lease of the land to bind the mortgagor, unless there be an absolute necessity for it; and if the mortgagor bring a bill in equity for reconveyance, and tender the amount due, although the mortgagee set up such lease in his answer, and offer to reconvey upon the plaintiff's assenting thereto, a reconveyance will be decreed free from this condition.<sup>3</sup>

<sup>1</sup> *Hanson v. Derby*, 2 Vern. 892; Sel. Cas. in Chan. 80; 2 Cruise, 81. See *Evans v. Thomas*, Cro. Jac. 172; *McCormick v. Digby*, 8 Blackf. 99; *Reid v. Bank, &c.*, 1 Sneed, 262; *Murdock, 2 Bland*, 461.

<sup>2</sup> *Waterman v. Matteson*, 4 R. I. 589;

*Page v. Robinson*, 10 Cush. 99; *Woodward v. Pickett*, 8 Gray, 617; *Frothingham v. M'Cusick*, 11 Shepl. 408; *Wright v. Lake*, 30 Verm. 206; *Bussey v. Page*, 2 Shepl. 182.

<sup>3</sup> *Hungerford v. Clay*, 9 Mod. 1.

(a) So a mortgagee will be held liable for pulling down cottages on the land. *Sandon v. Hooper*, 6 Beav. 246.

In Maine, a question has been made, whether a mortgagee after entry may cut and carry away for sale timber and

other trees. He must account for the proceeds of timber cut by a third person, which are received by him. *Blaney v. Bearce*, 2 Greenl. 182; *Gore v. Jenness*, 1 Appl. 58. (See chap. 81.)

## CHAPTER XXXI.

## EQUITY OF REDEMPTION. NATURE OF THE ESTATE—WHO MAY REDEEM, ETC.

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|---|--|
| 1. Distinction between an equity of redemption and a trust; mortgagor has seisin. | 10. Heirs, &c.   |
| 2. Curtesy.   | 11. Whether the whole debt must be paid.               |
| 3. Dower.   | 12. <i>Tacking</i> .                                   |
| 4. Whether assets.  | 14. Whether known in U. S.                             |
| 5. Subject to legal process.  | 15. Future advances, &c.                               |
| 6. Who may redeem.  | 17. <i>Time</i> of redemption.                         |
| 7. Subsequent incumbrancers.  | 20. No redemption in case of <i>fraud</i> .            |
| 9. Dowress, &c.—on what terms.  | 21. Terms of redemption—account—repairs, interest, &c. |

§ 1. AN equity of redemption has been held to resemble a *trust*. But in some respects the rights of a mortgagor are better protected by the law, than those of a *cestui*. A trust is said to be created *by the contract of the party*, and therefore subject to his directions. But an equity of redemption is *inherent in the land*, and, as has been seen (ch. 29), not liable to be impaired even by express restrictions. It is in fact the creature of a court of equity, and not an interest reserved by the parties. The former, anciently, did not bind a party coming to the estate *in the post*; while the latter adhered to the estate, into whose hands soever it might come.<sup>1</sup> A mortgagor, after breach of condition, if in possession, has, in the view of a court of equity, an equitable seisin, equivalent to a legal seisin in the view of a court of law. Hence, his interest is subject to conveyance, devise, descent, entailment, mortgage, and to be charged with an annuity. It is not *a mere right*, but *an estate in the land*.

<sup>1</sup> Pawlett v. Att'y Gen., Hard. 469; worth, 18 Ill. 654; King v. The Merchants', &c., 1 Seld. 547; Briggs v. Jones, Meigs, 513. See Coates v. Wood-Davis, 20 N. Y. 15.

The mortgage itself being only a *chose in action*, unless the ownership of the land is in the mortgagor, it is in nobody. The interest of the latter is no otherwise a right of action than every *trust*, which, though not to be executed but by *subpoena* out of chancery, is still regarded as real estate.<sup>1(a)</sup>

§ 2. On the same principle, an equity of redemption is subject to *curtesy*, if the wife is in possession of the land during coverture. For, though such possession is a mere tenancy at will, it is in equity that of *the real owner*, subject only to a pecuniary charge. Nor is the husband to be deprived of curtesy on the ground of *laches*, in not paying off the mortgage and thereby acquiring an absolute title, by analogy to the rule which requires of him actual entry upon a legal estate of the wife; for the payment of a mortgage is a far more difficult matter than a mere entry upon land; besides that the mortgagee is entitled to notice, before he is bound to accept such payment. Upon these grounds, a decision of Sir Joseph Jekyll, disallowing curtesy in an equity of redemption, was reversed by Lord Hardwicke.<sup>2</sup>

<sup>1</sup> 2 Cruise, 118; 2 Abr. Eq. 728; Casborne v. Scarfe, 1 Atk. 608; Ellithorpe v. Dewing. 1 Chipm. 140.

<sup>2</sup> Casborne v. Inglis, 2 Abr. Equ. 728;

1 Atk. 608. See Hitner v. Egere, 28 Penn. 305; Sentill v. Robeson, 2 Jones, Equ. 510.

(a) In South Carolina and Pennsylvania the right of redemption is not an equitable, but a strictly legal right. State v. Laval, 4 M'C. 840; Anderson v. Neff, 11 S. & R. 228.

An equity of redemption is *a title in equity*, not merely *a trust*. 1 Sand. Us. 208. See Sampson v. Pattison, 1 Hare, 588; Downe v. Morris, 3 Hare, 404. A mortgage deed does not *per se* create a trust; it conveys the estate subject to a condition. The mortgagee is not accountable to any one until he enters, takes possession, and receives the rents and profits, in which case he may in some sense be considered as a trustee, for he is to render an account; but this must be done in the manner and for the purposes provided in the several statutes for redeeming mortgages, and he is not trustee in any other light. Hence, under the statute giving equity jurisdiction of trusts to the Supreme Court in Massachusetts,

the assignee of a mortgagor cannot maintain a bill for injunction against the mortgagee, who is proceeding to recover possession at law; and for a decree that the mortgage be cancelled. Hunt v. Maynard, 6 Pick. 489. See Eastman v. Foster, 8 Met. 19.

A mortgagee is not precluded, by the nature of his relation to the mortgagor, from buying the land, under a mortgage sale, at a low price. Mott v. Walkley, 3 Edw. 590.

Conveyance to A in trust, chargeable with a certain sum, subject thereto in trust for B, and with a power of sale to A. Held, A could not *foreclose*. 1 Hare, 583. See, as to the nature of the estate or title called an equity of redemption, Burgess v. Wheate, 1 W. Bl. 145; Preston v. Christmas, 2 Wils. 86; Viscount, &c. v. Morris, 3 Hare, 407; Asay v. Hooner, 5 Barr, 21; Borst v. Boyd, 3 Sandf. Cha. 501; Silvester v. Jarman, 10 Price, 84;

§ 3. But, in England, independently of an express statute, an equity of redemption is not subject to *dower*. In this respect, it is placed on the same footing with a trust.<sup>1</sup> In one case,<sup>2</sup> the Master of the Rolls said, he did not know, or could find any instance, where dower of an equity of redemption was controverted and adjudged against the dowress; and decreed in favor of the claim. But afterwards<sup>3</sup> Lord Talbot made a contrary decision in regard to a trust, which has been since uniformly adhered to. And no peculiar equities on the part of the wife will operate to change the rule in her favor; as, for instance, the facts, that the husband expressed his expectation and desire that she should have dower, and was so instructed by the person who drew his will; that the wife is left for the most part otherwise unprovided for; and that certain articles of luxury, such as a coach and horses, and plate, are bequeathed to her, for which she can have no use without dower to support her.<sup>4(a)</sup>

<sup>1</sup> 2 Cruise, 122.

<sup>2</sup> Banks v. Sutton, 2 P. Wms. 719.

<sup>3</sup> Att'y Gen. v. Scott, For. 188; 1 Cruise, 444.

<sup>4</sup> Dixon v. Saville, 2 Cruise, 117.

Coates v. Woodworth, 18 Illin. 654; Chapman v. Mull, 7 Ired. Equ. 292; Clarke v. Sibley, 13 Met. 210; Hewitt v. Huling, 11 Penn. 27; Pratt v. Thornton, 28 Me. 355; Bank, &c. v. Whyte, 1 Md. Cha. 586.

(a) By a recent statute, dower is allowed in equitable estates. In Maryland, and the Maryland part of the District of Columbia, the old English rule prevailed, till expressly changed by statute in the year 1818. See Miller v. Stump, 8 Gill, 804; M'Iver v. Cherry, 8 Humph. 713; Stelle v. Carroll, 12 Pet. 201; Mayberrry v. Brien, 15 Ib. 21.

In the United States, the English rule is not adopted. It has been seen (chap. 9). that in several of the States dower is allowed, by express statute, in all *equitable* estates; and decisions to the same effect, in regard to equities of redemption, have been made in New York, Connecticut and Massachusetts. Chancellor Kent says, that dower is allowed in equities of redemption in Massachusetts, New York, Connecticut, New Jersey, Pennsylvania, Virginia, Alabama, Indiana, and probably most or all of the other States. 4 Kent. 44; Cooper v. Whitney, 8 Hill, 95. See, also, Mich.

Rev. Sts. 262, 263; Ark. Rev. Sts. 837; Verm. Rev. St. 289; Wisc. Rev. Sts. 833; Thompson v. Boyd, 1 N. J. 58; 2, 543; Tabele v. Tabele, 1 John. Cha. 45; Titus v. Neilson, 5, 452; Mantz v. Buchanan, 1 Md. Ch. 202; Hoogland v. Watt, 2 Sandf. Cha. 148; Denton v. Nanny, 8 Barb. 618; Frost v. Peacock, 4 Edw. Cha. 678; Bolton v. Ballard, 18 Mass. 229; Hildreth v. Jones, 18 Ib. 525; Niles v. Nye, 18 Met. 185; Lund v. Woods, 11 Met. 566; Wedge v. Moore, 6 Cush. 8; Raynham v. Wilmarth, 18 Met. 414; Gage v. Ward, 25 Maine, 101; Littlefield v. Crocker, 30, 192; Rossiter v. Cossit, 15 N. H. 88; Clough v. Elliott, 8 Fost. 182; Matthewson v. Smith, 1 Ang. 22; Danforth v. Smith, 28 Verm. 247; Brown v. Lapham, 3 Cush. 558; Tillinghast v. Fry, 1 Ang. 53; Van Vronker v. Eastman, 7 Met. 157; Thayer v. Richards, 19 Pick. 898; Henry's Case, 4 Cush. 257; Hinds v. Ballou, 44 N. H. 619; Norris v. Morrison, 45 Ib. 490; Conover v. Porter, 14 Ohio St. 450; M'Arthur v. Franklin, 15 Ohio St. 485.

(In New Jersey, a contrary doctrine was formerly held. Montgomery v. Bruere, 1 South. 260. See Thompson v. Boyd, 1 N. J. 38; 2 Ib. 543; Hinchman v. Stiles,

But where a mortgage is made *for years*, and not in fee, dower is allowed in the equity of redemption. If the mortgage has been satisfied, chancery will remove the term for the benefit of the widow; if not, she will be bound to pay one-third of the interest or of the principal.<sup>1</sup>

§ 4. In England, an equity of redemption was formerly not legal *assets* in the hands of the heir, but he might plead "*riens per descent*." Since the statute of frauds, like a trust, it has been held to be assets in equity; but only to pay debts of that description, to which the lands would have been liable if it had been a legal estate. Where the mortgage is made for years, the equity, being incident to the reversion in fee, is, like the latter, legal *assets*.<sup>2</sup> By St. 3 and 4 Wm. IV, ch. 104, equities of redemption, generally, are made legal assets; and the English rule has no application in this country.

§ 5. In England, an equity of redemption has been held not liable to be taken on *execution*. And it has been doubted whether this principle is changed by St. 1 and 2, Vict., ch. 110. But a *judgment* is a lien upon an equity of redemption.<sup>3</sup> And in the United States equities of redemption are almost universally made subject to legal process for the debts of the mortgagor. This subject will be considered hereafter.(a) (See ch. 35.) On the other hand, the interest of a mortgagee before foreclosure cannot be taken upon execution.<sup>4</sup>

§ 6. Although an equity of redemption is liable to be taken on execution by third persons, the mortgagee himself shall not be allowed to take it upon a judgment recovered for the mortgage debt; because a shorter time is allowed for redeeming an

<sup>1</sup> 2 Cruise. 123.

<sup>2</sup> Ib. 123-4.

<sup>3</sup> Plunket v. Penson, 2 Atk. 290;

Forth v. Duke, &c. 4 Madd. 501; Coote, 79, 80.

<sup>4</sup> 1 Pow. 255, n. 1. (See ch. 32.)

<sup>1</sup> Stockt. 361, 454. In Ohio, where the condition is broken before marriage, and the equity of redemption released after, there is no dower. Rands v. Kendall, 15 Ohio, 671.)

If the executor, &c., of the husband redeem the mortgage, the widow shall have dower. 18 Mass. 227, 525.

(a) In that part of the District of Columbia ceded by Maryland, they are

not thus liable. Van Ness v. Hyatt, 18 Pet. 294. See, also, for the law in South Carolina, State v. Laval, 4 McC. 840; Hill v. Smith. 2 McL. 448.

In New York, an equity of redemption is held liable to execution by the common law of that State. Jackson v. Willard, 4 John. 41; Hitchcock v. Harrington, 6, 290; Collins v. Torry, 7, 278.



equity, sold on execution, than for redeeming the land itself.<sup>1</sup> But where a negotiable note secured by mortgage is assigned without the mortgage, the equity of redemption may be attached and sold on execution by the indorsee.<sup>2(a)</sup>

§ 7. With regard to the persons who are entitled to redeem; it is, of course, to be understood, that any party in whom the law vests an equity of redemption, either by its own operation or by his voluntary act, may redeem the mortgage; indeed, the latter part of the proposition is a mere repetition of the former, since an equity of redemption is itself nothing else but the right or power to redeem. It seems, any one may redeem a mortgage, who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him.<sup>3</sup> Thus, a lessee who took a lease after the mortgage. So, it seems, the holder of a

<sup>1</sup> *Atkins v. Sawyer*, 1 Pick. 351; *Camp v. Coxe*, 1 Dev. & B. 52; *Goring v. Shreve*, 7 Dana, 64; *Palmer v. Foote*, 7 Paige, 487; *Waller v. Tate*, 4 B. Mon. 531; *Lyster v. Holland*, 1 Ves. jun. 431; *Tice v. Annin*, 2 John. Ch. 180.

<sup>2</sup> *Crane v. March*, 4 Pick. 131.

<sup>3</sup> *Gibson v. Crehore*, 5 Pick. 149; *Moore v. Beasom*, 44 N. H. 215; *Grant*

*v. Duane*, 9 John. 591; *Ib.* 611; *Smith v. Manning*, 9 Mass. 422; 4 Kent, 156; N. Y. St. 1838, 262; *Parvis v. Brown*, 4 Ired. Equ. 413; *Boarman v. Catlett*, 18 Sm. & M. 149; *Brainerd v. Cooper*, 10 N. Y. 356; *M'Dougald v. Capron*, 7 Gray, 278; *Beach v. Cooke*, 8 Tiff. (28 N. Y.) 598.

(a) One holding a note secured by mortgage indorsed the note and assigned the mortgage to a third person. The mortgagor afterwards died, having devised all his real estate to the mortgagee. The latter gave his own note to the assignee for the amount of the first note, with the interest which had accrued on it, the second note bearing a memorandum, that when paid it would discharge the first. The assignee retained the first note, brought a suit on the second, recovered judgment, levied on the right of redemption, and indorsed the proceeds on the first note in part payment. In an action brought by the purchaser of the equity, held, the levy was void, the facts showing a sale in behalf of the mortgagee of the right of redemption for the purpose of paying the mortgage debt. *Washburn v. Goodwin*, 17 Pick. 137.

In New York, an equity of redemption cannot be sold, upon an execution founded on a judgment at law for the mortgage debt. 2 Rev. St. 368.

In Pennsylvania, the sale of land mortgaged, under an execution upon the

debt, extinguishes the incumbrance and passes an absolute title to the purchaser. *Pierce v. Potter*, 7 Watts, 475.

If the mortgagee purchases the land for less than the debt, the mortgagor cannot compel an entry of satisfaction on the mortgage. *Ib.*

In Kentucky, it is held, that, although an equity cannot lawfully be sold on execution, in a suit by the mortgagee; yet, if sold, and if the purchaser pay the mortgage debt, he stands in the place and succeeds to the rights of the mortgagee. *Goring v. Shreve*, 7 Dana, 221. If land be mortgaged to a surety as indemnity, it cannot be taken on execution for the debt. *Bronson v. Robinson*, 4 B. Monr. 143. See *Roe v. Couch*, 1 Root. 452; *Buck v. Sherman*, 2 Doug. (Mich) 176; *Bratton, &c.* 8 Barr, 164; *Mott v. Clark*, 9, 399; *Towers v. Tuscarora, &c.*, 8, 297; *Hartz v. Woods*, *Ib.* 471; *Cathcart's, &c.* 18 Penns. 416; *Klock v. Cronkhite*, 1 Hill, 108; *Brouster v. Robinson*, 4 B. Mon. 143; *Freeby v. Tupper*, 15 Ohio, 467.

mere easement in the land.<sup>1</sup> So where one co-tenant conveys a parcel of the land by metes and bounds, takes back a mortgage and assigns it, a lessee for years from the mortgagor may redeem the mortgage from the assignee, if he has no title under the other co-tenant.<sup>2</sup> But, in general, a mere equitable owner, such as a *cestui que trust*; or one having a mere *personal claim*, such as an annuitant; or a party holding a *contract* in relation to the land; cannot redeem.<sup>3</sup>

§ 8. Any *subsequent incumbrancer* may redeem, and thereby take the place of the prior one; such as a judgment creditor, in those States where a judgment constitutes a lien on real estate. (a) And, in England, the *cognizee of a statute*, (see ch. 29, sec. 1, n,) acknowledged after the filing of a bill for foreclosure, has been allowed to redeem even after the foreclosure, if recent, and although the mortgagee had no notice. So where a tenant mortgages for years, and the land escheats, the lord of the manor may redeem. So the crown may redeem a mortgage on an estate forfeited for crime. So the assignee of a bankrupt, even a *prowling* assignee, who buys an equity long abandoned for a trifling sum.<sup>4</sup>

§ 9. A dowress or jointress may redeem. So a tenant by the curtesy. In one case, in Massachusetts, it was doubted, on account of the court's limited equity jurisdiction, whether a widow could redeem for the purpose of entitling herself to dower. But it seems to be now well settled that she may. Dower is, however, subject to the rights of the mortgagee, and he may defend against the claim till the mortgage is satisfied.<sup>5</sup> (b)

<sup>1</sup> Bacon v. Bowdoin, 22 Pick. 401.

<sup>2</sup> Ib. 2 Met. 591.

<sup>3</sup> 2 Story's Equ. sec. 1028; Upham v. Brooks, 2 W. & M. 407; Porter v. Road, 1 Appl. 363.

<sup>4</sup> 2 Cruise, 127; Crisp v. Heath, 7 Vin. Abr. 52; 2 Lit. 384; Bank, &c. v. Carrol, 4 B. Monr. 45; Downe v. Morris, 8 Hare, 404. (In Alabama, a second mortgagee may either pay the first mort-

gage, and then file a bill to have a sale for payment of both mortgages. or he may file a bill for foreclosure without payment, making all necessary parties, and have a decree for sale to pay both. Cullum v. Irwin, 4 Alab. N. S. 452; Chambers v. Mauldin, Ib. 477. See Moore v. Beasom, 44 N. H. 215.)

<sup>5</sup> Bird v. Gardner, 10 Mass. 364. See Wilkins v. French, 2 Appl. 111.

(a) In New Hampshire, an attaching creditor. N. H. St. 1845, 283. Where an equity of redemption is attached, the owner may still make another mortgage of it, and the second mortgagee or his

assignee may redeem from the execution purchaser. Bigelow v. Willson, 1 Pick. 485. See chap. 82.

(b) It has been heretofore held, that, where a purchaser of the equity of re-

§ 10. In case of the mortgagor's death, his heir or assignee alone can redeem. And, even though the estate be insolvent, this is no ground of objection to a redemption by the heirs; more especially after the lapse of a long time from the mortga-

demption pays the mortgage debt, and takes an assignment of the mortgage, the widow cannot redeem without paying the whole debt. But a recent case in Massachusetts decides, that a wife who signed the mortgage, releasing her dower, may redeem after the husband's death, by paying her proportion of the debt, estimated according to the value of the rest of the estate, including the reversion. If another person, claiming under the mortgagor, redeems, she will be entitled to her share of the land by paying her share of the debt, according to the value of her life interest in one-third of her estate. *Van Duyne v. Thayer*, 14 Wend. 238; *Gibson v. Crehore*, 5 Pick. 146; 5 John. Ch. 482; *Cass v. Martin*, 6 N. H. 25; *Van Vroncker v. Eastman*, 7 Met. 157. See *Gregory v. Gregory*, 16 Ohio St. 560; *Hinds v. Ballou*, 44 N. H. 619; *Baker v. Fettes*, 16 Ohio St. 596; also *Morris v. Morrison*, 45 N. H. 490; (affirming the distinction above stated as to the payment of the whole or of only one-third of the debt; (*M'Arthur v. Franklin*, 16 Ohio St. 198, (deciding that by consent only a proportion may be paid.)

If the purchaser of an equity of redemption takes an assignment of the mortgage, and continues in possession of the land more than three years from such assignment, the condition having been broken before the sale, and then the husband dies, the widow may redeem, unless she had notice of his being in possession for condition broken; and, in such case, the defendant shall account only for rents received, and be allowed only for repairs made, since the husband's death. *Eaton v. Simonds*, 14 Pick. 98.

A mortgagor devised the estate to his son, who died, leaving a widow. The executor sold the equity, purchased it himself, and redeemed the mortgage, paying one-half of it with assets in his hands as executor, according to the directions of the will, and the rest with his own funds. The sale was affirmed by the son's widow and heirs. Held, the widow should have for her dower the interest for her life of one-third of the price of the equity, and one-third of the amount paid from the testator's estate

to extinguish the mortgage. *Jennison v. Hapgood*, 14 Pick. 845.

A mortgaged land, his wife, B. joining, to release her dower. After the death of A, his administrator sold the equity of redemption to C, who took possession of the land. C then paid the mortgage debt, took an assignment of the mortgage, and afterwards made a declaration that he held for the purpose of foreclosure. B had no notice of his purpose to foreclose, and brought a bill in equity to redeem. Decreed for the plaintiff, and that the defendant should account from the time of assignment. *Gibson v. Crehore*, 5 Pick. 146.

In Ohio, a widow may redeem, though she join in the mortgage, unless she was made party to the foreclosure. *McArthur v. Franklin*, 16 Ohio St. 198.

In New York, where a wife pledges her own land for a debt of the husband, she has all the rights of a surety. But if she joins in a mortgage of his land, she cannot claim that it be satisfied from his interest alone, so as to give her a right of dower. *Hawley v. Bradford*, 9 Paige, 200. In case of a sale under the mortgage, she shall have dower only in the surplus remaining after payment of the debt; but the costs of suit will not be allowed as against her. *Ib.*

In Michigan, if the heir or other representative of the mortgagor redeem the land, the widow may either pay her share and take one-third of the land, or take so much less than a third as will be equivalent to her share of the debt. *Mich. Rev. St.* 262-3.

In Arkansas, where land subject to mortgage is sold for the mortgage debt after the husband's death, she will be entitled to the interest of one-third of any surplus. *Rev. St.* 887.

In Vermont, the widow of a mortgagor has dower upon payment of her proportion of the debt, under direction of the Probate Court. If the heir, &c., pay the debt, she has one-third of the land, deducting the value of the payment. The administrator is required to pay the mortgage, if for the benefit of those interested to redeem, either from the personal, or by sale of the real estate. If there is a sufficient personal

gor's death, during which the creditors have done no act towards redemption.<sup>1</sup>

§ 11. A party interested cannot redeem a mortgage, without paying *the whole debt*; and, if he has only a partial interest in the property, he will stand in the place of the party, whose interest in the estate he discharges. The distinction is made, that one person, having a partial interest in property mortgaged, cannot compel other owners to contribute for its redemption; because a foreclosure may perhaps be for their benefit. But, if he redeem alone, he may hold the whole till he is reimbursed. He is an assignee, and stands in the place of the mortgagee. So, if one of several mortgagees, in a subsequent mortgage, elects not to pay his share in redeeming a prior one; the others, who do redeem, have a prior lien for the sum paid, and may in equity compel the former to pay his share, or convey his interest to themselves.<sup>2(a)</sup>

<sup>1</sup> Smith v. Manning, 9 Mass. 422; Elliott v. Patton, 4 Yerg. 10; Shaw v. Hoadley, 8 Blackf. 165; Wells v. Morse, 11 Verm. 17.

<sup>2</sup> 5 Pick. 152; Messiter v. Wright, 16, 158; Saunders v. Frost, 5 Ib. 259. See

Brooks v. Harwood, 8, 497; Chittenden v. Barney, 1 Verm. 28; Smith v. Kelly, 27 Me. 237; Hubbard v. Ascutney, &c., 20 Verm. 402; Brown v. Worcester, &c., 8 Met. 47.

estate, the court may order dower in the whole land. Verm. Rev. St. 289.

In Maine, a mortgagor may devise his equity in lieu of dower. So the Probate Court may assign it. The widow may then redeem, or the heir, who may then eject her till she refunds. Wilkins v. French, 2 Appl. 111.

In New Hampshire, where one of several mortgagees was to have possession of part of the premises for life, and a pecuniary provision, under certain circumstances, not exceeding a particular sum; held, a tender by the widow to an assignee of the husband of a sum of money, as an indemnity against such provision, did not discharge the mortgage, or give her a claim to dower. Bullard v. Bowers, 10 N. H. 500. The husband or his assignee would be entitled to possession, and the widow to dower, until a claim made for such provision. Ib.

(a) Where a suit for foreclosure is brought against more than one defendant, it will not be delayed to give them opportunity of litigating their own mutual rights; unless it appear, upon a

cross bill filed by them, that this is absolutely necessary for their protection. Farmers', &c. v. Seymour, 9 Paige, 538.

A mortgagor of two parcels of land, who conveys one of them, cannot compel his grantee to contribute to a redemption of the mortgage. Allen v. Clark, 17 Pick. 47. But if, after such conveyance, together with a mortgage back for the purchase-money, the mortgagor convey the other parcel to another grantee, and become insolvent, and the second grantee refuse to contribute to a redemption, the first grantee, upon redeeming, may claim an assignment of the mortgage, and thus compel contribution. Ib.

Mortgage of two lots of land. The right of redeeming one was transferred to A, and the right of redeeming the other to B, and the mortgagee afterwards released the former. Held, B. in redeeming, could not compel A to contribute, but was entitled to an abatement of such proportion of the sum due on the mortgage, as the value of A's parcel bore, at the time of making the mort-

§ 12. In this connection we may consider the doctrine of *tacking*. In England, agreeably to the maxim, that "he who will have equity must do equity," it has been held, that a mortgagor cannot redeem the mortgaged estate, without paying not only the mortgage debt, but a subsequent bond given by him to the mortgagee for money borrowed. But this doctrine was not adhered to with respect to the mortgagor himself. It is, however, still retained as against *the heir or devisee* of the mortgagor; for a bond debt of the ancestor becomes his own, and the descended estate is assets in his hands; and, therefore, he will not be allowed to redeem without paying it. And the same doctrine has been applied, where one who has loaned money upon land afterwards takes an assignment of a mortgage made by the borrower. So, if part of a debt is paid, and more money borrowed upon a defective security, the mortgagor shall not redeem without paying the whole amount due. Though the principle is not adopted, as against an assignee of the equity of redemption, or any subsequent incumbrancer; who may always redeem without paying any independent claim held by the mortgagee against the mortgagor. So it has been said, that, where one makes two distinct mortgages of separate estates, one of which proves defective in title or value, neither he, nor a purchaser of one of the estates, holding under him, will be allowed to redeem one without redeeming both.<sup>1</sup>

§ 13. The doctrine of *tacking* is also applied to questions between successive mortgagees. Numerous decisions are found in the books, which recognize the principle that if a third

<sup>1</sup> 2 Cruise, 127-134.

gage, to the value of both parcels. *Parkman v. Welch*, 19 Pick. 231.

If a mortgage debt is payable by instalments, and for non-payment of the first of them the mortgagee enters, and after all have become due the mortgagor brings a bill to redeem; he will be required to pay the whole debt, as the condition of redemption. *Mann v. Richardson*, 21 Pick. 855.

If, in such case, a part of the instalments are not due, and the mortgagee

refuses to receive them; the court will, by special decree, order that the case stand open, the mortgagee to retain possession till they become due. *Ib.* See *Tillinghast v. Fry*, 1 R. I. 406; *Towle v. Hait*, 14 N. H. 61. The rule stated in the text does not necessarily operate to debar a party from redeeming part of the land, because the right of redeeming another part has been lost. *Dexter v. Arnold*, 1 Sumn. 118.

mortgagee, without notice of a second mortgagee, purchase in the first mortgage, thus acquiring the legal title, the second mortgagee cannot redeem the first mortgage without redeeming the third also.<sup>1</sup>

§ 14. The rules above stated, by which equity imposes upon a party, who seeks its aid in redeeming a mortgage, terms that are not provided for by the mortgage itself, have been said to be, in some particulars, solely matters of arrangement, to prevent a circuitry of suits, and to have no foundation in natural justice. They are strikingly at variance with the *registration system* universally practised upon in the United States, and chiefly on this ground, perhaps, have never been generally adopted as a part of American law.(a)

§ 15. In this connection we may consider the question, which has been somewhat discussed, how far a mortgage may be made to operate as security for *future advances* made or liabilities incurred by the mortgagee. The principle is said to be, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of a *bona fide* junior incumbrancer; but a mort-

<sup>1</sup> Story's Equ. 412; Baker v. Pier-son, 6 Mich. 523; 2 Cruise, 127-184. See White v. Hillacre, 8 Y. & Coll. 597; Grurgeon v. Gerrard, 4, 119; Second, &c. v. Woodbury, 2 Shepl. 281; Williams v. Owen, 18 Sim. 597; Aldworth v. Robinson, 2 Beav. 287; Young v. English, 7 Beav. 10; Watts v. Symes, 8 Eng. L. & Equ. 247; Brace v. Duchess, &c., 2 P. Wms. 491; Gray v. Jenks, 8 Mas. 522; Hartison v. Feth, Pre. Ch. 61; Edmunds v. Povey, 1 Vern. 187; Barnett v. Weston,

12 Ves. 180; Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, 2 Vern. 286; Margrave v. Le Hooke, Ib. 207; Pope v. Onslow, Ib. 286; King, 1 Atk. 800; Titley v. Davis, 2 Y. & C. (N. R.) 399; Roe v. Soley, 2 Bl. 726; Demain-bray v. Metcalf, Pr. Cha. 421; Cator v. Charlton, Coote, 468; Collett v. Munden, Ib.; Jones v. Smith, Ib.; Hooper, 19 Ves. 477; Ireson v. Denn, 2 Cox, 425; Bowker v. Bull, 1 Sim. (N.) 29.

(a) In Massachusetts, Vermont, New Jersey, Tennessee and Illinois, cases have occurred in which the courts have had occasion to advert to them, but have denied their binding force in those States. While in Maryland, Virginia and Connecticut, they have been to some extent recognized and enforced. Lee v. Stone, 5 Gill & J. 21-2; 2 Swift. 186-7; Scripture v. Johnson, 8 Conn. 213. (But in Maryland, tacking is now unknown. Coombs v. Jordan, 8 Bland, 380. And a mortgage is valid only for what appears upon the face of it. Md. L. 825.) Hopper v. Sisco, 1 Halst. Cha. 343, n.; Lor-

ing v. Cooke, 8 Pick. 48; Van Vronker v. Eastman, 7 Met. 157; Green v. Tanner, 8 Met. 411; Hicks v. Bingham, 11 Mass. 800; Green v. Chester, 7 Humph. 77; Lawson v. Sutherland, 18 Verm. 309; Frye v. Bank, &c. 11 Illin. 367; Robertson v. Campbell, 2 Call, 362; Chamberlain v. Thompson, 10 Conn. 251; Orvis v. Newell, 17 Conn. 97; Woodson v. Perkins, 5 Gratt. 345.

The doctrine of *tacking* was first attacked and exploded in the case of Grant v. U. S. Bank, 1 Caines' Cas. in Er 112; in which Gen. Hamilton made a celebrated argument against it.



gage is always good to secure future loans, when there is no intervening equity. In other words, where a mortgage is expressly made to cover future debts, these debts will be secured by it, in preference to the claim of a third person, who takes another mortgage between the making of the first and the incurring of the proposed future debts, with notice, express or implied, of the first mortgage. But a mortgage cannot be enlarged by tacking subsequent advances to it in virtue of a parol agreement; nor, it seems, under a written contract, unless the subsequent mortgagee has full notice of it.<sup>1</sup> It has been held, that a mortgage may be given to secure future advances, or as a general security for future balances. So, when a mortgagee has indorsed bills in blank, and taken the mortgage as security, it is not affected by subsequent mortgages, though made before the bills are put in circulation. So a mortgage is good to secure a future book account.<sup>2</sup> It is said,<sup>3</sup> the question of the validity of such a mortgage may arise under several different aspects. One inquiry is, what language in the deed itself, or what evidence, independent of the deed, is necessary and sufficient to create such a security. Another consideration is, whether the question is between the parties to the mortgage, or between the mortgagee and creditors of the mortgagor, or subsequent incumbrancers; also, how far such creditors and incumbrancers are bound by the registration of the first mortgage, and the first mortgagee by a registration of the second mort-

<sup>1</sup> 4 Kent, 175; *James v. Morey*, 2 Cow. 292; *Hendricks v. Robinson*, 2 John. Cha. 809; *Averill v. Guthrie*, 8 Dana, 83; *Leeds v. Cameron*, 8 Sumn. 492; *Walling v. Aiken*, 1 M'Mul. 1; *Ex parte Hooper*, 19 Ves. 477; *Walker v. Snediker*, 1 Hoffm. 146; *Johnson v. Bowie*, 2 Y & Coll. 268; *Welland v. Gray*, Ib. 199; *Watson v. Dickens*, 12 Sm. & M. 608; *Craig v. Tappin*, 2 Sandf. Cha. 78; *Quinebaug, &c. v. French*, 17 Conn. 129; *Torrey v. Bank, &c.* 9 Paige, 649; *North v. Crowell*, 11 N. H. 251; *McDaniels v. Colvin*, 16 Verm. 800; *Collins v. Carlile*, 18 Ill. 254; *Bank v. Finch, &c.* 8 Barb. Cha. 297; *Lewis v. De Forest*, 20 Conn. 427; *Mix v. Cowles*, 20 Conn. 420; *Hawkins v.*

*May*, 12 Ala. 678; *Kramer v. Bank, &c.* 15 Ohio, 258; *Gordon v. Graham*, 2 Equ. Cas. Abr. 598; *Truscott v. King*, 6 Barb. 846; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Bank, &c. v. Christie*, 8 Cl. & Fin. 214; *Huntington v. Cotton*, 31 Miss. 258; *Rowan v. Sharps, &c.* 29 Conn. 282; *Bayler v. Com.* 40 Penn. 87; *Bell v. Fleming*, 1 Beasl. 18, 490; *Speer v. Whitfield*, 2 Stockt. 107; *Wilson v. Russell*, 13 Md. 494; *Miller v. Whittier*, 86 Maine, 577; *Miller v. Lockwood*, 5 Tiffa. (32 N. Y.) 298; *Goddard v. Sawyer*, 9 Allen, 78; *Stone v. Lane*, 10 Allen, 74.

<sup>2</sup> *Bank, &c. v. Finch*, 8 Barb. Ch. 298; *Burdett v. Clay*, 8 B. Mon. 287; *McDaniels v. Colvin*, 16 Verm. 800.

<sup>3</sup> 1 Hill. on Mortg. 211.



gage, in reference to all subsequent advances. The court in Massachusetts have remarked,<sup>1</sup> that a stipulation in a mortgage, for the security of future advances and responsibilities, may have a fraudulent aspect, or may be satisfactorily explained, according to the attending circumstances. A mortgage made for this consideration alone might be void against creditors, as tending to facilitate collusion, and enabling the mortgagor to get credit on his property without notice of the incumbrance. But, where the object is to secure an existing demand, the addition of a clause, securing future advances, does not necessarily avoid the mortgage. These remarks are evidently directed to the point, whether such a mortgage is *void for the whole*; not whether it is effectual to cover the future advances.(a) In another case, Judge Story remarks,<sup>2</sup> that a conveyance may be valid in point of law, although given for future advances, if it be *bona fide*, and for a valuable consideration; that this will hardly be denied, and has been most solemnly settled.

§ 16. To render a prior mortgage valid against subsequent incumbrances, the condition of the former need not be so completely certain, as to preclude the necessity of extraneous inquiry, but only sufficiently definite to give the necessary information, with the exercise of common prudence and diligence.<sup>3</sup>

<sup>1</sup> Badlam v. Tucker, 1 Pick. 398; Atkinson v. Maling, 2 T. R. 462. See 7 Vin. Abr. 52-8.

<sup>2</sup> De Wolf v. Harris, 1 Mas. 580.

<sup>3</sup> Pettibone v. Griswold, 4 Conn. 158; St. Andrews, &c. v. Tompkins, 7 John.

Ch. 14; Garber v. Henry, 6 Watts, 57; Hart v. Chalker, 14 Conn. 77. See Young v. Wilson, 27 N. Y. (18 Smith) 351; Gilman v. Moody, 48 N. H. 289; Freeman v. Anld, 37 Barb. 587; Griffin v. N. J. &c, 3 Stockt. 49.

(a) The condition of a mortgage was to pay a debt due by note, dated May 10, 1884, on demand, with interest. Held, invalid against a subsequent mortgagee. Hart v. Chalker, 14 Conn. 77. See also Vanneter v. Vannetter, 8 Gratt. 147; Spader v. Lawler, 17 Ohio, 371. A mortgage, conditioned to pay all notes, which the mortgagee may give or indorse for the mortgagor, and all receipts which he may hold against him, is void against creditors. Pettibone v. Griswold, 4 Conn. 158. So, a mortgage conditioned to indemnify the mortgagee against a certain

note indorsed by him, and all other notes thereafter indorsed by him, for the mortgagor's benefit, not exceeding a certain sum, is void, with respect to the latter notes, against a subsequent incumbrancer. Shepard v. Shepard, 6 Conn. 87.

Mortgage from A to B, dated May 18, conditioned as follows: "Whereas B has indorsed for A a note for \$1,000, and has agreed to indorse \$1,000 in a note or notes hereafter, when thereto requested;" if A shall pay said notes, the deed to be void. June 16, B indorsed a note for A for \$1,000, which B was afterwards

§ 17. With regard to the time within which a mortgage shall be redeemed, although no precise period of limitation is fixed by law, and matters in equity are *governed by the course of the court*; yet, in analogy to the statute of limitations, uninterrupted possession by the mortgagee for twenty years will raise a presumption, that the right of redeeming is abandoned, more

obliged to pay. In November A mortgaged the same land to C, a *bona fide* creditor. On a bill for foreclosure by B against C, held, the mortgage was a valid security for the second note. *Hubbard v. Savage*, 8 Conn. 215. See *Smith v. Prince*. *Ib.* 472.

Condition of a mortgage from A to B, that, if A shall pay B the sums to be advanced him by B, according to an agreement mentioned in a certain bond of even date from A to B; and fulfil every other agreement mentioned in said bond, and build the bridge therein mentioned, and do all other things contained therein; the deed and bond to be void. A afterwards mortgages to C. Held, the mortgage to B should stand as security for advances made after the mortgage to C. *Crane v. Deming*, 7 Conn. 887. (See *Booth v. Barnum*, 9 *Ib.* 286.)

A mortgaged to B, conditioned nominally to secure a certain specified sum, but in reality to secure different sums due at the time, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. Held, although the misrepresentation of the true condition subjected the mortgage to suspicion, yet, as it proved on inquiry to be a fair transaction, the mortgagee's claim was good, not only for debts due at the time, but for those subsequently incurred upon the faith of the mortgage, as against all persons except those injured and deceived by the misrepresentation; but that it should not hold to secure advances made after notice of a subsequent conveyance by or incumbrance against the mortgagor. *Shirras v. Caig*, 7 *Crauch*, 34, 50-1.

A note secured by mortgage, duly recorded, was given by a firm to the plaintiffs, a bank, who at the same time gave the mortgagors a writing, setting forth that the note was held as collateral for other liabilities of the mortgagors to the bank. and that the note and mortgage were to remain for said purposes so long as the bank should hold any note against the mortgagors, and so long as they should be under any liabilities to the

bank; but this instrument was not recorded. Held, the mortgage was not fraudulent as against subsequent purchasers; that new notes, given the bank, whether in renewal of the original ones or not, were covered by the mortgage, though a third person had become a partner with the mortgagors, and the new notes were made or indorsed in the name of the new firm. *Commercial, &c. v. Cunningham*, 24 *Pick.* 270.

A being indebted to B, and B being also liable for him as surety, A gives a mortgage to secure a note, covering the whole amount of debt and liability; and the next day, before any payment by B, as surety, makes an assignment for benefit of creditors. Held, the mortgage was valid so far as to secure the debt due to B. *Sanford v. Wheeler*, 18 Conn. 165.

Mortgage to secure a note for \$500, such note being given solely on account of the mortgagee's suretyship for that amount, upon which he afterwards paid the debt. Held, as against a subsequent mortgagee, the mortgage was invalid. *North v. Belden*, 18 Conn. 876.

Mortgage to secure A, the mortgagee, as indorser of certain notes. When these fell due, they were renewed by giving others with different names, but the original liability of A remained undischarged, no new credit was given, and he finally paid the new notes. Held, the mortgage was still valid. *Pond v. Clarke*, 14 Conn. 884 (overruling *Peters v. Goodrich*, 8 Conn. 146.)

In Maryland, the validity of a mortgage to cover future advances seems to be recognized, though not distinctly decided. So in South Carolina. But, in New Hampshire, a statute seems to render it void. *Union, &c. v. Edwards*, 1 *Gill & J.* 363; *Clagett v. Salmon*, 5 *Ib.* 814; 1 *M'Cord's Cha.* 265; *N. H. L.* 1829, 532; *Rev. St.* 245.

But, notwithstanding the statute, such mortgage is valid for the amount of present indebtedness. 8 *Sumn.* 488; *New Hampshire, &c. v. Willard*, 10 *N. H.* 210.

especially as against the heir of the mortgagee.(a) So, where there has been a decree to redeem and account, the lapse of

(a) It will be seen that the *legal* time of limitation is changed in many of the States. The rule in equity varies accordingly. See, as to the effect of lapse of time in equity, *Mitchell v. Thompson*, 1 M'Lean, 106; *Piatt v. Vattier*, Ib. 164; *Scott v. Evans*, Ib. 486; *Cook v. Colyer*, 2 B. Monr. 78; *Dexter v. Arnold*, 8 Sumn. 152; *Wells v. Morse*, 11 Verm. 9; *Humbert v. Rector*, &c., 24 Wend. 587.

In England, by St. 8 & 4 Wm. IV. ch. 27, sec. 28, the time of redemption is now limited to twenty years next after the mortgagee's taking possession; or from any written acknowledgment given by him to the mortgagor of the right of the latter, if such exists. 1 Steph. Com. 284. See *Hodges v. Croydon*, &c., 8 Beav. 86; *Du Vigier v. Lee*, 8 Hare, 328.

It has been said, that "the right to foreclose and the right to redeem are reciprocal and commensurable." *Caufman v. Sayre*, 2 B. Monr. 206. So, also, "in the case of a mortgagor coming to redeem, that court (equity) has, by analogy to the statute of limitations, which takes away the right of the plaintiff after twenty years' adverse possession, fixed upon that as the period, after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee, who is seeking to foreclose, the general rule is, that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption,—as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like." *Hughes v. Edwards*, 9 Wheat. 497-8; acc. *Christophers v. Sparke*, 2 Jac. & W. 285; *Gates v. Jacob*, 1 B. Mon. 809; *Chick v. Rollins*, 44 Maine, 104; *Coates v. Woodworth*, 18 Ill. 654; *Belmont v. O'Brien*, 2 Kern. 894; *Hurd v. Coleman*, 42 Maine, 182.

The following remarks are made by the court in Massachusetts: "A question has been sometimes raised, whether the

doctrine of presumption, arising from the lapse of time and total neglect to take any measure to enforce a claim, could properly be applied to the case of a mortgage of real estate; and, in some of the earlier English cases, the doctrine was advanced, that the common law presumption applicable to bonds, judgments, &c., arising from a delay of twenty years to enforce the same, did not apply in the case of a mortgage; as in such cases the legal estate was in the mortgagee, and the mortgagor was a mere tenant at will, and his possession was therefore the possession of the mortgagee. But this doctrine was repudiated by Lord Thurlow in the case of *Trash v. White*, (8 Bro. C. C. 289.) and by the master of the rolls in *Christophers v. Sparke*, in very strong language; and the cases of debts secured by mortgages are placed on the same footing with other demands, and held liable to be defeated by the same presumption, arising from lapse of time and laches of the mortgagee."

The effect of long-continued possession, as has been seen, upon the rights of mortgagee or mortgagor, has been usually made to depend upon general principles or analogies. It has been a point somewhat discussed and variously decided, whether a general *statute of limitation*, as such, can be relied on by way of formal plea in case of mortgage; that is, whether the possession of one party can be considered *adverse* to the other. In England, late statutes (as has been seen *supra*, see also Sts. 7 Wm. IV & 1 Vict., chap. 28) establish definite periods of limitation for suits of this description, and thereby place such suits on the same footing with other actions relating to real property. But in the United States, where, in general, no such statutes exist, the question still remains open, whether mere lapse of time can be set up as a statutory bar in cases not included within the specific provisions, hereafter to be mentioned, for foreclosure and redemption. *Hadle v. Healey*, 7 Ves. & B. 586; *Montgomery v. Chadwick*, 7 Clarke. 114; *Bailey v. Carter*, 7 Ired. Eq. 282; *Bacon v. McIntire*, 8 Met. 87; *Coates v. Woodworth*, 18 Illin. 654, *Fenwick v. Macey*, 1 Dana, 279; *Dexter v. Arnold*, 2 Sumn. 109.

twenty years after such decree, the mortgagee being in possession, will be a bar to redemption. But the same disabilities—coverture, infancy, imprisonment, and absence from the country—which make an exception to the rule of limitation at law, will also save an equity of redemption from being barred in equity. But not an *absconding*, which is an avoiding or retarding of justice. And in equity, as at law, where twenty years had elapsed in the life of the ancestor, no subsequent disability in the heir will take the case out of the rule of twenty years' limitation. Where a bill for redemption itself shows that the mortgagee has had possession above twenty years, it has been held, (though since denied,) that the latter need not plead the limitation, but may demur to the bill. In equity, as at law, in case of disability, the party will, it seems, be allowed not twenty, but only ten years, after its removal.<sup>1</sup>

§ 18. The limitation above referred to, being founded chiefly upon the difficulty of a mortgagee's accounting after long continued possession, is not applicable, where an account has been settled within twenty years. Thus, after there had been four descents on the part of the plaintiff, and three on the part of the defendant, but the mortgagee, within twenty years, upon a bill for foreclosure, had made up an account; a redemption was decreed. So, where there had been a stated account, with an agreement to turn interest into principal—although the mortgagee had been in possession forty years. So, where within twelve years the clerk of the mortgagor's solicitor had settled

<sup>1</sup> Gordon v. Hobart, 2 Sumn. 401; Bollinger v. Chontean, 20 Mls. 89; Birnie v. Caystile, 40 Eng. L. & Equ. 28; Aggas v. Pickerell, 8 Atk. 225; 2 Cruise, 185-6; Phillips v. Sinclair, 7 Shepl. 269; 1 Ch. Rep. 286; White v. Ewer, 2 Vent. 340; Ashton v. Milne, 6 Sim. 369; St. John v. Turner, 2 Vern. 418; Cornel v. Sykes, 1 Ch. R. 198; Knowles v. Spence, 1 Ab. Equ. 815; Jenner v. Tracy, 8 P. Wms. 287, n.; Belch v. Harvey, Ib.; 1 N. J. R. C. 412; Dexter v. Arnold, 8 Sumn. 152; Bonham v. Newcomb, 2 Ventr. 864; Spring v. Haines, 8 Shepl. 126; Borst v. Boyd, 3 Sandf. Ch. 507; Davis v. Evans, 5 Ired. 525; Slee v. Manhattan, &c., 1 Paige, 56; Bond v.

Hopkins, 1 Sch. & Lef. 429; Martin v. Bowker, 19 Verm. 526; McDonald v. Sims, 8 Kelly, 388; Field v. Wilson, 6 B. Mon. 479; Gates v. Jacob, 1, 309; Giles v. Baremore, 5 John. Cha. 552; Dunham v. Minard, 4 Paige, 443; Cook v. Arnham, 3 P. Wms. 283; Newcomb v. St. Peter's, &c., 2 Sandf. Ch. 686; Farrow v. Farrow, 6 B. Mon. 482; Evans v. Hoffman, 1 Halst. Ch. 354; Morgan v. Davis, 2 Harr. & Mi. H. 18; Cook v. Sultan, 2 Sim. & St. 154; Dowling v. Ford, 11 Mees. & W. 329; Bennett v. Cooper, 9 Beav. 252; Noyes v. Sturdivant, 6 Shepl. 104; Murray v. Fishback, 5 B. Mon. 408.

an account of what was due, in order to pay off the mortgage, though no farther proceedings were had.<sup>1</sup> Upon a similar principle, any deliberate act of the mortgagee, done within twenty years, by which he recognizes the existence of the mortgage as such, will prevent the equity from being barred by lapse of time, either in favor of the mortgagee or one claiming under him. Thus, where a mortgagee, twenty-three years after the mortgage, made a will devising that, if the mortgage should be redeemed, the money should go in a certain way; and sixteen years after the will, the mortgagor being dead, his heir brought a bill to redeem; a redemption was decreed. But parol evidence, it seems, is insufficient.<sup>2</sup> So an acknowledgment by the mortgagee, in an answer in equity, that the mortgage still subsists as such, is sufficient to preserve the right of redemption from being barred by lapse of time. But the acknowledgments of a mortgagee, made after he has transferred his interest, will not bind a purchaser without notice.<sup>3(a)</sup>

<sup>1</sup> 1 Sumn. 109; Proctor v. Cowper, 2 Vern. 377; Conway v. Shrimpton, 5 Bro. Parl. 187; Barron v. Martin, 19 Ves. 327; 2 Cruise, 108; Hyde v. Dallaway, 2 Hare, 528; Howell v. Price, Gilb. 106; Dallas v. Floyd, 6 Sim. 379; Palmer v. Eyre, 6 Eng. L. & Eq. 355; Crooker v. Jewell, 31 Me. 306; Harsand v. Hardy, 18 Ves. 455; Fairfax v. Montague, 12 Ves. 84; Barron v. Martin, Coop. 189; Palmer v. Jackson, 5 B. P. C. 281; Lucas v. Denuison, 13 Sim. 584; Batche-

lor v. Middleton, 6 Hare, 75; Smart v. Hunt, 4 Ves. 478 n.; Hardy v. Reeves. Ib. 480; Trulock v. Robey, 12 Sim. 402; Calkins v. Calkins, 8 Barb. 305; Jackson v. Slater, 5 Wend. 295.

<sup>2</sup> Orde v. Smith, Sel. Cas. in Chan. 9; Heyer v. Pruyn, 7 Paige, 465; Dexter v. Arnold, 3 Sumn. 152.

<sup>3</sup> Dexter v. Arnold, 2 Sumn. 109; 3 Mur. 218. See Chonteau v. Burlando, 20 Mis. 482.

(a) Where a mortgagor has been in possession twenty years, the presumption of payment is not conclusive, if parol evidence is offered of an unequivocal recognition of the debt. Cheever v. Porley, 11 Allen, 584. The question has been raised, whether even the debt itself, which is secured by mortgage, might not be thereby saved from the operation of the statute of limitations, by which it would otherwise be barred; and the prevailing doctrine seems to be that the claim upon the personal security continues as long as that upon the land mortgaged; although in Massachusetts a different rule has been adopted. But in that State an action may be maintained upon the mortgage, notwithstanding the lapse of a period of time suf-

ficient to bar the debt, if it stood alone. The debt is said to remain, although the statute of limitations may discharge the remedy upon the note. But the non-production of the personal security, in connection with great lapse of time, may bar a suit to recover the land upon the mortgage. Fisher's, &c. v. Mossman, 11 Ohio St. 42; Wilkinson v. Flowers, 37 Miss. 579; Almy v. Wilbur 2 W. & M. 371; Brocklehurst v. Jessop, 7 Sim. 488; Dowling v. Ford, 11 Mees. & W. 329; Balch v. Onion, 4 Cush. 559; Bennett v. Cooper, 9 Beav. 252; Crane v. Paine, 4 Cush. 488; Merrills v. Swift, 18 Conn. 257; Elkins v. Edwards, 8 Geo. 325; Inches v. Leonard, 12 Mass. 379. See Savings, &c. v. Ladd, 40 N. H. 459; Perkins v. Sterne, 23 Tex. 561

§ 19. Although the rule above stated, as to the extinguishment of an equity of redemption by lapse of time, is well established, yet it is said, that the relation between mortgagee and mortgagor is so far analogous to that of trustee and *cestui que trust*, that the possession of either party is, as to the other, *amicable*, not *adverse*, unless the former show an unequivocal intent to the contrary, (see sec. 7, n. c.) and therefore the statute of limitations does not run against the party out of possession; that a mortgagor cannot *disseise* the mortgagee. So, even where a mortgagee attempts to convey an absolute title, this is no *disseisin* of the mortgagor, but passes merely a defeasible estate.<sup>1</sup>

§ 20. A court of equity will not aid a mortgagor in redeeming his estate, where such redemption would be a violation of good faith on his part, and an injury to the mortgagee, who has relied upon his statements and promises. Thus A, a mortgagor, encouraged B to purchase the mortgage from the mortgagee, C, saying that the land was not worth more than the debt, and that he would never redeem. B purchased the mortgage, and made expensive improvements upon the land. Held, A should not be allowed to redeem.<sup>2(a)</sup>

§ 21. With regard to the terms upon which a mortgagor may redeem his estate, or the respective claims and allowances between him and the mortgagee, the general principle is, that a mortgagee in possession is a *steward* or *bailiff* of the mortgagor, without a salary, and accountable to him for all the profits of the land. So, also, is an assignee of the mortgagor or a subsequent mortgagee. In general, however, he is not responsible for all that might have been made from the land, but only for actual receipts; unless guilty of gross neglect or wrong, as by rejecting a good tenant or admitting an insufficient one; nor is he subject to any account, unless the mortgage is

Fenwick v. Macey, 1 Dana, 279;     <sup>2</sup> Fay v. Valentine, 12 Pick. 40.  
Dexter v. Arnold, 2 Sumn. 109.

(a) But a mortgagee will not lose his right of strict foreclosure, by a mere promise to give time to the mortgagor to redeem. Danforth v. Roberts, 7 Shepl. 867.



redeemed.<sup>1</sup> But where the mortgagee enters before condition broken, it seems the law will hold him to a very strict account of the rents and profits, such entry being regarded as a harsh proceeding, contrary to the intention of the transaction, and unwarranted by any default of the mortgagor.(a)

§ 22. If it be proved that the land was let by the mortgagee for a certain rent, it will be presumed that it was leased for the whole time on the same terms, unless the contrary be shown. And if he has kept no account of the rents, he is chargeable with what he may be presumed to have received; and, if he himself occupy, with an occupation rent. But, in general, he is not chargeable with interest on the rents.<sup>2</sup> If the mortgagee either enters on the land, but allows the mortgagor to take the profits, or permits him to use the mortgage for keeping off other creditors, he will be held accountable for the profits. But a first mortgagee, who enters for breach of condition, but allows the mortgagor to remain in possession without accounting for rents and profits, is not himself liable thus to account, though he entered for the purpose of preventing an attachment of the crops by creditors of the mortgagor.<sup>3</sup>

§ 23. The mortgagee, in general, can claim no compensation for his own trouble in receiving the rents, and even a special agreement therefor will be disallowed. But for the necessary services of an agent, and for counsel fees, he may have an allow-

<sup>1</sup> 1 Vern. 45; *Anthony v. Rogers*, 20 Mis. 381; *Reitenbaugh v. Ludwick*, 81 Penn. 181; *Cross v. Hepner*, 7 Ind. 859; *Brown v. Simons*, 44 N. H. 475; *Bailey v. Myrick*, 52 Maine, 182; *Gladding v. Warner*, 86 Verm. 54; *Hawks v. Sawyer*, 88 Verm. 99; *Gould v. Tancred*, 2 Atk. 534; 1 Abr. Equ. 328; *Hubbard v. Shaw*, 12 Allen, 120; *Hogan v. Stone*, 1 Alab. N. S. 496; *Ruckman v. Astor*, 9 Paige, 517; *Portland, &c. v. Fox*, 1 Appl. 99; *Cholmondeley v. Clinton*, 2 Jac. & W. 179; *Moore v. DeGraw*, 1 Halst. Ch. 846; *Beare v. Prior*, 6 Beav. 183; *Trulock v. Robey*, 15 Sim. 265; *Holabird v.*

*Burr*, 17 Conn. 556; *Kellog v. Rockwell*, 19, 446; *Bank, &c. v. Rose*, 1 Strobb. Equ. 257; *Tennent v. Dewees*, 7 Barr, 806; *Walton v. Withington*, 9 Miss. 549; *Bennett v. Butterworth*, 12 How. 867.

<sup>2</sup> Sel. Cas. in Chy. 68; *Dexter v. Arnold*, 2 Sumn. 109; 1 Ala. (N. S.) 498; *Lloyd v. Mason*, 2 My. & C. 487; *Beare v. Prior*, 6 Beav. 188. See *Miller v. Lincoln*, 6 Gray, 558.

<sup>3</sup> *Coppring v. Cooke*, 1 Vern. 270; *Chapman v. Tanner*, Ib. 267; *Charles v. Dunbar*, 4 Met. 498.

(a) In Massachusetts and Maine, by statute, the mortgagee, in such case, shall account for the *clear rents and pro-*

*fits*. Mass. Rev. St. 635; Me. Ib. 553; *Ruby v. Abyssinian, &c.* 8 Shepl. 306. See *M'Carron v. Cassidy*, 18 Ark. 84.



ance; and in Massachusetts he is usually allowed a commission of five per cent. for his own trouble, though there is no fixed rule upon the subject, and he is not restricted to this per centage.<sup>1</sup> But if he occupy himself, he shall not have, for his care of the estate, any commission on the rent with which he is charged.<sup>2</sup> The question, whether a mortgagee's charges are reasonable, is not for a jury, but for the court, with reference to the facts found by the jury. And in an action by the mortgagor, or his assignee, to recover back money overpaid to a mortgagee in possession, in order to prevent a foreclosure, the same legal and equitable rules are to govern, which apply to a settlement of the mortgagee's account upon a bill for redemption.<sup>3(a)</sup>

§ 24. A mortgagee shall account for all loss by gross negligence or wilful default, in bad cultivation and omission to repair.(b) So also he shall account for *waste* committed by him; as, for pulling down cottages. But the English doctrine of waste is subject to the same modifications as between mortgagor and mortgagee, which have already been stated in relation to landlord and tenant. See also ch. 30, sec. 20.<sup>4</sup>

§ 25. The mortgagee shall not be required to account for the proceeds of improvements made by himself.<sup>5</sup>

§ 26. The mortgagee will be allowed for all necessary repairs, and for the expense of defending the title to or obtaining possession of the land, both of which claims shall bear interest;(c)

<sup>1</sup> Hubbard v. Shaw, 12 Allen, 120; Moore v. Cable, 1 John. Cha. 385; 2 Mar. 339; Gibson v. Crehore, 5 Pick. 146; Clark v. Robbins, 6 Dana, 350; Adams v. Brown, Law Rep. (May, '61) p. 38.

<sup>2</sup> Tucker v. Buffum, 16 Pick. 46; Eaton v. Simonds, 14, 98.

<sup>3</sup> Cazenove v. Cutler, 4 Met. 246.

<sup>4</sup> Givens v. M'Calmont, 4 Watts, 460; Bland, 22 n.; Sandon v. Hooper, 6 Beav. 246.

<sup>5</sup> Moore v. Cable, 1 John. Ch. 385.

(a) In Maine, the mortgagor may have execution for the excess of rents received by the mortgagee over the repairs. And the court may deduct on this account from the money brought into court. Me. Rev. St. 557.

(b) He is not liable for damages done by a suitable tenant, or for wood for fire and repairs. Hubbard v. Shaw, 12 Allen, 120.

(c) By the civil law, he is allowed for improvements not absolutely necessary, with interest. 1 Domat, 865.

In Maryland, a mortgagee is allowed for necessary repairs and permanent improvements. Rawlings v. Stewart. Bland, 22 n.; Neale v. Hagthorp, 3 Ib. 590.

Judge Story says, it seems there is no universal duty in a mortgagee to make all sorts of repairs; but he is bound to

and he will be allowed for all necessary repairs and betterments, though the expense exceed the rents and profits. So for *taxes*, if paid by necessity.<sup>1</sup>

§ 27. He will not be allowed, in general, for the clearing of wild lands,<sup>(a)</sup> nor for any ornamental improvements or new erections, unless permanently beneficial, or absolutely necessary for the upholding of the estate; as in case of an aqueduct, requisite for supplying the premises with water. Nor will he be allowed for *insurance*, unless effected at the mortgagor's request. It is said, however, that there is no inflexible rule on this subject, but the question of allowance is in the discretion of the court, subject to the particular facts of each case. The mortgagee will not be permitted to make improvements, which will *cripple* the right of redemption.<sup>2</sup>

§ 28. The mortgagee shall not get any advantage from the mortgage fund, beyond the principal and interest of his debt. It is the general rule, that, where a mortgagee receives a sum exceeding the interest due, it shall go to sink the principal. But in decreeing an account, it seems, the Court of Chancery will not require that every trifling amount be thus applied; or,

<sup>1</sup> 2 Sumn. 125, 6, 148; *Crafts v. Crafts*, 18 Gray, 368; *Bollinger v. Chouteau*, 20 Mis. 89; *Woodward v. Phillips*, 14 Gray, 138; *M'Arthur v. Franklin*, 16 Ohio St. 193; *M'Cumber v. Gilman*, 15 Ill. 381; *Strong v. Blanchard*, 4 Allen, 588; *Montgomery v. Chadwick*, 7 Clarke, 114; *Waterman v. Curtis*, 26 Conn. 241; *Godfrey v. Watson*, 8 Atk. 518; *Reed v. Reed*, 10 Pick. 398; *Mix v. Hotchkiss*, 14 Conn. 82. See *Thorneycroft v. Crockett*, 16 Sim. 445; *McConnel v. Holobush*, 11 Illin. 61; *Marine, &c. v. Blays*, 4 Harr. & J. 343; *Arnold v. Foot*, 7 B. Mon. 66; *Page v. Foster*, 7 N. H. 392; *Dobson*

*v. Land*, 14 Jur. 288; *White v. Brown*, 2 Cush. 412; *Pettibone v. Stevens*, 15 Conn. 19; *Lewis v. De Forest*, 20 Conn. 427; St. 8 & 9 Vict., ch. 56.

<sup>2</sup> *Moore v. Cable*, 1 John Cha. 385; 10 Pick. 398; *Russell v. Blake*, 2 Pick. 506; *Saunders v. Frost*, 5 Pick. 259; *Ford v. Philpot*, 5 H. & John. 312; *Quin v. Brittain*, 1 Hoffm. 858; *Clark v. Smith*, Saxt. 121; *Dougherty v. M'Colgan*, 6 Gill & J. 275; 4 Kent, 167, n.; *Mix v. Hotchkiss*, 14 Conn. 82; *Sandon v. Hooper*, 6 Beav. 246; *Horlock v. Smith*, 1 Coll. Cha. 287.

make such as are reasonable and necessary, under the particular circumstances of each case. If a building is very old and dilapidated, there is no rule requiring him to incur a greatly disproportionate expense in repairing; and he certainly is not bound to make any new advances. And he is not allowed for improvements, unless they increase the value of the estate. *Dexter v. Arnold*, 2

Sumn. 125, 6; *Gordon v. Lewis*, Ib. 148; *Reed v. Reed*, 10 Pick. 198.

He is allowed for all disbursements, to which the mortgagor or his assignee, having notice of the facts, or the means of knowing them, assents. *Cazenove v. Cutler*, 4 Met. 246.

(a) On the contrary, if he cut timber, he may be chargeable for waste. *Givens v. McCalmont*, 4 Watts, 460.

in all cases, even that annual rests be made. It takes into view the hardship upon the mortgagee, of being obliged to enter and receive his debt in fractions, and obtaining no allowance for his care and trouble, though treated as a bailiff in his liability to account. In general, the mortgagee will be liable for an excess of the interest received by him over the interest of his debt; but it will be otherwise where he retains it, after satisfaction of his debt, by mistake. The party claiming to redeem shall allow interest upon the money, which he tendered, and which the defendant refused to accept.<sup>1(a)</sup>

§ 29. Where surplus rents remain in the hands of the mortgagee after satisfaction of his debt, they constitute a *chose in action*, which may be assigned by the mortgagor; and the assignee may maintain a bill for an account.<sup>2</sup> When the mortgage is accompanied with a *power of sale* to the mortgagee, the surplus to be paid to the mortgagor, his executors and administrators; if the land is sold in the mortgagor's lifetime, the surplus will be personal estate; if after his death, the equity will descend to his heirs, and the surplus will pass along with it.<sup>3(b)</sup>

<sup>1</sup> Gould v. Tauced. 2 Atk. 584; Kittredge v. McLaughlin, 88 Maine, 518; Gordon v. Lewis, 2 Sumn. 148; Tucker v. Buffum, 16 Pick. 46; Finch v. Brown, 8 Bear. 70; Jenkins v. Eldredge, 8 Story, 325; Paige v. Broom, 4 Russ. 224; McDaniels v. Lapham, 21 Verm. 222; Dunshee v. Parmelee, 19, 172;

Booker v. Gregory, 7 B. Mon. 489; Boston, &c. v. King, 2 Cush. 400; Bourne v. Littlefield, 29 Maine, 802; Aston v. Aston, 1 Ves. 264; Earp, 1 Pars. (Penus.) 453.

<sup>2</sup> 2 Sumn. 148.

<sup>3</sup> Wright v. Rose 2 Sim. & St. 828.

(a) Mortgage, payable in two years, with interest semi-annually. After two years, an assignee enters under a judgment, and receives the rents, &c. Upon a bill to redeem, brought by the widow, held, there should be annual rests; the amount paid by defendant the first year for repairs, &c., to be deducted from the rents, and the balance considered the net rents; the interest for the first year to be added to the principal, the net rent deducted from the product, and the balance to form a new principal, and so on to the time of judgment. Van Vronker v. Eastman, 7 Met 157.

(b) In New York, the surplus of proceeds of sales passes to heirs and is assets. Moses v. Murgatroyd, 1 John. Cha. 119.

In Maine and Rhode Island, the mortgagor will be entitled to redeem, by paying or tendering the debt due, with interest and costs, or performing or tendering performance of any other condition of the mortgage, together with the amount of reasonable expenses incurred in repairs and betterments, over and above the rents and profits. And, in Maine, if the mortgagor have paid money to the mortgagee, or brought it into court, without deduction on account of the rents and profits received by the mortgagee he shall be entitled to a restitution of the balance due him on this account. In Massachusetts, if the mortgagee or any one under him, has had possession, he shall account for the rents and profits, and be allowed for reason-

able repairs and improvements, for taxes and assessments, and other necessary expenses in the care and management of the estate. If there is a balance due him, it shall be added to the amount which the mortgagor is to tender; if there is a balance due from him, it shall go to sink the debt. 1 Smith's St. 160-1-4; Mass. Rev. St. 686; R. I. Sts.

(Bill in equity to redeem. Answer, that the tender made by the plaintiff was conditional, and that he had not been always afterwards ready to pay. Held, the defendant could not subsequently plead, that the suit was commenced more than a year after the tender, according to St. 1821, c. 86, sec. 8. *Tucker v. Buffum*, 16 Pick. 46.)

In Georgia, a mortgagee is made liable for taxes upon the land, if the mortgagor does not pay them. Prince, 848.

Upon a bill in equity, to redeem *an equity of redemption sold on execution*, the defendant shall account for the rents and profits, though, before suit commenced, the plaintiff tendered the amount of the purchase-money which he paid for the equity, without deducting the rents and profits. Where such purchaser, after the tender, occupied under a lease from the mortgagee at a low rent, and afterwards purchased the mortgage, held, he should account for the fair annual value of the land, with an allowance for repairs and improvements. *Tucker v. Buffum*, 16 Pick. 46.

## CHAPTER XXXII.

## MORTGAGE. ESTATE OF A MORTGAGEE—SUCCESSIVE MORTGAGES OF THE SAME LAND.

1. Mortgage—personal estate—passes to executors, &c.; devise of a mortgage; American doctrine—whether an assignment of the debt passes the mortgage.
2. Assignment of mortgage is the transfer of *an estate*.
3. Interest of mortgagee, not liable to execution.
4. Statute of limitations, and lapse of time.
5. Insurance.
6. Subsequent mortgagees—general principles.
7. Rights of, not affected by transactions between first mortgagee and mortgagor.
9. Assignment of first mortgage.
10. Mortgage to several persons by one deed.
- 12 & n. Equitable interference for subsequent mortgagee; fraud on the part of the mortgagor.

§ 1. A MORTGAGE, though it purport to convey a fee-simple, yet, being merely security for debt, is *personal estate*, so long as the right of redemption continues. Both in law and equity, the mortgagee has only a chattel interest, or a *chose in action*. He is not *the substantial owner*. His principal right is to the money, and his right to the land is only as security for the money. Hence, upon the mortgagee's death, the mortgage passes to his executors, not to his heirs; is primarily liable for debts; and may be devised without the formalities necessary to a will of real estate.<sup>1</sup>(a) And though the heir of the mortgagee

<sup>1</sup> Treat of Equ. B. 8, ch. 1, sec. 18; Whitney v. French, 25 Verm. 668; Bennett v. Taylor, 5 Cal. 461; Crow v. Vance, 4 Iowa, 484; Bryan v. Butts, 27 Barb. 505; Young v. Miller, 6 Gray. 153; Steel v. Steel, 4 Allen, 421; Ely v. Schofield, 85 Barb. 880; George v. Baker, 8 Allen, 826 n.; Riley v. M'Cord, 24 Mis. 265; Babbitt v. Bowen, 82 Verm. 487; Naglee v. Macy, 9 Cal. 426; Crooker v. Temell, 81 Maine, 806; Cooper v.

Cole, 88 Verm. 185; Grace v. Hunt, Cooke, 844; Jackson v. De Lancy, 18 John. 587; Ballard v. Carter, 5 Pick. 112; Chase v. Tuckerman, 11 G. & J. 185; Me. Rev. St. 555; Cutts v. York, &c. 6 Shepl. 190. See Silvester v. Jarman, 10 Price, 78; Harriett, &c., M'Lel. & Y. 292; Thornbrough v. Baker, 1 Cas. in Cha. 285; Bunyan v. Mersereau, 11 John. 584; Martin v. Mowlin, 2 Burr. 978; Dougherty v. M'Colgan, 6 Gill & J. 275.

(a) In Johnson v. Bartlett, 17 Pick. 481, Hunt v. Hunt, 14, 379-80, and

Hatch v. Dwight, 17 Mass. 299, it is intimated that entry for condition broken

be in possession after condition broken, and there be no want of assets, he shall be decreed to convey to the administrator.<sup>1</sup> But it has been held, that lands held originally under old mortgages passed by a general devise, though no release of the right of redemption was shown; and that there was no equity between the executor and the heir or devisee, requiring any change of the property from its condition at the death of the deceased owner.<sup>2</sup> So if the mortgagee indicate an intention to pass the mortgage as real estate, the law will so treat it.(a) Thus, where he devises it to his daughter *and her heirs*, the husband of such daughter, upon her death, shall not hold it as personal property, but it shall go to her heirs.<sup>3</sup> And it seems to be now settled, that a mortgage will pass by will, under general words relating to the realty, unless the expressions of the will, or the purposes and objects of the testator, call for a different construction.<sup>4</sup> So, if the mortgagee, after a decree for foreclosure, but before an account taken, or actual foreclosure, devise the mortgage to a relation to whom he is indebted in a smaller sum, this is no satisfaction of the debt, being regarded as a devise of

<sup>1</sup> Ellis v. Guavas, 2 Cha. Cas. 50.

<sup>2</sup> Att'y-Gen. v. Bower, 5 Ves. 800. See Pawlett v. Att'y-Gen., Hardres, 467; Fields, &c. 7 Eng. L. & Equ. 260; Priel. Law Rep. June, 1850, p. 92; Beck

v. M'Gillis, 9 Barb. 85; Asay v. Hoover, 2 Barr, 21; Gay v. Minot, 8 Cush. 352.

<sup>3</sup> Noys v. Mordant, 2 Vern. 581.

<sup>4</sup> Jackson v. Delaney, 18 John. 555; Braybroke v. Inship, 8 Ves. 407.

might change the character of the mortgagee's estate. So, in Rhode Island, it is said, if the mortgagee dies *without taking possession*, the mortgage passes to his executors, and the heirs need not be made parties in a bill to redeem. 1 Sumn. 109. So, in New York, the mortgagor is said to have the legal title till *foreclosure or entry*. Van Duyne v. Thayre, 14 Wend. 235-6. See, also, Perkins v. Dibble, 10 Ohio, 438; Miami, &c. v. Bank, &c., Wright, 249.

In Massachusetts, Rhode Island, Maine and Michigan, statutes provide, that the executor, &c., of a mortgagee may recover possession of the land, and hold it as assets, and be seised to the use of the heirs, widow or devisees, in Maine, and, in Massachusetts, of creditors also, or of the same persons who might claim the money if paid to redeem the land. In New Hampshire the law

is the same. Gibson v. Bailey, 9 N. H. 168.

In Massachusetts and Rhode Island, it may be sold for payment of debts by license of court. In Maryland, an executor may discharge a mortgage. 1 Smith, 166-7; Mass. Rev. St. 430; R. I. L. 233-4; Mich. L. 57; Md. L. 2528. See Boylston v. Carver, 4 Mass. 609; Webber v. Webber, 6 Greenl. 127; Johnson v. Bartlett, 17 Pick. 477; Blair, 18 Met. 126; Mass Sts. 1849, ch. 47; 1851, ch. 288. As to the mortgage of a mortgage, see Coffin v. Loring, 9 Allen. 154. The law allows grace upon a mortgage, as upon the accompanying note. Coffin v. Loring, 5 Allen, 158.

(a) This is not in analogy with the rule, by which a bequest of a chattel to one *and his heirs* passes it to his executors, or that by which mortgage-money, though secured to heirs, goes to executors. 2 Cha. Cas. 51.

real estate.<sup>1</sup> But in such cases, although, as between a devisor and devisee, the mortgage is treated as real estate; yet, for payment of debts, it is held to be personal assets in case of deficiency.<sup>2(a)</sup>

<sup>1</sup> Garret v. Evers, 2 Cruiso, 85.

<sup>2</sup> Ib.

(a) The general doctrine above stated (sec. 1) seems to have been fully recognized in New York by Mr. Justice Kent. He says, the estate in the land is the same thing as the money due on the note; is liable to debts; goes to executors; passes by a will not conformable to the statute of frauds; is transferred or extinguished by an assignment, or even a parol forgiving of the debt. The land is but appurtenant to the debt. Whoever owns the latter, is likewise owner of the former. There must be something peculiar in the case, some very special provision of the parties, to induce the court to separate the ownership of the note from that of the mortgage. In the eye of common sense and of justice, they will generally be united. Upon these grounds, Judge Kent held, that *the delivery* of a mortgage, accompanying the indorsement of a note which it was made to secure, passed the mortgage as well as the note. Mr. Justice Radcliffe, on the other hand, held, that the legal title to the land did not pass, although the assignee acquired an equitable interest, which a court of equity would sustain; that although, as *between mortgagor and mortgagee*, the mortgage was to be regarded as personal estate, so as to pass to executors, or be extinguished by payment of the debt; yet it could not be so regarded, in reference to a transfer to third persons. In a subsequent case, Judge Kent adheres to his former doctrine, that at law, as well as in equity, the mortgage is regarded as a mere incident attached to the debt. *Johnson v. Hart*, 8 John. Cas. 329; *Jackson v. Willard*, 4, 48.

A similar doctrine is adopted in Pennsylvania. In Maryland, a mortgage, containing a power to sell, may be assigned by indorsement in blank. In Vermont, a mortgage may be assigned by parol. *Pratt v. Bank, &c.* 10 Verm. 298. See *Wilkins v. French*, 2 Appl. 111; *Johnson v. Hart*, 8 John. Cas. 329-30; *Ib.* 326-7; *Jackson v. Willard*, 4 John. 48; 2 Rawle, 242; *Craft v. Webster*, 4, 242; Md. St. 1836. ch. 249, sec. 15; *Slaughter v. Foust*, 4 Blackf. 380;

*Young v. Miller*, 6 Gray, 152; *Blake v. Williams*, 86 N. H. 40; *Moore v. Ware*, 88 Maine, 496; *Bridenbecker v. Lowell*, 82 Barb. 9; *Dubois, &c.* 88 Penn. 281; *Hough v. Osborne*, 7 Ind. 140; *Anderson v. Baumgartner*, 27 Mis. 80; *Paine v. French*, 4 Ham. 818; *Crow v. Vance*, 4 Iowa, 484; *Ord v. M'Kee*, 5 Cal. 515; *Burdett v. Clay*, 8 B. Mon. 287; *Dick v. Mawry*, 9 Sm. & M. 448.

In New Jersey, it has been held that the principle, of treating a mortgage as a mere incident to the debt which it is designed to secure, does not dispense with the necessity of a formal assignment of the former, to a party who pays and takes up the latter, in order that he may defend against a suit for the land by the mortgagor. And where an informal assignment was first taken, another formal assignment, made after commencement of suit, will be ineffectual as a defence to the action. In such case, the mortgagee holds the mortgage *in trust* for the party who pays the debt, but the latter has no legal title. *Den v. Dimon*, 5 Halst. 156.

In New Hampshire, it is said, a mortgage passes nothing, unless it appears that the debt secured also passed, or was in the power of the mortgagee. (*Warden v. Adams*, 15 Mass. 288; *Parsons v. Welles*, 17 Mass. 419; *Bell v. Morse*, 6 N. H. 205; *Southerin v. Mendum*, 5 N. H. 420. But see *Cutler v. Haven*, 8 Pick. 490.)

The estate of a mortgagee is held to be real, so far as is necessary to perfect his security, but not so as to enable him to transfer the land without the debt, or to pass the debt by a mere deed of the land. Whether the rule is different, after possession taken, is treated as doubtful. *Ellison v. Daniels*, 11 N. H. 274. A later case decides, that the deed of a mortgagee, in possession, will convey his rights under the mortgage. *Lamprey v. Nudd*, 9 Fost. 299.

In Massachusetts, where negotiable notes are secured by mortgage, and assigned without the latter, the mortgagee becomes a trustee for the assignees, and



§ 2. Although a mortgage in most respects is treated as a mere security accompanying the debt; yet the assignment of a mortgage is held to be the conveyance of an estate, and not the mere transfer of a security. Hence, the assignee must bring an action, if at all, in his own name.<sup>1</sup> Though, if the mortgagor is disseised, the mortgagee is also disseised, and cannot convey his interest.<sup>2</sup> But where the mortgage is assigned as security for a smaller sum than is due upon it, the mortgagee may maintain a bill for foreclosure, especially if the assignee refuses to sue.<sup>3</sup>(a) So, where he guarantees the mortgage debt to the assignee, he is a proper party to a suit for foreclosure.<sup>4</sup>(b)

<sup>1</sup> Gould v. Newman, 6 Mass. 289.

<sup>2</sup> Crane v. March, 4 Pick. 181; Dadmun v. Lamson, 9 Allen, 85.

<sup>3</sup> Norton v. Warner, 8 Edw. 103.

<sup>4</sup> Bristol v. Morgan, 8 Edw. 142; Curtis v. Tyler, 9 Paige, 432; Leonard v. Morris, Ib. 90.

holds the mortgage for their benefit. Crane v. March, 4 Pick. 181.

In Vermont, as has been seen, an assignment of all the notes secured by mortgage passes the mortgage also. An assignment of a part of them may or may not have this effect, according to the agreement of the parties. Langdon v. Keith, 9 Verm. 299.

In Pennsylvania, a mortgage, and the claim which it secures, are so far distinct, that, where a *scire facias* is brought on a bond with warrant of attorney, it is no defence, that a mortgage by which the bond was secured is not in the plaintiff's possession, or is lost, mislaid or destroyed. Hodgdon v. Naglee, 5 Watts & S. 217. See Haskell v. Monmouth, &c. 52 Maine, 128.

(a) Where a mortgage is itself mortgaged, it seems, three years' redemption will be allowed, as in case of real estate. Cutts v. York, &c. 6 Shepl. 190.

(b) Where a mortgage is given to secure several bonds, and the mortgagee assigns a part of them at different times and to different persons, and the mortgaged premises are afterwards sold upon execution in favor of the mortgagee against the mortgagor; the proceeds of sale shall be applied in payment of all the bonds *pro rata*, as well those which the mortgagee himself retains, as those which he has transferred. The principle, "*qui prior in tempore, potior est in jure*," is not applicable to this case, because it relates only to successive charges upon

the same property, whereas the several bonds in this case are distinct things; and, if the respective dates of the transfers were open to inquiry, great uncertainty and fraud would be likely to ensue. The mortgagee himself has equal rights with the assignees, because the assignment involved no transfer of the mortgage, unless by implication, and no warranty express or implied. Donley v. Hays, 17 Ser. & R. 400.

This decision was made by a majority of the court in Pennsylvania. Gibson, Ch. J., dissented, on the grounds, that the assignment created a moral obligation upon the mortgagee, which equity would enforce, though not a legal one; that, the debt being the principal, and the mortgage an accessory, the assignment of a part of the debt was an assignment of the mortgage, not *pro rata*, but *pro tanto*, and the assignee, a purchaser of all the securities of the assignor, to be used by him as freely and beneficially as by the assignor himself; and that the same principles were applicable to assignees of separate parts of the same debt.

Where a vendor of land takes several notes for the price, retaining also a lien upon the land, and assigns some of the notes, with the lien, retaining the others; upon a sale of the property, the proceeds shall be applied to all the notes *pro rata*, unless a contrary intention is expressed in the assignment. Ewing v. Arthur. 1 Humph. 537: acc. McVay v. Bloodgood,

§ 3. It has been already seen, (ch. 31,) that an equity of redemption is liable to legal process for the debts of the mortgagor. On the other hand, the estate of a *mortgagee*, before foreclosure or possession taken by him, is not subject to be attached or taken upon execution. Until foreclosure, it is a mere *chose in action*, and an incident attached to the debt, from which it cannot properly be separated. As distinct from the debt, the mortgage has no determinate value; and, if assigned, the assignee's rights must be subject to the holder of the personal security. And the debt cannot be sold with the mortgage, it being well settled that a *chose in action* is not subject to sale on execution.<sup>1(a)</sup>

§ 4. Notwithstanding the principle that the mortgage is merely incident to the personal security which it accompanies, the statute of limitations, applicable to the latter, will not bar a claim upon the former. On the contrary, the recital of a debt in the mortgage deed has been held to take such debt out of the operation of the statute.<sup>2(b)</sup>

<sup>1</sup> Jackson v. Willard, 4 John. 43-4.

<sup>2</sup> Clark v. Bull, 2 Root, 329; Langan v. Henderson, 1 Bland, 282; Heyer v. Prunyn, 7 Paige, 465; Cheslyn v. Dalbey, 2 Y. & C. 170. See Den v. Spinning, 1

Halst. 478; ch. 38, N. H. Rev. St. 360; Thayer v. Mann, 19 Pick. 586; Grinnell v. Baxter, 17 Pick. 388; Miller v. Helm, 2 Sm. & M. 687.

9 Por. 547. But where a note secured by mortgage is assigned, this is *pro tanto* an assignment of the mortgage, and, if the security is insufficient for the whole debt, the assignee has a prior claim. Cullum v. Erwin, 4 Ala. (N. S.) 452. Successive assignees have priority in the order of their assignments, unless it is expressly agreed otherwise. *Ib.*

(a) These remarks, made by Mr. Justice Kent, seem to require not merely *entry*, but *foreclosure*, by the mortgagee, to subject his interest to be taken on execution. The case finds, however, that the mortgagee had not *entered*, and the question stated for decision is, whether a sale is valid, made "before foreclosure, and while the mortgagor is suffered to retain possession." And the learned judge remarks, that, *when the mortgagee has taken possession, the rents and profits may become the subject of computation and sale.* Jackson v. Willard, 4 John. 41-2-4.

In Massachusetts and Connecticut, it is distinctly decided, that, before entry, the mortgagee's interest is not subject to execution; and doubted, whether it is so subject before foreclosure; because, till that event, all the inconveniences exist which are applicable in the other case. The like decision has been made in Kentucky. In New Hampshire, the interest of the mortgagee cannot be levied on, unless that of the mortgagor is also taken, and they join in appointing an appraiser, or unless there has been an entry to foreclose. A judgment for possession is not enough. Eaton v. Whiting, 8 Pick. 488; Marsh v. Austin, 1 Allen, 285; Thornton v. Wood, 42 Maine, 282; Jenkins v. Quincy, &c. 7 Gray, 373; Huntington v. Smith, 4 Conn. 287; 1 Dana, 24-188; Johnson v. Bartlett, 17 Pick. 477; Glass v. Ellison, 9 N. H. 69.

(b) A mortgage was made in 1809, and recorded. The mortgagor trans-

§ 5. The principle, that the personal security and the accompanying mortgage are incident to each other, does not apply to any merely collateral security, obtained by the mortgagor for the benefit of the estate. Thus the mortgagee has no claim to a policy of insurance upon the premises, to the exclusion of other creditors. It is a mere personal contract, not attached or incident to the mortgage.<sup>1</sup> But if, by the terms of the mortgage, the mortgagor was bound to insure for the mortgagee's benefit, the latter has an equitable lien upon the insurance to the amount of his debt.<sup>2</sup> The mortgagor and mortgagee may each insure his own interest. If the latter does it, it is merely an insurance of the debt, which ceases when the debt is paid. If a loss occurs before such payment, he may recover to the amount of the debt, and the insurer may claim an assignment of the debt, and enforce it against the mortgagor. If the mortgagor obtains insurance, it has been held that he may recover the full amount of the policy.<sup>3(a)</sup>

§ 6. It has already been stated, (ch. 31,) that a mortgagor may mortgage his equity of redemption, or, as it is commonly expressed, make a second mortgage of the land; and that a second mortgagee stands in the place of the mortgagor, as to his

<sup>1</sup> *Columbia. &c. v. Lawrence*, 10 Pet. 507; *McDonald v. Black*, 20 Ohio, 185. See *Curtis v. Tyler*, 9 Paige, 482; *Graves v. Hampden, &c.* 10 Allen, 281.

<sup>2</sup> *Carter v. Rocket*, 8 Paige, 487.

<sup>3</sup> *Carpenter v. Providence, &c.* 16 Pet. 495. See *King v. The State, &c.* 7 Cush. 1; *Thomas v. Von Kapff*, 6 G. & John. 372; *Vernon v. Smith*, 5 B. & A. 1; *Kittredge v. Rockingham, &c.* (N. H.) Law Rep. (Dec. 1849) 412; *King v. State, &c.* (Mass.) Ib. (June, 1851) 88;

*Felton v. Brooks*, 4 Cush. 203; *Larrabee v. Lambert*, 32 Maine 97; *Kernocham v. N. Y. &c.* 17 N. Y. 428; *Jenkins v. Quincy, &c.* 7 Gray, 370; *Insurance Co. v. Woodruff*, 2 Dutch. 541; *Nichols v. Barter*, 5 R. I. 491; *Grosvenor v. Atlantic, &c.* 17 N. Y. 891; *Loring v. Manufacturers', &c.* 8 Gray, 28; *Pollard v. Somerset, &c.* 32 Maine, 221; *Larrabee v. Lambert*, 32 Maine, 97; *Hillsborough, &c.* 44 N. H. 238.

ferred the estate. The mortgagee never gave notice of his mortgage to the purchaser; and, in 1821, brought a suit for the land, and recovered. *Dick v. Batch*, 8 Pet. 80.

(a) In Maine, by statute, where a mortgagor effects insurance, if he consents in writing, the insurer may pay the loss to the mortgagee; if he does not consent, a trustee process lies, and a payment will be available *pro tanto*.

Different mortgagees have claims according to priority. Any insurance by the mortgagee will be void, if he claims under this act, unless the insurer of the mortgagor consent. St. 1844, 97-8. Where a life policy is assigned to the mortgagee, in trust, to receive the proceeds, he cannot have a decree to sell it, but may have one for the foreclosure, and still retain the policy. *Dyson v. Morris*, 1 Hare, 413.

right of redeeming the first mortgage. And the right in equity, of redeeming any number of successive mortgages, may be mortgaged anew.<sup>1</sup>(a) It seems to be the universal rule in the United States, that mortgages, like other deeds, take effect *in the order of their registration*. In England, upon the same principle of *tacking*, by which it has been seen, (ch. 31,) that a mortgagee may insist upon payment of independent claims against the mortgagor, as the condition of redemption; a third mortgagee may gain priority over a second mortgage, by buying up the first mortgage and *tacking* it to his own, thereby obliging the second mortgagee to redeem both, in order to redeem one.

§ 7. The rights of a second mortgagee cannot be impaired by any transaction, to which he is not a party, between the first mortgagee and the mortgagor; nor, on the other hand, will such transaction operate as an extinguishment of the first mortgage, unless the circumstances plainly demand this construction.(b)

<sup>1</sup> 8 Mass. 555, 16 Pet. 495. See *Clark v. Brown*, 3 Allen, 509; *N. E. &c. v. Merriam*, 2 Ib. 891; *Kilborn v. Robbins*, 4 Allen, 369; *Trenchard v. Warner*, 18 Illin. 142; *Warburton v. Lanman*, 2 Greene, 420; *Ellsworth v. Mitchell*, 31 Maine, 247; *Barber v. Cary*, 11 Barb. 549; *State, &c. v. Campbell*, 2 Rich. Equ. 179; *Head v. Egerton*, 3 P. Wms.

280; *Hooper v. Ramsbottom*, 6 Taun. 12; *Dale v. Shirley*, 8 B. Mon. 524; *Kimmell v. Willard*, 1 Doug. 217; *Simonds v. Brown*, 18 Verm. 231; *Clarke v. Stanley*, 10 Barr, 472; *Jones v. Phelps*, 2 Barb. Cha. 440; *Holabird v. Burr*, 17 Conn. 556; *Bank, &c. v. Peter*, 18 Pet. 128; *Hall v. Bell*, 6 Met. 481.

(a) So, land subject to the lien of an execution may be mortgaged; and the mortgagor cannot interfere with the mortgagee's title, by ordering a sale of more than enough to satisfy the execution. *Addison v. Crow*, 5 Dana, 279.

(b) A mortgaged to B, afterwards to C, afterwards to D. B and C. entered on the same day, for condition broken. Afterwards E, a creditor of A, attached his equity of redemption, recovered judgment in the suit against him, and subsequently purchased and took an assignment of B's mortgage. At the execution sale. E afterwards purchased A's equity of redemption, and, after the expiration of a year from such purchase, believing and representing himself to be the absolute owner in fee, conveyed with warranty to F. C, the second mortgagee, tendered to F the amount due upon B's mortgage, at the same time

protesting that he considered it as extinguished, and brought a bill in equity to redeem. Held, 1. That although, by purchasing the equity of redemption, according to the English law, E might have excluded intervening incumbrances, yet, as the doctrine of *tacking* is here unknown, he acquired no such right. 2. That the right of C to redeem B's mortgage was not reduced, by the sale on execution, from three years to one year; such abridgment of the right of redemption being wholly confined to the relation between the mortgagor and purchaser, and not affecting the claims of other mortgagees, accruing before attachment of the equity, which are not subject to be impaired by any transaction between the mortgagor and his creditors. 3. That the union of the equity of redemption and the first mortgage in the hands of E did not extinguish the latter. Decreed

§ 8. A junior mortgagee must be made party to a bill for foreclosure by a senior one—else he is not bound thereby.<sup>1</sup> But, in New Hampshire, if a mortgagee bring an action at law against the mortgagor, recover judgment, enter and remain in possession a year; the foreclosure binds a subsequent mortgagee, though not notified of such entry.<sup>2</sup> A second mortgagee cannot enjoin a suit against him for foreclosure by the first mortgagee to whom nothing is due on the mortgage; this being a defence at law. But if he also prays to redeem, the bill may await the result of the suit at law.<sup>3</sup>

§ 9. An assignment of the prior mortgage to a subsequent mortgagee does not necessarily operate as an extinguishment of the first mortgage. Thus, where a mortgagee leased the land, and a subsequent mortgagee undertook to discharge the first mortgage, paid the debt, and took an assignment of the first mortgage and the lease, for the purpose of collecting the rent; this was held no extinguishment.<sup>4</sup>

§ 10. Where a mortgage is made to several persons, to secure debts due to them severally, but giving a partial priority to some over others; they are not to be regarded as prior and subsequent mortgagees, in reference to their respective claims upon the property, but as parties to one deed, with full notice of its terms.(a)

<sup>1</sup> Cooper v. Martin, 1 Dana, 25.

<sup>2</sup> Downer v. Clement, 11 N. H. 40.

<sup>3</sup> Dickinson v. Gunn, 12 Allen, 547.

<sup>4</sup> Willard v. Harvey, 5 N. H. 252.

that, on payment of the sum due upon the first mortgage, F should surrender the land, and convey and release his right as the assignee of E. Thompson v. Chandler, 7 Greenl. 177. (See ch. 33, sec. 14.)

(a) A debtor mortgaged to three creditors, A, B and C, who were absent, and ignorant of the transaction. The sum secured was \$8,000, to be paid in the proportion of \$2,000 to the mortgagee last named, and to the first and second \$3,000 each. At the date of the mortgage, the second and third had advanced the amount of their respective claims, but the first had not. He had since, however, made up the deficiency by further advances. The property being sold on execution under the mortgage,

and the proceeds insufficient to pay the whole sum secured; held, they should be distributed according to the sums expressed in the mortgage; that C did not stand as a subsequent mortgagee, but the owner of an interest in common with the others, and under the same title; that he had neither done any act nor relinquished any right, in consequence of the mortgage, to his own prejudice; and that, having affirmed the instrument in part, he was bound by it in the whole. Irwin v. Tabb, 17 S. & R. 419.

Where a trustee, holding two sums of money, one belonging to A, the other to B, loaned both to C, taking distinct mortgages at the same time, and not intending any priority, but one mortgage

§ 11. A second mortgagee succeeds to all the rights of the mortgagor, arising out of any special contract which the latter has made with the first mortgagee, in relation to the land. Thus, if the first mortgagee, having taken a lease of the mortgagor, covenanting to pay rent, refuse to pay the rent to a subsequent mortgagee, when demanded, not having paid it to the mortgagor; the subsequent mortgagee, when he redeems, may compel the first mortgagee to account for the profits, as received towards the payment of his prior mortgage.<sup>1</sup>

§ 12. Where one creditor has two funds, from which he may satisfy his debts, and another has a subsequent lien on only one of the funds. the former creditor will be compelled in equity to resort to his exclusive fund, provided it can be done without injury to himself or the debtor. Thus, if A mortgages two estates to B, and then mortgages only one of them to C, the court will order B to take satisfaction from the estate which is not included in C's mortgage, if sufficient for the purpose. But, where there exists any doubt of the sufficiency of this estate, or where the first mortgagee is unwilling to run the hazard of obtaining payment from it, equity cannot take from him any part of his security, till he is fully satisfied.<sup>2(a)</sup>

§ 13. In connection with the subject of *successive mortgages*, may be briefly stated the well established rule of equity, that,

<sup>1</sup> Newall v. Wright, 8 Mass. 138.

<sup>2</sup> Evertson v. Booth, 19 John. 486-93; Pettibone v. Stevens, 15 Conn. 19; Ayres v. Husted, 15 Conn. 516; Bank v. Mitchell, Rice (Equ.), 389; Butler v. Taylor, 5 Gray, 455; Palmer v. Fowley, Ib. 545.

See Sober v. Kemp, 6 Hare. 155; Ferris v. Crawford, 2 Denio, 595; Lanoy v. Duke, &c., 2 Atk. 444; Miami, &c. v. Bank, &c.. Wright, 249; Barnes v. Baxter, 1 Y. & Coll. 401; Kellogg v. Rockwell, 19 Conn. 446.

was recorded a short time before the other; held, they should be paid rateably, according to their respective amounts. Rhoades v. Canfield, 8 Paige, 545.

Where one owning an undivided share of a township makes a mortgage, covering but a portion of his interest, the mortgagee takes a proportional share, as tenant in common. Randell v. Mallett, 2 Shepl. 51.

(a) In Georgia and South Carolina, a mortgagor who makes a second mortgage, without disclosing, in writing, the existence of the first to the second mort-

gagee, shall not be allowed to redeem the second mortgage. But the second mortgagee (whose deed is on record, in Georgia), may redeem the first mortgage. In South Carolina, if a person suffer a judgment, or enter into a statute or recognizance, binding his land, and afterwards mortgage it, without giving notice, in writing, of the prior incumbrance; unless, within six months from a written demand, he clear off such incumbrance, he shall not be suffered to redeem. Prince, 161; 1 Brev. 166-7-8.



where a mortgage is given for a debt which is also secured by the obligation of a *surety*; the surety is entitled to be subrogated or substituted to all the rights and remedies of the creditor whose debt he is compelled to pay, in relation to the mortgaged estate; and that the mortgagee cannot relinquish the estate, without thereby also discharging the surety.<sup>1</sup>

§ 14. Where a mortgage is made *to a surety*, for the purpose of indemnifying him for his liability on account of the mortgagor, similar equitable rules are applied, as in the case above referred to, of a mortgage accompanied *by other security to the mortgagee*. It is held, that such a mortgage is in reality a security for the debt itself; to the benefit of which the creditor is entitled. But he cannot make a claim upon it till the indorser's liability is fixed, and, if the latter is discharged by his *laches*, he loses all title to the property.<sup>2</sup>

§ 15. Somewhat analogous to the case of *successive mortgages*, is that of a conveyance by the mortgagor of a portion of the mortgaged land, retaining the remainder; or the conveyance of different portions, included in one mortgage, to successive purchasers, and the apportionment of the mortgage debt upon such parcels, respectively. The general rule upon this subject is, that, if the mortgagor conveys a part of the land, retaining the

<sup>1</sup> Mathews v. Aikin, 1 Comst. 599; Root v. Bancroft, 10 Met. 46; Copis v. Middleton, 1 Tur. & R. 231; Hodgson v. Shaw, 3 My. & K. 195; Williams v. Owen, 18 Sim. 597; Hays v. Ward, 4 John. Ch. 180; Bowker v. Bull, 1 Sim. (N.) 84; Norton v. Coons, 3 Denio, 180; Higgins v. Frankis, 10 Jur. 328; Gossin v. Brown, 1 Jones (Penn.), 527; McDermott v. Bank, &c., 9 Humph. 123; Root v. Stow, 18 Met. 5; Capel v. Butler, 2 Sim. & St. 457; Becket v. Snow, 1 Cush. 510; Orvis v. Newell, 17 Conn. 97; Brewer v. Staples, 8 Sandf. Cha. 579; McLean v. Towle, 3 Sandf. 117; King v. McVickar, 3 Sandf. Cha. 192; Swan v. Patterson, 7 Md. 164.

<sup>2</sup> Holabird v. Burr, 17 Conn. 556; Reinhard v. Bank, &c., 6 B. Mon. 252; Miller v. Musselman, 6 Whart. 354; Lewis v. DeForest, 20 Conn. 427; Stockard v. Stockard, 7 Humph. 808; Moore v. Moberly, 7 B. Mon. 299; Davis v.

Mills, 18 Pick. 394; Goodhue v. Berrien, 2 Sandf. Cha. 680; Tilford v. James, 7 B. Mon. 336; Shepard v. Shepard, 6 Conn. 37; Curtis v. Tyler, 9 Paige, 432; Eastman v. Foster, 8 Met. 19; Yelverton v. Sheldon, 2 Sandf. Cha. 481; Irwin's. &c. v. Longworth, 20 Ohio, 581; Knox v. Moatz, 8 Harr. 74; Stewart v. Preston, 1 Branch, 10; Kramer v. Bank, &c., 15 Ohio, 258; Francis v. Porter, 7 Ind. 203; Ellis v. Martin, 7 Ind. 652; De Cottes v. Jeffers, 7 Flori. 284; Jones v. Quinpiack, &c., 29 Conn. 25; Hilton v. Catherwood, 10 Ohio St. 109; Root v. Collins, 84 Verm. 178; Day v. Patterson, 18 Ind. 114; Gaskill v. Sine, 2 Beas. 400; Chilton v. Chapman, 18 Mis. 470; Strong v. Blanchard, 4 Allen. 558; Bowman v. McElroy, 15 La. An. 466; Prescott v. Hayes, 43 N. H. 598; Emerson v. Gilman, 44 N. H. 235; New, &c. v. Fairhaven, &c., 9 Allen, 175.



rest, the part retained is primarily liable, and the portions conveyed are liable to the *inverse* order of their alienation.<sup>(a)</sup> And the latter branch of the rule applies, where the whole land is successively conveyed.<sup>1(b)</sup>

<sup>1</sup> *Ferguson v. Kimball*, 8 Barb. Cha. 616; *Cushing v. Ayer*, 25 Maine, 388; *Kellogg v. Rand*, 11 Paige, 59; *Cumming v. Cumming*, 8 Kelly, 460; *Knickerbocker v. Boutwell*, 2 Sandf. Cha. 819; *Henkle v. Allstadt*, 4 Gratt. 284; *Skeel v. Spraker*, 8 Paige, 182; *Schryver v. Teller*, 9 Paige, 173; *Sheperd v. Adams*, 32 Maine, 63; *Morris v. Oakford*, 9 Barr, 499; *Champlin v. Williams*, Ib. 341; *Blyer v. Monholland*, 2 Sandf. Ch. 478;

*Johnson v. White*, 11 Barb. 194; *Howard, &c. v. Halsey*, 4 Sandf. 565; *Kilborn v. Robbins*, 4 Allen, 369; *Reilly v. Mayer*, 1 Beasl. 55; *Delaware, &c.*, 38 Penn. 516; *Salem v. Edgerly*, 38 N. H. 46; *Aiken v. Gale*, 37 Ib. 501; *Bates v. Rud-dick*, 2 Clarke, 423; *Lyman v. Lyman*, 32 Verm. 79; *Cheever v. Fair*, 5 Cal. 387; *Davis v. Rider*, 5 Mich. 423; *Brown v. Simons*, 45 N. H. 211; 44 Ib. 475.

(a) As between the mortgagor and a purchaser, where land is conveyed subject to a mortgage, the amount of which is allowed to the purchaser by a deduction from the price of the land, it is held that the law implies a promise on his part to indemnify the grantor against the mortgage debt. *Townsend v. Ward*, 27 Conn. 610. See *Klapworth v. Dressler*, 2 Beasl. 62.

(b) As to the effect of a *release* by the mortgagee of a part of the land mortgaged, see *Shepherd v. Adams*, 32 Me. 63; *McLean v. Lafayette, &c.*, 3 McL.

587; *Paxton v. Harrier*, 1 Jones, 812; *Holman v. Bank, &c.*, 12 Ala. 369; *Howard, &c. v. Halsey*, 4 Sandf. 565; *Patty v. Pease*, 8 Paige, 277; *Stuyvesant v. Hall*, 2 Barb. Cha. 151; *Engle v. Haines*, 1 Halst. Cha. 186; *Ross v. Haines*, Ib. 632; *Meney*, 4 Barr, 80; *Wheelwright v. Loomer*, 4 Edw. Cha. 232; *Laws of Dela.* 1859, 698; *Dennis v. Burritt*, 6 Cal. 670.

See, also, somewhat qualifying the general rule, *Beall v. Barclay*, 10 B. Mon. 201.

## CHAPTER XXXIII.

MORTGAGE. ASSIGNMENT, PAYMENT, RELEASE, ETC, OF MORTGAGES,  
AND TRANSFERS OF EQUITIES OF REDEMPTION.

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| 1. Mortgage cannot be assigned without the debt.  | 10. Discharge of execution—not conclusive of discharge of mortgage.   |
| 2. Assignment cannot prejudice the mortgagor—notice, &c.  | 11. Payment on mortgage, cannot be applied to other debts.  |
| 3. Mortgage an incident to the debt—principle considered—and whether payment reveals the estate in the mortgagor; discharging mortgage upon the record. | 12. Substituting of one security for another, &c.—in general, no payment of mortgage.                                 |
| 4. Release of equity—whether a payment; release of mortgage—release in part.  | 13. Assignment and discharge of mortgage—when a transfer will be construed as an assignment, and when as a discharge. |
| 5. Deposit of money with mortgagee—no payment.  | 14. Satisfied mortgage—whether a stranger may set it up.  |
| 6. Death of mortgagor does not turn a mortgage into payment—practice in case of insolvency.   | 15. Sale by mortgagor with mortgagee's consent.   |
|   | 16. Joint release to mortgagee and mortgagor.   |

§ 1. It is said, a mortgagee cannot transfer his estate, separate from the debt, either absolutely or for security; especially, before it becomes absolute, or there has been a foreclosure.<sup>1</sup>

§ 2. If the mortgagee assign his mortgage, in general, the assignee can claim only what really remains due upon it when assigned; not what appears to be due. For this reason, in England, it is usual to make the mortgagor a party to such assignment.<sup>2</sup> So any payment to the mortgagee, after assignment, but before notice of it, will be effectual against the assignee; and it is held, that registration is not sufficient notice of an assignment as against the mortgagor, though sufficient to bind

<sup>1</sup> *Aymar v. Bill*, 5 John. Ch. 570. But see ch. 82.

<sup>2</sup> *Matthews v. Wallwyn*, 3 Ves. 118. See *Holbrook v. Worcester &c.*, 2

Curt. 244; *Horstman v. Jerker*, 49 Penn. 281; *Losey v. Simpson*, 8 Stockt. 246.

subsequent purchasers.<sup>1</sup> Hence it appears, that all dealings with the mortgagee, even in his character of mortgagee, before notice of the assignment, are valid.<sup>2</sup> And *a fortiori* is this rule applicable, where the mortgagee has assumed to be absolute owner of the land, by having purchased the equity of redemption. Therefore, if, after such purchase, he assign the mortgage as a subsisting incumbrance, and then convey the whole estate to a third person, equity will not allow the assignee of the mortgage to do what the assignor could not have done, by interposing a dormant mortgage to the prejudice of an ignorant purchaser; to do that indirectly, by a secret assignment, which he could not do directly.<sup>3</sup>

§ 3. In conformity with the principles stated in the last chapter, it is said, by Lord Mansfield, that, where a debt is secured by mortgage, the assignment of the debt, or forgiving it, will draw the land after it, though the debt were forgiven only by parol; that whatever would give the money, will carry the estate in the land along with it to every purpose; and that the estate in the land is the same thing as the money due upon it. Upon a similar principle, a simple contract debt has been held not to acquire the character of a specialty, in consequence of being secured by mortgage.<sup>4</sup> These remarks, however, are to be considered as rather illustrative of the general qualities of a mortgagee's estate than as literally true under all circum-

<sup>1</sup> Williams v. Sorrell, Ib. 389; James v. Johnson. 6 John. Cha. 428. In New York, this is expressly provided by statute. 1 N. Y. Rev. St. 768; acc. Napier v. Elam, 6 Yerg. 108; Hodgden v. Naglee, 5 Watts & S. 217.

<sup>2</sup> 4 Ves. 427. See Glidden v. Hunt, 24 Pick. 221; Clark v. Flint, 22. 281; Chambers v. Goldwin, 1 Smith. 252; Williams v. Stevens. 1 Halst. Cha. 119; Wolcott v. Sullivan, 1 Edw. 899; Palmer v. Yates, 3 Sandf. 137; Bree v. Holbeck. Dougl. 655; Hammond v. Washington, 1 How. 14; Moore's, &c., 7 W. & S. 298; Bowes v. Seeger, 8 W. & S. 222; Mott v. Clark. 9 Barr, 899; Farmers', &c. v. Douglass, 11 S. & M. 469; Peabody v. Fenton, 3 Barb. Cha. 451; Williams v. Birbeck, 1 Hoffm. Cha. 859; Noyes v. Clark, 7 Paige, 189; Van Hook

v. Somerville, &c., 1 Halst. Cha. 638; Deming v. Comings, 11 N. H. 474; Marshall v. Billingsley, 7 Ind. 250; Chamberlain v. Barnes, 26 Barb. 160; Martineau v. M'Collum, 4 Chandl. 158; Bloomer v. Henderson, 8 Mich. 895; Potts v. Blackwell, 4 Jones Equ. 58; Pierce v. Faunce, 47 Maine, 507; Mitchell v. Burnham, 44 Maine, 286; Eaton v. George, 42 N. H. 875; Beatty v. Clement, 12 La. An. 82.

<sup>3</sup> 6 John. Cha. 427.

<sup>4</sup> Martin v. Mowlin, 2 Burr. 978. See 1 Halst. 478. Also, ch. 82; Grinnell v. Baxter, 17 Pick. 388; Crosby, 50 Maine, 180, (an important case); Dyer v. Toothaker, 51 Maine, 380; Conner v. Whitmore, 52 Maine, 185; Heath v. Page, 48 Penn. 180; Spring, &c. v. Tradesmen's, &c. 46 Penn. 493; 44 Barb. 406.

stances.(a) It seems to be only where the condition of a mortgage is performed strictly *at the time*, or *before the time*, that the title will *ipso facto* revert in the mortgagor. If the debt be paid *after the day*, the mortgagee becomes a trustee in equity, and may be compelled by a bill to reconvey; the necessity for which, however, shows that the legal title is in him. So a *term* becomes absolute, and must be surrendered or assigned. So the mortgagor cannot maintain an action of trespass against the mortgagee or any one holding under him, though the debt may have been paid.<sup>1</sup> But, in case of ancient mortgages, a reconveyance may be presumed.<sup>2</sup> And an acknowledgment written on the back of a mortgage, under hand and seal, in payment and fulfilment of the condition, is a good discharge.<sup>3</sup> So entry of satisfaction on the back of a mortgage discharges it.<sup>4</sup> And Chancery will decree satisfaction of a mortgage which has been paid, so that it may be cancelled on the record.<sup>5(b)</sup>

<sup>1</sup> *Howe v. Lewis*, 14 Pick. 329; *Murdock v. Ford*, 19 Ind. 52.

<sup>2</sup> 2 Cruise, 86.

<sup>3</sup> *Allard v. Lane*, 6 Shepl. 9.

<sup>4</sup> *Allard v. Lane*, 18 Maine, 9.

<sup>5</sup> *Kellogg v. Wood*, 4 Paige, 578. See *Barnes v. Camark*, 1 Barb. 392.

(a) See Mr. Justice Wilde's criticism upon them. *Parsons v. Welles*, 17 Mass. 424. See also *Vose v. Handy*, 2 Greenl. 383; *Evans v. Merriken*, 8 Gill & J. 46; *Wilkins v. French*, 20 Maine, 116; *Shannon v. Bradstreet*, 1 Sch. & Lef. 66.

(b) Upon the point, however, whether mere payment of the debt will revert the estate in the mortgagor, there seems to be a conflict of the American authorities. *Jackson v. Davis*, 18 John. 1; *Wentz v. Dehaven*, 1 S. & R. 312; 1 Halst. 471; *Morgan v. Davis*, 2 Har. & McH. 17; *Perkins v. Dibble*, 10 Ohio, 488. See *Upham v. Brooks*, 2 W. & M. 407; *Cutler v. Lincoln*, 3 Cush. 128; *Doton v. Russell*, 17 Conn. 146; *Post v. Arnot*, 2 Denio, 844; *Wolfe v. Dowell*, 13 Sm. & M. 103; *Hadlock v. Bulfinch*, 31 Maine, 246; *Webb v. Flanders*, 32, 175; *Williams v. Thurlow*, 31, 392; *Jennings, &c. v. Wood*, 20 Ohio, 261; *Bassett v. Mason*, 18 Conn. 131.

In Maine and Massachusetts, after payment of the mortgage debt, the mortgagee cannot maintain a writ of entry for the land, for the reason that in such case he could not recover the *conditional judgment* provided by statute. But, on

the other hand, in these States, and also in Connecticut, the mortgagor cannot maintain this action against the mortgagee, the latter being in possession. His only remedy is by a bill in equity. These points will be further considered hereafter. (See ch. 87. s. 2.)

(Mortgage from A to B, to secure several notes, payable at different times, and afterwards from A to C. Subsequently, and before maturity of either of the above notes. A gave B a warranty deed of the land, in full satisfaction and discharge of them and of another note. All the notes were surrendered to A, but the mortgage was not discharged. C brings a bill in equity to redeem against B. Held, B's title under his mortgage was defeated; if C's mortgage was valid, he had by writ of entry a complete and adequate remedy at law against B; and, therefore, the bill could not be sustained. *Holman v. Bailey*, 3 Met. 55.)

In New Hampshire, New York and Maryland, a tender, even after condition broken, reverts the estate in the mortgagor. The statute, in New Hampshire, provides for a redemption, within one year after entry for condition broken.

§ 4. Mere possession of the obligation which a mortgage is given to secure, by a party claiming the land, will not be a sufficient ground of defence against a suit by the holder of the mortgage. Thus, in a suit by the assignee of a mortgage against a stranger in possession, the latter produced the notes secured by such mortgage, but no discharge; and the evidence strongly tended to prove that the notes could not have been paid to any lawful holder or assignee of the mortgage. Held, a discharge of the mortgage should not be presumed.<sup>1</sup>

<sup>1</sup> Crocker v. Thompson, 8 Met. 224.

and that the mortgage shall become "utterly void." Nor is this construction controlled by other provisions, that the mortgagee shall release upon the record, and that money tendered shall be paid into Court; because, these apply equally to a tender before breach of condition, and are designed merely to *perpetuate the evidence of payment* in favor of the mortgagor. Wade v. Howard, 11 Pick. 297; New England, &c. v. Merriam, 2 Allen, 390; Wilson v. Ring, 40 Maine, 116; Pearce v. Savage, 45 Ib. 92; Well v. More, 40 Ib. 515; Gillett v. Eaton, 6 Wis. 30; Webb v. Flanders, 82 Maine, 175; Williams v. Thurlow, 81 Maine, 892; Wilkinson v. Flowers, 37 Miss. 579; 2 Har. & McH. 17; Vose v. Handy, 2 Greenl. 322; Parsons v. Welles, 17 Mass. 419; Gray v. Jenks, 3 Mass. 520; Smith v. Vincent, 15 Conn. 1; Swett v. Horn, 1 N. H. 882; Farmers', &c. v. Edwards, 26 Wend. 541.

(In New York the mortgagor cannot bring ejectment. Bolton v. Brewster, 32 Barb. 389.)

In New Hampshire, by the Revised Statutes, the mortgage becomes void, on performance of condition, with payment of damages, &c., arising from breach, or a tender thereof. Rev. St. 245.

In the States of Massachusetts, Maine, New Hampshire, (where, after payment or tender, the court may decree a discharge, and a copy of the decree shall be recorded,) Vermont, Rhode Island, Pennsylvania, Delaware, South Carolina, Alabama, Indiana, Illinois, Missouri, Arkansas, Michigan, (upon certificate from the mortgagee, acknowledged, &c., like deeds,) statutory provision is made, for discharging mortgages upon the margin of the public record. Purd. Dig. 196; Mass. Rev. Stat. 408; 1 Verm. L. 194,

195. (See Ib. 1337, 6.) Aik. Dig. 94; S. C. St. Dec. 1817, p. 26; Ind. Rev. L. 272; Illin. Rev. L. 510; R. I. L. 206, 206; Dela. Rev. L. 1829, 92; Misso. St. 409, 410; Mich. St. 1839, 219; N. H. Rev. St. 245, 246; Verm. Ib. 816; Verm. L. 1837, 6, 7. See King v. McVickar, 8 Sandf. Ch. 192; McLean v. Lafayette, &c., 8 McLean, 587; Haskell v. Haskell, 8 Cush. 540; Patch v. King, 29 Maine, 448; People v. Keyser, 1 Tiffa. 226. In Pennsylvania, Illinois, Missouri and Alabama, the mortgagee shall enter such discharge in three months from demand, (or, in Missouri, give a release,) under penalty of forfeiting a sum not exceeding the whole debt. In South Carolina, in three months from demand of any party interested in the estate, under penalty of one-half the debt. In Arkansas, within sixty days; in Rhode Island, Vermont and New Hampshire, in ten days from demand; in Massachusetts, seven days; in Delaware, sixty days, under penalty of paying all damage; or, in Delaware, a fixed sum, with treble costs in Rhode Island. And the same provision is made in the latter State, in case of a refusal to execute a release of the mortgage. The statute, however, is not to impair the effect of any other legal discharge, payment, satisfaction or release, in Rhode Island. In Vermont, the mortgagor may have a discharge, witnessed, upon the deed itself, to be recorded in the margin of the records.

In Indiana, the register of deeds may discharge a mortgage, on the exhibition of a certificate of payment or satisfaction, signed by the mortgagor. (*qu. mortgagee?*) or his representative, and attached to the mortgage, which shall be recorded. A similar provision in New York. 1 N. Y. Rev. Sts. 751; Ind. Sts. 1836, 64.

§ 5. Where a mortgagor releases his equity of redemption to the mortgagee by warranty deed, made for full consideration, this is presumed to be a payment of the mortgage debt, unless there be clear proof to the contrary; and the presumption is strengthened by the lapse of more than six years from the purchase.<sup>1</sup> But where a mortgagor, by deed of sale and quit-claim, for valuable consideration therein expressed, conveyed the land to the mortgagee; held, no intention being shown to pay, by such conveyance, the notes secured by the mortgage, they might still, if outstanding, be collected or negotiated.<sup>2</sup>

§ 6. It has been suggested as a questionable point, whether, by a purchase of the equity of redemption in a part of the land, the mortgage is not extinguished as to the whole; upon the principle that a contract cannot be apportioned, and in analogy with the well settled rule, as to a purchase of part of the land from which a rent-charge issues.<sup>3</sup> (See p. 356.)

§ 7. It has been said, in Vermont, that a release of the equity of redemption to the mortgagee does not strengthen his legal title. But, in South Carolina, although the mortgagor is expressly declared to be legal owner of the land, a release to the mortgagee will give him the whole estate.<sup>4</sup> Even parol consent of the mortgagee to a sale of a part of the land has been held to operate as a release of that part.<sup>5</sup> But a formal release of a part does not discharge the rest.<sup>6</sup> And where the same party holds two mortgages, embracing the same land, and executes a partial release of each; if other transactions and instruments between the parties show such to be the intent, the releases will operate to transpose and substitute, but not to discharge the respective securities.(a)

<sup>1</sup> Burnet v. Denniston, 5 John. Cha. 85; Miles v. Comstock, Ib. 214. See Shelton v. Hampton, 6 Ired. 216; Klock v. Kronkite, 1 Hill, 107; Brewer v. Staples, 8 Sandf. Cha. 579; White v. Todd, 10 Mis. 189; Longstreet v. Shipman, 1 Halst. Ch. 48.

<sup>2</sup> Van Deusen v. Frink, 15 Pick. 449.

See Cullum v. Emanuel, 1 Alab. (N. S.) 28.

<sup>3</sup> James v. Johnson, 6 John. Ch. 426.

<sup>4</sup> Elithorp v. Dewing, 1 Chip. 141; 1 Brev. 177; Taylor v. Stockdale, 3 M'Cord, 302.

<sup>5</sup> Laughlin v. Ferguson, 6 Dana, 120. See Proctor v. Thrall, 22 Verm. 262.

<sup>6</sup> Culp v. Fisher, 1 Watts, 494.

(a) A conveyed to B an undivided mortgage for the price, and afterwards moiety of certain land, taking back a covenanted, upon request, to execute all



§ 8. The *depositing of money* with the mortgagee, accompanied with the note of a third person, upon payment of which the money is to be restored, does not constitute payment. Thus a mortgagor sold the land, receiving in payment the purchaser's note, and agreeing to extinguish the mortgage. He delivered the note to the mortgagee, with an agreement, that, if paid, the proceeds should pay the mortgage; and he also left the sum due, with the agreement that it should not be *applied*, but merely to stop the interest. The mortgagee receipted for the

conveyances requisite for a partition. He subsequently conveyed the other moiety to C, taking back a mortgage for the price. B and C then exchanged deeds of partition, in aid of which, A released the divided moiety of each grantee from the other's mortgage. Held, such releases did not extinguish the mortgages as to one-half of each divided moiety, but the whole divided moiety of each grantee became subject to his mortgage, as his undivided moiety was before. *Bradley v. Fuller*, 23 Pick. 1.

A, holding land subject to mortgage, conveyed a part of it to B, afterwards received the price, and then conveyed the remainder for its full value to C, under an agreement that the whole price should go to pay the mortgage, and C's portion be released therefrom, which was accordingly done by the mortgagee. Held, the mortgage still remained a lien upon B's part of the land. *Patty v. Pease*, 8 Paige, 277.

A, having an undivided share of a township, made a mortgage of it to B, and it was afterwards divided by process of partition. Held, B should hold A's portion of the land. *Randell v. Mallett*, 2 Shepl. 51.

In Equity, as has been seen, it is an established rule, that, where a creditor has a lien on several parcels of land, some of which belong to the party equitably liable for the debt, and others have been sold by him; such debt shall be first charged upon the portion unsold, and then upon the others in the inverse order of the respective transfers. *Skeel v. Spraker*, 8 Paige, 182. This rule applies to different mortgages of different dates. *Schrymer v. Teller*, 9 Paige, 173. See *Torrey v. Bank, &c.*, Ib. 649.

Where A, owning land subject to mortgage, sells a part of it to B, who assumes the whole debt; and the owner of the remaining portion is compelled to pay it; he may claim an assignment of the mortgage to reimburse him. *Halsey v. Reed*, 9 Paige, 446. In such case, under the Revised Statutes, (in New York,) upon a suit for foreclosure, chancery may make a decree over against B, for any deficiency in the mortgage debt. Ib. See *Rathbone v. Clark*, 9 Paige, 648.

Where two tenants in common mortgage for their joint debt, and afterwards make partition; the part set off to each shall be sold to pay one-half the debt, in the inverse order of alienations, made subsequent to the partition. Ib.

In South Carolina, the right to compel a resort to one particular fund among several, is not applied in favor of subsequent incumbrancers or general creditors. *Bank v. Mitchell*, Rice, 889. In Connecticut, the law does not sanction any *marshalling* of securities, in case of successive mortgages on the same property. The claim of the first mortgagee is paid in full. *Mix v. Hotchkiss*, 14 Conn. 82; *Butler v. Elliott*, 15, 187. But where a mortgagee holds other securities, upon a bill for foreclosure brought by him, other mortgagees may require that he make use of such securities towards the discharge of his debt. *Pettibone v. Stephens*, 15, 19. In the same State it is held, that, where there are two funds for payment, one creditor can compel another to resort to one of those funds, in exclusion of the other, only where there is but one debtor, and the claims are against the funds of one. *Ayres v. Husted*, Ib. 504. See also *Stamford v. Benedict*, Ib. 487; *Chester v. Wheelwright*, Ib. 562.



money. The note was not paid. Held, these facts did not constitute a payment of the mortgage.<sup>1</sup>

§ 9. The *death* of a mortgagor does not have the effect of turning the mortgage into payment of the debt, wholly or *pro tanto*. Hence, in New Hampshire and Connecticut, where a mortgagor dies insolvent, the course is to have the whole debt allowed by the commissioners of insolvency, and, after receiving his dividend, the mortgagee shall hold the land for the balance. Nor will the fact, that the mortgagee has purchased the equity of redemption, make any difference. But in Massachusetts the practice is, to allow the mortgagee only the excess of the debt over the value of the mortgage.<sup>(a)</sup> This is in analogy with the English practice in cases of bankruptcy. And, in England, the mortgagee will be allowed to prove against the estate of the deceased mortgagor only what remains due after a sale of the land.<sup>2</sup>

§ 10. Where a mortgagee recovers judgment upon the debt secured by the mortgage, and gives a receipt, acknowledging full satisfaction, upon the execution issued on such judgment; this is not conclusive evidence of a payment and discharge of the mortgage. Thus, where the judgment-debtor, on the day previous to giving such receipt, conveyed his equity of redemption to a third person, who, on the same day the receipt was given, conveyed it to the mortgagee; held. the payment of the judgment must be construed only as an intended confirmation of the mortgagee's title; because the supposition of the payment of money would involve the absurdity, that either the mortgagor or his assignee released all his interest, at the very moment when the money to redeem the land was paid to the person taking the release.<sup>3</sup>

<sup>1</sup> *Howe v. Lewis*, 14 Pick. 829. But see *Toll v. Hiller*, 11 Paige, 228.

<sup>2</sup> *Amory v. Francis*, 16 Mass. 808; *Greenwood v. Taylor*, 1 Russ. & M. 185; *Doe v. McLoskey*, 1 Alab. (N. S.) 708; *Rowe v. Young*, 4 Y. & Coll. 204. See *Grafton, &c. v. Doe*, 19 Verm. 468;

*Findlay v. Hosmer*, 2 Conn. 850; *Farnum v. Bontelle*, 18 Met. 159; *Belloe v. Rogers*, 9 Cal. 128; *Falkner v. Folsom*, 6 Ib. 412; *Davis v. Winn*, 2 Allen, 111; *Walker v. Baxter*, 26 Verm. 710.

<sup>3</sup> *Perkins v. Pitts*, 11 Mass. 125.

(a) If personal property is pledged, with a power of sale, the property must be sold or its value legally ascertained,

before the claim can be allowed against the estate. *Middlesex, &c. v. Minot*, 4 Met. 325.

§ 11. Where money is paid by one person interested in an equity of redemption, to obtain a partial release of the mortgage, such payment shall be applied to the benefit of others interested in the equity, and not to independent claims held by the mortgagee. Thus A mortgaged to B two distinct parcels of land, and afterwards conveyed one of them to C, and the other to D. B released to D, for a certain sum, the land transferred to him. C afterwards tendered to B a sum which, with the amount paid by D, was equal to the whole debt due; but B claimed the right to apply the sum paid by D to an independent debt, which he held against the mortgagor. Held, C might redeem the estate.<sup>1</sup>

§ 12. A mortgage being given as security for a debt, and not merely for any particular *evidence of debt*, the general rule is, that nothing but actual payment of the debt or an express release will operate as a discharge of the mortgage. Hence, where the mortgage is given to secure a note, which is afterwards cancelled, and a new one substituted, the mortgage will stand as security for the new note.<sup>2</sup> Thus in Massachusetts, where a note is held to be *prima facie* payment of a debt, a new note, substituted for an old one which was secured by mortgage, though given to an assignee of the mortgage, will be subject to the same security, if not intended as payment; as between the mortgagee and mortgagor, or parties claiming under them. (Whether in relation to purchasers from the mortgagor, *qu.*)<sup>3</sup> So A mortgaged land to B, to secure *the amount*

<sup>1</sup> Hicks v. Bingham, 11 Mass. 800.

<sup>2</sup> Baxter v. McIntire, 18 Gray, 171; Cleveland v. Martin, 2 Head, 128; Smith v. Stanley, 87 Maine, 11; Cottes v. Jeffers, 7 Flori. 284; Birnel v. Eskie, 9 Cal. 104; Markell v. Eichelberger, 12 Md. 78; Gault v. M'Grath, 82 Penn. 892; Strachn v. Foss, 42 N. H. 48; Robinson v. Urquhart, 1 Beasl. 515; Brown v. Scott, 51 Penn. 857; Elliot v. Sleeper, 2 N. H. 525; Crosby v. Chase, 5 Shepl. 869; Davis v. Maynard, 9 Mass. 247; Williams v. Little, 12 N. H. 29. See Grugeon v. Gerard, 4 Y. & Coll. 119; Teed v. Carruthers, 2 Y. & Coll. Cha. 81; Morse v. Clayton, 18 Sm. & M. 878; Burdett v.

Clay, 8 B. Mon. 287; Bank, &c. v. Finch, 8 Barb. Cha. 298; Hadlock v. Bulfinch, 81 Maine, 246; Buswell v. Davis, 10 N. H. 424; Euston v. Friday, 2 Rich. S. C. 427, n.; Hardy v. Commercial, &c., 10 B. Mon. 98; Flanders v. Barstow, 6 Shepl. 857; Hugunin v. Starkweather, 5 Gilm. 492; McCormick v. Digley, 8 Blackf. 99; New Hampshire, &c. v. Willard, 10 N. H. 210. But see Holman v. Bailey, 8 Met. 55; Bonham v. Galloway, 18 Illin. 68; Purser v. Anderson, 4 Edw. Cha. 17; McGiven v. Wheelock, 7 Barb. 22; Boston, &c. v. King, 2 Cust. 400.

<sup>3</sup> Watkins v. Hill, 8 Pick. 522.

of a certain note, which he afterwards took up, and gave a new one. C purchased the land *bona fide* from A, who delivered to him the original note, which he had taken up. C brought a bill in equity against B, for a conveyance free from his mortgage; but the bill was dismissed.<sup>1</sup> So where a note, given to a *feme sole*, and secured by mortgage, was, after her marriage, given up to the mortgagor, and a new one taken by the husband for the amount then due; held, the mortgage was not discharged as against a purchaser from the mortgagor.<sup>2</sup> So A mortgaged to B. C, a creditor of B, afterwards summoned A in a trustee process against B, recovered judgment against A, and committed him upon execution, but afterwards gave him a release of the judgment. B brings ejectment upon the mortgage. Held, these facts constituted no defence to the action.<sup>3</sup> But, under special circumstances, and to effect the apparent intent of the parties, the substitution of a new note will discharge the mortgage. Thus a mortgage was made by A to B, conditioned to pay B the contents of a note, payable on demand, signed by A as principal and B as surety, or indemnify B against his liability thereupon. The note was afterwards taken up, by the substitution of a new one, signed by A and other sureties; and, subsequently, B assigned the mortgage. Held, the condition was performed, and nothing passed by such assignment.<sup>4</sup> So A gave a mortgage to B, to secure a note payable by instalments. The first being due, B demanded payment, saying that if it were paid he could sell the securities; whereupon A gave a negotiable note for the amount, payable in four months, which B proposed to have discounted at a bank. At the same time, this indorsement was made upon the first note: "Received the first instalment on the within, of \$402.78." B having afterwards assigned this note with the mortgage; held, the transaction was not a mere change of security for the same debt, but a payment, and a discharge *pro tanto* of the mortgage.<sup>5</sup>

<sup>1</sup> Bolles v. Chauncey, 8 Conn. 890.

<sup>2</sup> Pomroy v. Rice, 16 Pick. 22.

<sup>3</sup> Cary v. Prentiss, 7 Mass. 68.

<sup>4</sup> Abbott v. Upton, 19 Pick. 484.

<sup>5</sup> Fowler v. Bush, 21 Pick. 280. See

Bonham v. Galloway, 18 Ill. 68; Bowman v. Manter, 38 N. H. 580; Dingman v. Randall, 13 Cal. 512; Mead v. York, 2 Seld. 449.

§ 13. The giving of new security for the mortgage debt will not, in general, operate to discharge the mortgage, though it be of a higher nature than the original security; as a *recognizance*, for a simple contract.<sup>1</sup> But, it seems, where a judgment has been recovered upon the debt, a release of the judgment will discharge the mortgage.<sup>2</sup>

§ 14. It is a question of very frequent occurrence, whether, under the particular circumstances of a case, the transfer of a mortgage shall be considered *an assignment*, by which the mortgage is preserved as a lien or incumbrance upon the land; or as a *discharge or extinguishment*, which relieves the land from incumbrance, and lets in other, and previously posterior claims. Upon the principle, that an equitable title merges in the legal title, where both become vested in the same person; if the holder of an equity of redemption pay, and take an assignment of the mortgage, the latter is extinguished, unless he has some beneficial interest in keeping it alive. A court of equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party.<sup>3</sup> A merger is presumed, where an estate and the charge upon it become united in one person. A transfer to a trustee is held to be evidence against such presumption, but not conclusive.<sup>4</sup> Where there is no direct proof of the intention, it may be inferred from circumstances, one of which is the interest of the party. But this may be rebutted by others. The party may intend to merge, upon a mistaken view of his interest. He may judge erroneously, knowing all the facts. But if the

<sup>1</sup> Davis v. Maynard, 9 Mass. 247.

<sup>2</sup> Perkins v. Pitts, 11 Mass. 125.

<sup>3</sup> Van Wagenen v. Brown, 2 Dutch. 196; Mickles v. Townsend, 18 N. Y. 982; N. E., &c. v. Merriam, 2 Allen, 390; How v. Woodruff, 12 Ind., 214; Jewett v. Davis, 10 Allen, 68; Sahler v. Siegner, 44 Barb. 606; Robinson v. Urquhart, 1 Beas. 515; Champney v. Coope, 34 Barb. 339; 8 Beav. 513; Bailey v. Myrick, 50 Maine, 171; Hinds v. Ballou, 44 N. H. 619; Norris v. Morrison, 45 Ib. 490; Starr v. Ellis, 6 John. Cha. 396; Bailey v. Willard, 8 N. H. 429; Cooper v. Whitney, 3 Hill

95; Moore v. Harrisburg, &c., 6 Watts, 138; Poole v. Hathaway, 9 Shepl. 85; Hill v. Smith, 2 M'L. 446; Hatch v. Kimball, 4, 146; Bank, &c. v. Tarleton, 23 Miss. 173; Frye v. Bank, &c., 11 Illin. 867; Robinson v. Leavitt, 7 N. H. 100; Campbell v. Knights, 11 Shepl. 382; Helmhold v. Man, 4 Whart. 410; Slocum v. Catlin, 22 Verm. 137; McGiven v. Wheelock, 7 Barb. 29; Loud v. Lano, 8 Met. 517; Brown v. Lapham, 3 Cush. 554; Kinley v. Hill, 4 W. & S. 426.

<sup>4</sup> Hood v. Phillips, 8 Beav. 513.

intent is clear, a merger will take place, though he expected advantages which he does not realize.<sup>1</sup> A mortgage is said to be extinguished by *payment from the debtor's funds*.<sup>2</sup> Thus, where a mortgage debt is discharged by a bond of the heirs, who are also assignees of the mortgage, to prevent a sale of the land, the mortgage is also discharged.<sup>3</sup> Equity will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. With reference to the party himself, it is said, it is of no sort of use to have a charge on his own estate; and, where this is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. In the case of *an infant*, entitled to the estate and also to a charge upon it, the court will keep the rights distinct, if it be deemed most beneficial for the infant. But equity will not recognize as a beneficial purpose, the enabling a mortgagee, after he has purchased the equity of redemption, at some future time to assign the mortgage, lying dead in his possession, to a creditor, instead of giving a new mortgage. On the contrary, this purpose is pregnant with fraud and imposition.<sup>4</sup> Thus, upon the 20th of August, 1800, A mortgaged to B, to secure payment of \$2,500 in one year. In 1801, C, a creditor of A, caused his equity of redemption to be sold on execution, and became himself the purchaser. In December, 1806, C paid and took an assignment of B's bond and mortgage, and in January, 1811, conveyed the whole estate to D for \$7,000, with warranty against incumbrances, &c. In March, 1810, C assigned the bond and mortgage to E, to secure \$3,500. The assignment was *acknowledged* after the deed to D, and D in his answer, (probably to a bill for foreclosure,) stated his belief, that it was *made* after the deed to him. Held, it was the intention of C to *extinguish* the mortgage, inasmuch as he could have no object in keeping it alive, and the bill was dismissed.<sup>5</sup> On the other hand, when the transfer to the mortga-

<sup>1</sup> Loomer v. Wheelright, 3 Sandf. Ch. 157.

<sup>2</sup> Kinley v. Hill, 4 W. & S. 426.

<sup>3</sup> Robinson v. Leavitt, 7 N. H. 73. See Hadley v. Chapin, 11 Paige, 245.

<sup>4</sup> Forbes v. Moffatt, 18 Ves. jr. 384; Compton v. Oxenden, 2 Ves. jr. 261; James v. Johnson, 6 John. Cha. 425.

<sup>5</sup> Gardner v. Astor, 8 John. Cha. 53.

gor is expressly designed to effect another object, it will not operate as an extinguishment. Thus, A mortgaged to B and to C. D afterwards extended an execution upon the equity of redemption. B and C entered into an agreement with A, that the land should be sold, and the proceeds applied, first to their mortgages, then to the execution of D. The land was sold accordingly to E, who paid the mortgage debts, and the balance of the proceeds to D. D was privy to the arrangement. B acknowledged upon the records satisfaction of his mortgage, and C released to A all his right in the land. On the same day, A conveyed with warranty to E. Held, without reference to D's knowledge of the transaction, the effect of it was to make E substantially the *assignee* of B and C, A being a mere instrument for effecting the assignment; and that D was not entitled to the land, without paying the mortgages to E.<sup>1</sup> So A, being a first mortgagee, made a lease of the land to B. C, a subsequent mortgagee, undertook to discharge the first mortgage, paid the debt, and took an assignment of the mortgage and lease, for the purpose of enabling him to collect the rent. Held, no extinguishment of the mortgage.<sup>2</sup>

§ 15. Questions arise, in cases where the mortgage passes into the hands of a purchaser of the equity of redemption, as to the effect upon the mortgage debt; more especially where accompanying notes are taken up. If a second mortgagee purchases the equity of redemption, and pays the notes secured by the first mortgage, no action lies upon the notes against the original debtor or his sureties.<sup>3</sup> So it has been held, that, where a purchaser of the equity of redemption takes an assignment of the debt for which the mortgage was given as security, the effect is the same, as if the mortgagor himself had done it, and the debt is to be considered as paid. Thus A gives to B a note and mortgage, and then conveys the land to C. C pays B the amount due him, takes an assignment of the securities, and then brings a suit against A, in the name of B, upon the note. Held, the action would not lie.<sup>4</sup> So where a prior

<sup>1</sup> *Marsh v. Rice*, 1 N. H. 167.

<sup>2</sup> *Willard v. Harvey*, 5 N. H. 252.

<sup>3</sup> *Viles v. Moulton*, 11 Verm. 470.

<sup>4</sup> *Eaton v. George*, 2 N. H. 800.

incumbrancer contracts for a purchase of the land in discharge of his debt, and assumes the payment of a subsequent mortgage as a part of the consideration, such purchase will operate as an extinguishment of his mortgage, and give priority to the subsequent mortgagee.<sup>(a)</sup> But if a mortgagee assign his mortgage as security, take back a deed of the land, and agree to pay the assignee; this is no merger of the mortgage.<sup>1</sup> So if a mortgagor applies to a third person for money to pay the mortgage, agreeing to give him the same security which the mortgagee had, and on receiving the money pays it to the mortgagee, and takes an assignment to the lender; this is no discharge of the mortgage.<sup>2</sup> So A, a mortgagee, took a deed of the land from B, the mortgagor, professing to be designed to cancel the mortgage. The mortgage and notes remained with the mortgagee, upon the agreement to abide the event of an attachment, to which the land was then subject. An execution being afterwards levied upon it; held, the mortgage was not discharged, but still had precedence of the attachment.<sup>3</sup>

§ 16. Another general principle on this subject has been thus stated. When he who has the right to redeem pays the mortgage money, the mortgage is discharged, because he becomes absolutely seised—he pays his own debt on his own account. The mortgage is extinguished, because the debt is paid *by the real debtor to the creditor*. But, where one owns only *part of*

<sup>1</sup> *Patty v. Pease*, 8 Paige, 277.

<sup>2</sup> *White v. Knapp*, 8 Paige, 178.

<sup>3</sup> *Crosby v. Chase*, 5 Shepl. 369. *FM*

(a) A mortgaged to B, then to C, and then charged the land with another debt to B. A and C afterwards entered into an indenture, which set forth that C had agreed for an absolute purchase of the land for a certain sum, being the amount of all the debts, out of which he was to pay a certain part to the *first mortgagee*, and retain the balance in satisfaction of his debt. In consideration of the sum named, being the amount of B's two claims, *the payment of which C assumed*, and of C's own debt, A conveyed the equity of redemption, subject to the mortgage and charge of B, to C, and C

covenanted to pay B. Held, C's debt was hereby extinguished, and that B might maintain a bill for foreclosure upon both his mortgages, without paying it. *Brown v. Stead*, 5 Sim. 535.

An estate, subject to two charges, was devised to A, who held the first one. Upon her marriage, a settlement was made, to which B, the holder of the second charge, was no party, whereby it was agreed that the first charge should not be raised. Held, B should hold, clear of the first charge. *Farrow v. Roes*. 4 Beav. 18.



*the land*, as he might pay the whole and call for contribution, so he may buy in the mortgage.<sup>1</sup>

§ 17. If a mortgagor is appointed executor of the mortgagee, such appointment, and a subsequent conveyance of the land by the former, will operate as an extinguishment of the mortgage. Thus A mortgaged land to B, his father, as security for a bond. B died before condition broken, having appointed A his executor. A mortgaged the land to C, with the usual covenants of warranty, and C assigned the mortgage to D. Afterwards, A, as executor, assigned his own mortgage, given to B in his lifetime, and the accompanying bond, to E; and E, in a suit upon the mortgage against A in his natural capacity, recovered possession of the land. D brings a suit for the land against E. Held, whether the mortgage given by A was extinguished by his appointment as executor or not, it was extinguished by his conveyance to C.<sup>2</sup> So where the mortgagor was appointed administrator of the mortgagee, and returned an inventory, including the mortgage debt, and an account, charging himself with the personal estate, whereupon there was a decree of distribution; held, this was a payment, and the administrator could not afterwards assign the mortgage.<sup>3</sup> But where, certain land having been twice mortgaged, the mortgagor, after condition broken, was appointed administrator of the second mortgagee, and returned an inventory, including the debt due from himself; held, such appointment was not, in respect to an assignee of the first mortgage, who had purchased the mortgagor's right of redemption, a payment of the second mortgagor's debt, and an extinguishment of the mortgage, but that the administrator might redeem as against such assignee.<sup>4</sup>

§ 18. A deed of quit-claim, given by the mortgagee to a purchaser of the equity of redemption, in which he covenants only against the acts of those claiming under himself, may operate as

<sup>1</sup> Taylor v. Bassett, 8 N. H. 298; Drew v. Rust, 86 N. H. 835; Russell v. Piston, 8 Seld. 171.

<sup>2</sup> Ritchie v. Williams, 11 Mass. 50.

<sup>3</sup> Ipswich, &c. v. Story, 5 Met. 310.

<sup>4</sup> Kinney v. Ensign, 18 Pick, 232. See Hough v. DeForest, 18 Conn. 472; Miller v. Donaldson, 17 Ohio, 264.

an assignment of the mortgage.<sup>1</sup> So a quit-claim deed from the mortgagor to the mortgagee, after assignment of the mortgage, is no merger.<sup>2</sup> And where the assignee of a mortgage takes a quit-claim deed of one-half of the land; this is at most an extinguishment of only a part of the debt.<sup>3</sup> So, in Massachusetts, a warranty deed, after entry, passes the mortgage, though the notes are not assigned.<sup>4</sup> So, after attachment of land under mortgage, the mortgagee, upon payment of his debt by a third person, and with the mortgagor's consent, gave to such third person a quit-claim deed of the land. Held, this operated as an assignment, not an extinguishment, of the mortgage, and a levy upon the land by the attaching creditor did not give him a legal title. It seems, such levy passed to him the equity of redemption, and he might bring a bill in equity to redeem.<sup>5</sup>

§ 19. It has been held in Massachusetts, that, where a wife joined her husband in a mortgage, and a purchaser of the equity of redemption, from the administrator of the mortgagor, paid the sum due, and the mortgage was discharged upon the record; the widow was not thereby let in to her dower, the discharge having the effect to pass *the legal interest* to the holder of the equity, and thus vesting the whole estate in him.<sup>6</sup> But this doctrine has been since overruled, and such a discharge, made by the mortgagee to an execution purchaser of the equity, held an extinguishment of the mortgage, which let in the widow to her dower.<sup>7</sup>

§ 20. The purchaser of an equity of redemption at an execution sale, who afterwards takes an assignment of the mortgage, may recover possession of the land, by a suit commenced before expiration of the year, within which the mortgagor has a right to redeem, although neither such purchaser nor the mortgagee

<sup>1</sup> Hunt v. Hunt, 14 Pick. 374; Dixfield v. Newton, 41 Maine, 221; Collamor v. Langdon, 8 Wms. 32; Grover v. Thatcher, 4 Gray, 526; Conner v. Whitmore, 52 Maine, 185; Hinds v. Ballou, 44 N. H. 619.

<sup>2</sup> Pratt v. Bank, &c., 10 Verm. 293.

<sup>3</sup> Klock v. Cronkhite, 1 Hill, 107.

<sup>4</sup> Ruggles v. Barton, 13 Gray, 506.

<sup>5</sup> Freeman v. M'Gaw, 15 Pick. 82. See Wilson v. Troup, 2 Cow. 195; Olmsted v. Elder, 2 Sandf. 325; Crooker v. Jewell, 31 Maine, 806.

<sup>6</sup> Popkin v. Bumstead, 8 Mass. 491.

<sup>7</sup> Eaton v. Simonds, 14 Pick. 98. See Swift v. Kroemer, 13 Cal. 526.

ever entered on the land. There is no merger of the mortgage.<sup>1(a)</sup>

§ 21. Where a mortgagor executes a release of the equity of redemption to the mortgagee, and receives from him the note secured; this does not extinguish the mortgagee's title under the mortgage, or his right to recover damages, for breach of the covenants of warranty contained therein. The fact that the mortgage deed contains such covenants, while the deed of release does not, constitutes a sufficient ground for keeping the mortgage alive.<sup>2</sup>

§ 22. If, after a conveyance to a wife of an equity of redemption, she and the husband take possession, and the husband takes an assignment of the mortgage, there is no merger, but she holds under the mortgagor, and he under the mortgagee.<sup>3</sup>

§ 23. It is the general rule, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. But, as the legal title is not technically released by receiving the money, this rule must be founded on an equitable

<sup>1</sup> Tuttle v. Brown, 14 Pick. 514. See West, &c. v. Chester, 1 Jones, 282; Berger v. Hiester, 6 Whart. 210; Moore v. Shultz, 1 Harris, 96; Waddle v. Cureton, 2 Speers, 58.

<sup>2</sup> Lockwood v. Sturdevant, 6 Conn. 374; Baldwin v. Norton, 2 Conn. 161; Marshall v. Wood, 5 Verm. 250; \* Van Deusen v. Frink, 15 Pick. 458.

<sup>3</sup> Cooper v. Whitney, 8 Hill, 95.

(a) A and B, tenants in common, mortgaged to C and D to secure \$400. Afterwards, their equity of redemption was sold to E, upon an execution in favor of another creditor. C and D recovered a judgment for possession of the land; and afterwards C conveyed all his interest in the land to E, and E conveyed one-half of the right in equity of A and B, which he had purchased at the execution sale, to F. Subsequently, the execution in the suit of C and D was served, by delivering possession of the land to the parties entitled. Afterwards, E conveyed to D all his interest in the land, thereby uniting in D the titles of mortgagor and mortgagee of half the land. This conveyance F treated as payment of one-half of the debt; and, having tendered the amount of the other half, he brought a bill in equity against D to redeem. Held, as D purchased only a moiety of the equity of redemption, only a moiety

of the mortgage could be held as extinguished; that the recovery of a judgment upon the mortgage by C and D, being previous to D's acquiring any interest in the equity, was no indication of his intention, as to an extinguishment or otherwise; and, as there was nothing to show that D would in any way gain by keeping alive a moiety of the mortgage, it should be held extinguished. Freeman v. Paul, 8 Greenl. 260.

Where the purchaser of an equity of redemption, under two distinct mortgages, takes an assignment of the first, this is no merger, nor will it give the second mortgagee a priority in the proceeds of a sale. Millspaugh v. McBride, 7 Paige, 509.

\* The marginal note states that the release of the equity was by a warranty deed; but the case does not so find.

control by courts of law over parties in ejectment; and is therefore subject to exceptions, where equity so demands. Thus land was sold by trustees, for payment of the debts of one deceased. The land was mortgaged by him before his death, and the mortgagee brings ejectment upon the mortgage, against the trustees, and the heirs of the mortgagor. The purchaser had received no deed from the trustees, and therefore gained no legal title, but he had paid most of the purchase-money. The mortgagee having obtained a decree for foreclosure and sale, the purchaser, with the consent and in presence of one of the trustees, paid the whole amount due upon the mortgage; the sum being considered as part of the purchase-money due under the sale made by the trustees. The mortgagee gave the purchaser a receipt, and an order to enter the suit "settled," which was done. In an action of ejectment by the heirs of the mortgagor against the purchaser, held, although a stranger could not set up a mortgage, satisfied by the mortgagor, to defeat his title, yet he might thus use a mortgage bought in by himself; that, in this case, the purchaser owning the equitable estate, and having paid off the mortgage on his own account, the incumbrance belonged to him, and the *mortgagor* could not have demanded a reconveyance from the mortgagee; and that the action would not lie.<sup>1</sup>

§ 24. Where a third person purchases mortgaged property, nominally as from the mortgagor, but really from the mortgagee, or with his concurrence and by his request; the latter will not be allowed to set up a title under his mortgage. Thus A mortgages to B, to secure the purchase-money of property bought from B. Afterwards, A being unable to pay the purchase-money, application was made to C, with the knowledge and by the desire of B, who himself wrote to C on the subject, to buy a portion of the property at an advanced price. C accordingly bought it, and paid the price; but the receipts were expressed to be on account of A's debt to B. Before the purchase was completed, B expressed to C his perfect confi

<sup>1</sup> *Peltz v. Clarke*, 5 Pet. 481.

dence in his fulfilling his engagements. Most of the property was delivered to C with B's consent, and a part of it by B himself. The portion remaining in B's hands having been sold at a reduced price, and his debt against A being therefore unsatisfied; B claimed to hold the part conveyed to C, under his mortgage from A. C files a bill for a perpetual injunction against this claim. Held, B was a party to the contract between A and C, and the portion of the property sold to C was discharged from the mortgage.<sup>1</sup>

§ 25. Where a release of a mortgage is made to distinct parties, it will take effect according to their respective interests in the land, independent of such mortgage. Thus A mortgaged land to B. Afterwards, A and B joined in mortgaging to C. C entered for condition broken, but, before the three years requisite for foreclosure had elapsed, according to a previous agreement, tendered a release of his mortgage, which they refused to receive, until five years had passed from C's entry. Held, the release reinstated A and B in their former relation of mortgagor and mortgagee, as if the mortgage to C had never been made.<sup>2</sup>

<sup>1</sup> *Skirving v. Neufville*, 2 Des. 194.

<sup>2</sup> *Baylies v. Bussey*, 5 Greenl. 158. See *George v. Wood*, 9 Allen, 80.

## CHAPTER XXXIV.

## MORTGAGE. FROM WHAT FUND TO BE PAID.

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|--|---|
| 1. Debt paid from the fund benefited—<br>executor and heir.                | to the rule of applying the per-<br>sonal estate; rule in New York;<br>in Pennsylvania; recapitulation of<br>cases. |
| 2. Mortgage by father and son.   |   |
| 8. Devised lands; personal estate may<br>be expressly exempted; exceptions | 7. Application of payments in equity.   |

§ 1. It is a rule in equity, that, where a person dies, leaving a variety of funds, one of which must be charged with a debt; it shall be paid out of that fund which *received the benefit*. Hence the personal estate, in the hands of the executor, shall be applied to discharge a mortgage upon the real estate, in the hands of the heir; because the money borrowed went to increase the personal estate. And it is immaterial, whether there is any personal obligation for payment of the money or not; because there was a debt contracted by the borrowing.<sup>1(a)</sup>

§ 2. If a father and son join in a mortgage of the father's land, without covenant, the father receiving the money, and the son conveying for a nominal consideration; the real assets of the father will not be charged in the hands of the son, an heir not being bound even by an express obligation, unless specially named; nor the real or personal assets of the son, who had received no part of the money borrowed.<sup>2</sup> See sec. 5.

<sup>1</sup> 2 Cruise, 146, 147. See *Halsey v. Reed*, 9 Paige, 446; *Goodhue v. Barnwell*, Rice, 198; *Quennell v. Turner*, 4 Eng. L. & Equ. 84; *Douglass v. Durin*,

51 Maine, 121; *Wright v. Holbrook*, Ib. 587.

<sup>2</sup> 2 Cruise, 146, 147.

(a) Upon a sale by the mortgagee, for the purpose of foreclosing; if in the lifetime of the mortgagor, the surplus, after satisfying incumbrances, is personal es-

tate; if after his death it belongs, with the equity of redemption, to the heir. *Wright v. Rose*, 2 Sim. & Stu. 328.

§ 3. The principle above stated (sec. 1) requires the discharge of a mortgage upon lands devised, as well as those descended, out of the personal estate of the testator.<sup>1</sup>

§ 4. The personal estate is liable to payment of a mortgage debt, though the land is devised *subject to the incumbrance*, or the personal estate bequeathed, or the land expressly charged with payment of debts, or the real estate limited in trust, either in fee or for a term, for payment of debts.<sup>2</sup>

§ 5. If the personal estate is deficient, a mortgage shall be discharged from the proceeds of land devised for payment of debts.<sup>3</sup> And where a mortgaged estate is devised, and another estate descends to the heir, the latter shall be applied in payment of the mortgage.<sup>4</sup>(a) A testator may, however, exempt the personal estate from payment of the mortgage debt, by substituting the real estate in its stead. And this may be done, either by express words, or by a manifest intent appearing upon the will.<sup>5</sup> So the specific bequest of a chattel will exempt it from liability for a mortgage debt.<sup>6</sup> And the rule above stated, being founded on the consideration that the debt was originally a personal one, and the charge on the land merely collateral, is not applicable where the mortgage debt was contracted by one person, and the land descends to another.<sup>7</sup> Thus, if a grandfather mortgage, with a covenant to pay the money, and the land descend to his son, who dies without paying the mortgage, leaving personal estate and a son; the father's personal estate shall not be applied in payment of the mortgage. So a covenant by one person to pay the debt of another, which is secured by mortgage, will not subject the personal estate of the former, primarily, to the payment of the debt. And even though a person expressly charge his real and personal estate with his debts, this will not render the personal estate liable to

<sup>1</sup> 2 Cruise, 147.

<sup>2</sup> Ib. 148.

<sup>3</sup> Ib. 149.

<sup>4</sup> Ib. 152.

<sup>5</sup> Ib. 152-60; 2 Atk. 424.

<sup>6</sup> Ibid. 161, 162.

<sup>7</sup> 2 Cruise, 163. See sec. 2.

(a) This point was settled by Lord Hardwicke, upon reconsideration of a decree to the contrary, in regard to which he remarked, that, "not to confess an error, is much worse than to decree to the contrary, in regard to err."



the payment of a mortgage made by another. Upon the same principle, where one purchases an equity of redemption, his personal estate will not be applied to payment of the mortgage-money, even though he have expressly covenanted to pay it, unless it appears to have been his intention to make the debt his own. So, in case of a deed given, subject to a mortgage, the land is the primary fund for payment. Equity effects a *subrogation* in favor of the mortgagor. So, also, as against a second purchaser from the first grantee, though the second deed does not mention the mortgage. So, in case of sale of the equity of redemption on execution, the land, in equity, is the primary fund; and, if a suit is brought upon the bond, and judgment given for the defendant, this is no bar to a subsequent bill for foreclosure. If a wife joins her husband in a mortgage of her own estate, and the money goes to his benefit, his personal estate will be first applied in payment of it. But where money is borrowed on the wife's estate, partly to pay her debts, and partly for the husband's use, the latter is not bound to indemnify the wife's estate against any part of it. And, if it appear not to have been the wife's intention to stand as a creditor for the mortgage money, the husband's personal estate will not be liable.<sup>1</sup>(a)

<sup>1</sup> 2 Cruise, 164-5-6-8-70-73-5; *Jumel v. Jumel*, 7 Paige, 591; *Hayer v. Pruett*, Ib. 465. See *Cox v. Wheeler*, Ib. 248; *Skeel v. Spraker*, 8, 182; *Gilbert v.*

*Averill*, 15 Barb. 20; *Tripp v. Vincent*, 8 Barb. Cha. 618; *Cherry v. Trouro*, 2 Ib. 618; *Church v. Savage*, 7 Cush. 440.

(a) In New York, the heir or devisee of a mortgaged estate shall not call upon the executor to redeem it, unless the will expressly so direct. 1 N. Y. Rev. Stats. 749; *Halsey v. Reed*, 9 Paige, 446. In 1824, A gave a bond secured by mortgage. B purchased the land, subject to payment of the mortgage, and conveyed to a trustee for the benefit of A's wife. After A's death, the *cestui que trust*, being legal owner, under the Revised Statutes, administered upon the estate. Held, in equity, the land was the primary fund for payment of the mortgage, and the administratrix, owning subject thereto, was not allowed for a payment of the mortgage. *Jumel v. Jumel*, 7 Paige, 591.

In Missouri, the court may order redemption with the personal assets, if the

will makes no provision therefor, and it will be useful to the estate, and not injurious to creditors. Otherwise, the court may order a sale of the equity. Sts. 51. In Pennsylvania, A mortgaged to the plaintiff one lot of land, and then devised all his estate, comprising many other lots, to B. B died, having devised the mortgaged tract to C, and the rest of her estate to her executors. The plaintiff having recovered judgment upon the bond which accompanied the mortgage, a motion was made that the sum due should be levied upon the land mortgaged, and the rest of the estate discharged. Held, that all the lands which had belonged to A should contribute, according to their respective values; that there was nothing in the will of B, show-

§ 6. Although an heir is entitled to the aid of the personal property of the mortgagor in paying off mortgages, yet, if he disposes of the mortgaged estate, he cannot afterwards come upon the personal estate for assistance. And there seems to be no authority, requiring an administrator to redeem mortgaged

ing an intention that C should take the estate *cum onere*, and therefore it should share equally with the other lands in payment of the mortgage debt; and that to charge C with the whole debt, she being a specific devisee, would plainly defeat the intention of B, while to charge the lands held by the residuary legatees would not have that effect. *Morris v. McConaughy*, 2 Dall. 189.

In New Hampshire, an administrator must redeem a mortgage, unless licensed to sell subject thereto. Rev. Sts. 818.

As between heir and executor, the rules above stated are of comparatively little consequence in the United States; because, in general, real and personal estates, at the death of the owner, pass to the same heirs. As between devisee and executor, they may be important; but very few cases have been decided. There is, however, one opinion of extraordinary ability and value; being that delivered by Chancellor Kent in *Cumberland v. Codrington*, 8 John. Cha. 252, in which case he presents at length the English doctrine and decisions upon this subject, as follows:

As between the representatives of the real and personal estate of the deceased purchaser of a mortgage, the land is the primary fund to pay off the mortgage.

In *Shafto v. Shafto*, (2 P. Wms. 664. n. 1,) decided by Lord Thurlow in 1786, the devisee of land, mortgaged by the testator, covenanted with the holder of the mortgage, that the estate should remain as security for the debt and interest, with an additional one per cent. of interest. The question was, whether the personal estate of the devisee, who had died in the meantime, should not pay the debt and interest, or at least the arrears of interest, with the additional one per cent. Held, the land was the primary fund to discharge the mortgage, that the interest must follow the nature of the principal, and that the contract for additional interest was also in the nature of a real charge.

In *Tankerville v. Fawcett*, (2 Bro. 57,) Lord Kenyon declared, that, where an estate descends or comes to one, subject

to a mortgage, although the mortgage is afterwards assigned, and the party covenants to pay the money, his personal estate will not be bound. The devisee of land having voluntarily charged a simple contract debt of the testator upon the land devised, and died; held, the debt was not the proper debt of the devisee, and his personal estate was not liable.

In *Tweddell v. Tweddell*, (2 Bro. 101, 152.) A purchased the equity of redemption of a mortgaged estate, and agreed with the mortgagor to pay, in part consideration of the purchase, the mortgage debt to the son and heir of the mortgagee, and the rest of the purchase-money to the mortgagor. He also covenanted with the mortgagor, that he would thus pay the mortgage debt, and indemnify the mortgagor from the mortgage. A died, having devised the estate. Upon a bill by the devisee, to have the mortgage discharged from the personal estate; held, the personal estate was not thus liable; that the personal estate is never charged in equity, where it is not at law; that A took the land subject to the charge, but the debt, as to him, was a real, not a personal one; and that his contract with the mortgagor was a mere contract of indemnity, which would have been implied, if not expressly made.

In *Billinghurst v. Walker*, (2 Bro. 604,) an estate was held by a lease for lives, subject to a charge of £2,200 to A. It was conveyed by the holder to B, subject to this charge, and subject to a charge of £900 to C; and B, in the indenture of conveyance to which A was party, covenanted to pay both charges. B paid the debt to C, and afterwards gave bond to pay A the interest of her claim for life, and the principal at his death. The lease having been repeatedly renewed. B died, having devised the estate to two of the defendants, and appointed two others of the defendants his executors. The charge being called in, and paid to a legatee of A, by the executors of B, the defendants were called on by the plaintiffs, pecuniary legatees of B, who were unpaid, to have £2,200 replaced by the devisees of the

estates in foreign countries; inasmuch as he would have no power to do any act, as administrator, in those countries.<sup>1</sup>

§ 7. In connection with the subject of this chapter, may properly be stated the rules of law, regulating the application of moneys paid by a party who is indebted upon mortgage, and

<sup>1</sup> Haven v. Foster, 9 Pick. 133-4. See Jennison v. Hapgood, 10 Pick. 77;

1 Lit. 818; Church v. Savage, 7 Cush. 440.

land, and paid over to them. Held, notwithstanding the covenant by B to pay the debt, contained in an instrument to which A, the holder of the debt, was a party, and the subsequent bond, altering and extending the original time of payment; the nature of the charge was not varied, but it remained primarily a debt upon the land; that, though B incurred a personal liability to the creditor, this did not subject his personal estate, because such intention did not appear; and the defendants were decreed to pay over the money.

Hence, it seems, to charge the personal estate, the assumption of the debt must be accompanied with evidence of an intention to assume it, as a *personal* debt, detached, as it were, from the land. 8 John. Cha. 256.

In *Mattheson v. Hardwicke*, (2 P.Wms. 664, n.) the testator devised land to A and B in fee, charged with the payment of debts and legacies. A paid all of them but one legacy, for which he gave his note, and died. It was admitted that he had paid off the other incumbrances, in order to relieve the land from them entirely. Held, the note was merely collateral security, and the land the primary fund for payment of the legacy.

The question in the latter cases seems to be, not whether the party acquiring the mortgaged or charged estate has made himself personally liable for the debt, but whether the land or the personal estate shall be treated as the primary fund for payment. The distinction is this: that, where one mortgages land as security for his own debt, the debt is the principal, and the mortgage merely collateral. But, on the other hand, where one acquires an estate already mortgaged, even though he personally assume the debt, and covenant to pay it, he is understood to become a debtor only in respect to the land, and his promise to be made on account of the land, which therefore is the primary fund for payment. The cases establishing

each of these propositions are said to be equally numerous and decisive. 8 John. Cha. 256-7.

In *Woods v. Huntingford*, (8 Ves. 128.) A had mortgaged land to raise money for his son, B. The land was afterwards conveyed, subject to the mortgage, to the use of B, who joined with his father in a covenant for payment of the money. The land was next reconveyed to A, who covenanted to discharge the mortgage, and afterwards borrowed a further sum from the mortgagee, and made a new mortgage for the whole debt. The question was between the heir and personal representative of A, which should pay the debt. Lord Alvanley, M. R., held, that, though the debt belonged primarily to B in equity, and to A and B together at law, A had made it his own; and that it was as strong a case as could exist, without express declaration. He was careful not to contradict in any degree the principle established in *Tweddell v. Tweddell*, which was a very governing case. In that case, there was no communication with the mortgagee, but only a covenant of indemnity; and the purchaser did not thereby personally assume the debt. 8 John. Cha. 258.

In *Butler v. Butler*, (5 Ves. 534.) the purchaser of an equity of redemption agreed with the vendor, to pay the mortgage debt of £2,000, and also £1,000 to the vendor; but there was no communication with the mortgagee. The authority of *Tweddell v. Tweddell* was recognized, as showing that the land was primarily chargeable with the debt, which did not become the debt of the purchaser, as a personal liability. Lord Alvanley collected from the decisions, that the purchaser of land, charged with a debt, by a mere covenant to indemnify the vendor, does not make the debt his own, *except in respect to the estate*; and the estate, not his personal property, must bear it. The purchaser might be circuitously liable to the vendor for his indemnity, but the decree would have been,

also upon other securities, to the same creditor; and likewise the appropriation of payments, with reference to the conflicting interests of successive mortgagees.

§ 8. Where a creditor, holding several debts, some of which are secured by mortgage and others not, joins them in one suit,

in such case, for a sale of the land. 8 John. Cha. 258.

In *Waring v. Ward*, (5 Ves. 670; 7, 332,) the testator, having purchased a mortgaged estate, borrowed a further sum, and gave a new bond and mortgage for it. Held, the debt should be paid from the personal estate, because the personal contract was primary, and the real contract only secondary. Lord Eldon, in giving judgment, remarked, that in general the personal estate was primarily liable, because the contract was primarily a personal contract, and the land bound only *in aid* of the personal obligation. That Lord Thurlow carried the doctrine so far as to hold, that, if the purchaser of an equity of redemption covenants to pay the mortgage debt, and also to raise the interest from four to five per cent.; yet, as between his real and personal representatives, even the additional interest is not primarily a charge upon the personal estate, being incident to the charge. That, even without any express covenant, the purchaser of an equity is bound to indemnify the vendor against any personal obligation, and pay a debt charged upon the land. That the case of *Tweddell v. Tweddell* proceeded upon the ground, that the debt due the mortgagee was never a debt *directly* from the purchaser. That, if Lord Thurlow was right upon the fact, the case was a clear authority, that the purchase of an equity will not make the mortgage debt the debt of the purchaser. That in his hands it is the debt of *the estate*, and a mortgage interest, as between his representatives.

In the *Earl of Oxford v. Lady Rodney*, (14 Ves. 417.) the testator purchased a mortgaged estate, paid the consideration remaining for the vendor beyond the mortgage, and then covenanted with the mortgagee to pay him the mortgage debt. After his death, upon the question whether the personal estate should go to pay the debt. Sir William Grant, M. R., remarked, that it was not very easy to reconcile the case of *Tweddell v. Tweddell* with the decision in *Parsons v. Freeman*, by Lord Hardwicke, that, where the

mortgage-money is taken as part of the price, the charge becomes a debt from the purchaser. But he admits that Lord Thurlow's principle was right, in a case where the contract of the purchaser gives to the mortgagee no *direct and immediate* right against himself, but is a mere contract of indemnity.

Chancellor Kent remarks upon these observations, (8 John. Cha. 260, 261,) that the mortgage debt is always *part of the price*, unless the vendor agrees to remove the incumbrance. By covenanting to indemnify the vendor, the purchaser takes the land *cum onere*, and the value of the incumbrance is of course deducted from the value of the land. This was the fact in many of the cases already cited.

From this series of cases, Chancellor Kent deduces the general principle, (8 John. Cha. 261, 262,) that a covenant by the purchaser of an equity of redemption, to indemnify the vendor against the mortgage, does not make the debt his own, so as to render it primarily chargeable upon his personal assets. To produce this effect, there must be a *direct* communication and contract with the mortgagee, and moreover some decided evidence of an intention to charge primarily the personal estate; as where the original contract is essentially changed, and lost or merged in the new and distinct engagement with the mortgagee; and the party shows that he meant to take upon himself the debt, absolutely and at all events, as a personal debt of his own.

Chancellor Kent then proceeds to a consideration of the older cases upon this subject, and concludes that they establish the same doctrine. Ibid. 263, 264.

In *Pockley v. Pockley*, (1 Vern. 86,) the testator had purchased an annuity out of mortgaged lands, and taken an assignment of the mortgage to protect his purchase. By his will, he directed that the mortgage debt should be paid from his personal estate. Lord Chancellor Nottingham decreed, that it should be thus paid, in consequence of this express direction.

Chancellor Kent remarks, (Ibid. 264,) that this case shows, that the purchase

and recovers judgment, and the execution is satisfied only in part; a court of equity will first apply the moneys received, to extinguish those parts of the claim which are not secured by the mortgage. And whenever the mortgage is enforced in a suit for foreclosure, upon the hearing in equity to ascertain the amount due, every consideration, as to the application of pay-

of land mortgaged did not at that day make the debt a personal one, but an express direction by will was required to have this effect. This view is confirmed by the observation of the counsel in the case, that the purchaser of an equity of redemption must hold the land subject to the debt, but was not personally liable, as for his own proper debt.

In *Coventry v. Coventry*, (9 Mod. 12; 2 P. Wms. 222; Str. 596,) A had a life estate, with power to settle a jointure upon his wife. He covenanted to settle lands accordingly, but died before doing it. The plaintiffs brought a bill against the heir for a specific execution. Held, the assets of A should not be applied to relieve the settled estate, because, wherever assets were thus applied, the debt originally charged the personalty. The covenant remained as a real lien on the settled estate, and the personal estate could not be applied, since there was no debt from which this estate was to be relieved.

In *Bagot v. Oughton*, (1 P. Wms. 847,) the ancestor mortgaged his estate, and died. His daughter and heir married; and the husband settled the estate by fine on himself and his wife, joined in an assignment of the mortgage, and covenanted to pay the money, and died. Lord Chancellor Cowper held, that the mortgage was not to be paid from the personal estate of the husband, the covenant being only an additional security to the lender, and not designed to change the nature of the debt.

In *Evelyn v. Evelyn*, (2 P. Wms. 659,) A mortgaged his land, and his son B afterwards covenanted with an assignee of the mortgage to pay the debt. Upon the death of A, B came to the estate by settlement, and died intestate. Held, B's personal estate should not be applied to the debt, for it was still A's debt, and B's covenant was merely a surety for the land.

In *Ancaster v. Mayer*, (1 Bro. 454,) Lord Thurlow was inclined to think, that, in the preceding case, B, by his covenant, had assumed the debt; and he supposed

the idea of the court was, that the covenant was by way of accommodating the charge, and not of making the debt his own. But Chancellor Kent considers the decision as conformable to those in other cases. 8 John. Cha. 266.

In *Leman v. Newnham*, (1 Ves. 57,) the same point was settled, where a son, inheriting a mortgaged estate, covenanted with the mortgagee to pay the debt.

In *Parsons v. Freeman*, (Ambl. 115; 2 P. Wms. 664 n.) Lord Hardwicke remarked that, where an ancestor has not charged himself personally with a mortgage debt, the heir shall take *cum onere*. So if one purchase the equity of redemption, with usual covenants to pay the mortgage, he knew of no decision to that effect, but was inclined to think the heir could not claim to have the land relieved. But where, as in that case, the purchaser agreed with the vendor to pay a part of the price to him, and the rest to the mortgagee, this made the debt his own, and the personal estate should be first applied to pay it.

Chancellor Kent supposes, (Ib. 266, 267,) that this case is imperfectly reported, no facts being given, and a very brief note of the opinion. He remarks that, as it stands, it is repugnant to most of the cases which preceded and followed it; and that Lord Hardwicke himself soon afterwards made a contrary decision. Thus, in *Lewis v. Nangle*, (Amb. 150; 2 P. Wms. 664. n.) a mortgaged estate came to a married woman. The husband borrowed money by bond and mortgage of the land, the wife joining, and the money being applied partly for his use and partly to pay her debts. The husband gave a bond, and covenanted to pay the whole mortgage debt. Lord Hardwicke held, according to the presumed intention of the parties, that the land was still the primary fund for payment, and that the husband was not bound to relieve it.

In *Forrester v. Leigh*, (Amb. 171; 2 P. Wms. 664, n.,) a testator purchased several mortgaged estates, and cove-



ments and partial satisfaction, will arise, which could be entertained in the ordinary course of a bill in equity. The case is one, not of voluntary payment, but of a satisfaction *pro tanto in invitum*, and the plaintiff may well be presumed to make the application, in the manner most beneficial to himself.<sup>1</sup>(a)

<sup>1</sup> Williams v. Reed, 8 Mas. 428-4. See Norton v. Soule, 2 Greenl. 341.

nanted to pay the debt due upon one of them. He purchased only a part of another of the estates, and he and his co-purchaser covenanted to pay their several shares, and to indemnify each other. Held, by Lord Hardwicke, as between legatees and devisees of the testator, the debts should be paid from the land.

In the case of the Earl of Belvidere v. Rochford, (6 Bro. Parl. 520,) A mortgaged to B, and afterwards sold to C. In the covenant of warranty in the latter deed, the mortgage was excepted, and the deed stated, that the mortgage debt was to be paid by C out of the purchase-money. An indorsement also acknowledged payment of a part of the price *on perfection of the deed*, and the rest *allowed on account of the mortgage*. C, by his will, gave a large personal estate to his wife, and also devised to her the mortgaged land for life, then to his oldest son George in fee, subject to debts and legacies, declaring that his wife should hold, free from incumbrance, and that George should pay the interest of the mortgage debt from other lands devised to him. After some legacies, he bequeathed the rest of his personal estate, after payment of all his just debts, and all his real estate, to George, whom he appointed his executor. George paid the interest, but not the principal, of the mortgage debt. His mother also released her interest in the land to him. He made a will, giving small annuities to his younger sons; the mortgaged land, according to his estate therein, to his youngest son William; and the principal part of his estate, being very large, to his eldest son Robert. After the death of George, Robert refused to pay the principal or interest of the mortgage debt, and, William being unable to pay it, the mortgage was sold, and afterwards the estate also, under a decree. William then filed a bill against the executors of the father (of whom Robert was one) and of the grandfather, to have the mortgage debt paid from the personal assets, in relief of the land. Lord

Chancellor Lifford decreed, that the mortgage debt was the debt of the grandfather at his death; and that his personal estate, which came first to the son and afterwards to the grandson, should be applied to pay it. The decree was affirmed in the House of Lords.

Chancellor Kent (8 John. Cha. 270, 271, 272) questions the authority of this case as a precedent, although a different decision would have operated with extreme hardship under the circumstances. "But hard cases often make bad precedents." He remarks, that it has been disregarded or rejected by Lord Thurlow, Lord Alvanley, Lord Eldon, and Sir William Grant; and also that no precise account is given of the reasons upon which the decision was founded, and it may perhaps be considered as turning upon the construction of a will, and its very special provisions.

The result of the cases, as stated by Chancellor Kent, is, (3 John. Cha. 272) that, as to wills, the testator may charge an incumbrance upon his personal assets, by express directions, or by disposition and language equivalent to such directions—as where a charge upon the land would oppose or defeat other provisions in the will. And, in order to charge the personal assets by acts done in his lifetime, he must become directly liable to the creditor, and also indicate in some way an intention to make the debt his own.

A mortgagor by his will ordered payment of his debts, and devised his residuary lands, including the land mortgaged, and all his residuary personal property, to his oldest son, who was the executor. The son dies intestate, the mortgage not being paid. The father and son leave sufficient personal property to pay the mortgage. Held; as between the heir and administrator of the son, the mortgaged estate was the primary fund for payment. Clarendon v. Barham, 1 Y. & Coll. Cha. 688.

(a) Bill in equity brought by A against B and C, to foreclose a mortgage, made

by B to A, January 1, 1817, to secure a note for \$1,116. C was a purchaser of B's right of redemption. C filed a cross bill, in which he alleged, that the mortgaged premises consisted of two distinct parcels of land, one of which was of much greater value than the other; that lot No. 1, being the less valuable parcel, had been sold to him in November, 1821, upon an execution against B and himself, as B's security, for \$175; and he prayed that the mortgage debt, due to A, might be apportioned upon No. 1 and No. 2, according to their respective value, and the former discharged from the mortgage, upon payment of the amount thus charged upon it; or that A might be decreed to accept his debt from C, and assign the mortgage to him. It appeared that in July, 1821, B sold No. 2, the purchaser having received a verbal promise from A to release his claim to it under the mortgage. In February, 1822, after C's purchase of No. 1, A, without consideration, accordingly made a release. Held, this was not a case, where C, as a party interested in one of two mortgaged estates, might, by the aid of equity, throw the burden upon the other, because A's interest would be thereby injured; but that C was entitled to relief, either by paying A his debt, and taking a conveyance of all the property still incumbered by the mortgage; or by paying such proportion of the debt, as the value of C's purchase bore to that of all the estate holden in security; that the court

were bound to regard the *equitable* situation of the property at the time of C's purchase, taking into view A's parol obligation to release a part of it, as any other course would be punishing him for the benevolent act of relinquishing a part of his security; and that C, not being a mere speculator or volunteer, but having purchased in consequence of his being bail for B, was entitled to the privilege, which A would otherwise have had, of electing between the two modes of relief above named. *Chittenden v. Barney*, 1 Verm. 28.

A mortgaged two estates to B, then one to C, then both to B, for the former, and also another debt; then both to D, with notice of the prior incumbrances. The property was not sufficient to pay all the claims, but No. 32 was sufficient to pay B. Held, as between C and D, the court would not require B to satisfy his whole claim from No. 32, so as to give C a prior lien upon the other land, but B's claim might be charged, rateably, upon both estates. *Barnes v. Raester*, 1 Y. & Coll. Cha. 401.

See further, as to the subject of this chapter, *Halliwell v. Tanner*, 1 Russ. & My. 688; *Goodburn v. Stevens*, 1 Md. Ch. 420; *Symons v. James*, 2 Y. & Coll. (N. S.) 801; *Mansell, &c.*, 1 Pars. 871; *Mason, &c.*, 1 Pars. 182; *Jones v. Bruce*, 11 Sim. 221; *Ouseley v. Anstruther*, 10 Beav. 458; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Blount v. Hipkins*, 7, 48; *Church v. Savage*, 7 Cush. 440.



## CHAPTER XXXV.

### SALES OF EQUITIES OF REDEMPTION ON EXECUTION.

1. Estate of mortgagor—universally liable to execution.
2. Effect of sale—mortgagor's right after sale.
3. Levy upon two executions.
4. Levy in case of disseisin.
5. No ouster of mortgagee.
6. Purchaser becomes seised.
7. Attachment of equity—mortgage discharged before sale.
- 8, 15. Redemption from purchaser—when, and on what terms.
16. Fraudulent mortgage; sale of equity void; right to redeem subsequent mortgages.

§ 1. THE right of a mortgagor to redeem his estate is almost universally liable, in the United States, to be taken upon execution by his creditors.(a) This liability seems to be a neces-

(a) In New Hampshire, equities of redemption have always been held liable to execution, and the statute of July 8, 1822, merely has the effect to change the mode of levy, from an extent to a sale. *Pritchard v. Brown*, 4 N. H. 402. So in Maryland, Kentucky, North Carolina and New York. *Waters v. Stuart*, 1 Caines' in Er. 47; 1 Ky. Rev. L. 653; *Pratt v. Lane*, 9 Cranch, 456; 1 N. C. Rev. Stat. 266. Whether in Indiana, *quære*. *Lasselle v. Barnett*, 1 Blackf. 153.

In Mississippi, it has been held that an equity of redemption is not subject to sale on execution, unless the whole debt has been paid. *Boarman v. Catlett*, 18 Sm. & M. 149; *Thornhill v. Gilmer*, 4, 153. See *Wolfe v. Dowell*, 18, 103; *Henry v. Fullerton*, *Ib.* 681; *Farmers', &c. v. Commercial, &c.*, 10 Ohio, 71; *Hunter v. Hunter*, *Walker*, 194; *State v. Lawson*, 1 Eng. 269; *Morris v. Way*, 16 Ohio, 469; *Whitaker v. Sumner*, 7 Pick. 551; *Pomeroy v. Winship*, 12 Mass. 514; *Atkins v. Sawyer*, 1 Pick. 351; *Thayer v. Felt*, 4 Pick. 354; *Commissioners, &c. v. Hart*, 1 Brev. 492; *State v. Laval*, 4 McC. 336; *Punderson v. Brown*, 1 Day, 93; *Hinman v. Leaven-*

*worth*, 2 Conn. 244; *Scripture v. Johnson*, 8, 211; *Kelly v. Burnham*, 9 N. H. 20; *Swift v. Dean*, 11 Verm. 323; *Naples v. Minier*, 8 Penn. 475; *Roberts v. Williams*, 5 Whart. 170; *Tower's, &c.*, 9 W. & S. 108; *Kimball v. Smith*, 21 Verm. 449; *Jones v. Thomas*, 4 Ired. 12; *Allen v. Parish*, 3 Ham. 526; *Dougherty v. Lithicum*, 8 Dana, 194; *Trudear v. McVicar*, 1 La. Ann. R. 426; *Governor v. Powell*, 9 Ala. 88; *Steward v. Allen*, 5 Greenl. 103; *Warren v. Childs*, 11 Mass. 222; *White v. Bond*, 16 Mass. 400; *Jenks v. Ward*, 4 Met. 404; *Brown v. Worcester, &c.*, 8, 47; *Slocum v. Catlin*, 22 Verm. 187; *Franklin, &c. v. Blossom*, 10 Shepl. 546; *Swift v. Dean*, 11 Verm. 323; *Kimball v. Smith*, 21 Verm. 449; *Houghton v. Bartholomew*, 10 Met. 188; *Phelps v. Butler*, 2 Ohio, 831; *Ely v. McGuire*, *Ib.* 380; *Davis v. Evans*, 5 Ired. 525; *Curtis v. Root*, 20 Ill. 53; *Knight v. Fair*, 9 Cal. 117; *Perry v. Hayward*, 12 Cush. 844; *Pratt v. Skolfield*, 45 Maine, 386; *Harwell v. Fitts*, 20 Geo. 723; *Lenox v. Lotrebe*, 1 Hemp. 251; *Thompson v. Parker*, 2 Jones Eqn. 475; *Reed v. Diven*, 7 Ind. 189; *Wootton v. Wheeler*, 22 Tex. 838; *Crocker v. Frazier*, 52 Maine, 405.

sary incident or consequence of the principle, already considered at length, that the mortgagor, until foreclosure, and as to third persons, remains *the owner of the land*, while the mortgagee has a mere *lien*, which is not subject to legal process. The mortgagor's actual possession is unnecessary to such liability.<sup>1</sup> The provisions of law in the several States, relating to the seizure and sale of equities of redemption upon execution, will be particularly stated hereafter. (Vol. II.) A few general principles on the subject are stated in this chapter.

§ 2. In Massachusetts, by statute 1783, ch. 57, an equity of redemption might be *set off*, as land subject to incumbrance, to the judgment creditor, and the debtor might redeem the right in equity by paying the debt. By a later statute, (1798, c. 77,) a right in equity might be *sold*, and the proceeds applied to payment of the debt; and the debtor was allowed three years to redeem. The provisions of *the Revised Statutes* upon the subject will be stated hereafter. The former statutory rules are stated by the court,<sup>2</sup> as above mentioned; and are referred to in this place, not because now in force, but merely as introductory to other observations of the court in the same case, which seem to be of permanent applicability, and probably are adopted, in substance, in all the States.

§ 3. Where an equity of redemption is taken on execution, the whole estate of the debtor is taken from him. A mortgagor is considered as the *owner*, against all but the mortgagee. But a debtor, after such levy, has not, strictly speaking, any estate or interest in the land. He is not a freeholder. He has only a *possibility*, or right to an estate, on payment of a certain sum of money. The law presumes that he has received the full value of his estate; and the right of redemption, still reserved to him, is a mere personal privilege to keep his own land, if he does not wish to part with it at its full value. He is under no obligation to redeem. There is no reciprocity between him and the creditor. The creditor cannot demand the money, but is merely bound to convey the land, on receiving payment in a

<sup>1</sup> *Watkins v. Gregory*, 6 Blackf. 113.

<sup>2</sup> *Kelly v. Beers*, 12 Mass. 388-9.

certain time. Upon these grounds, the right in question was held not liable to be again taken upon execution.<sup>1</sup>(a) The court, in their opinion, remark, that the legislature might have made it thus liable; but have not done so, probably because it was considered of no value. *Real estate mortgaged* is made subject to execution; because land is usually mortgaged for less than its value, and the right of redemption, therefore, is a valuable interest. Nor can it be said that the debtor, after such sale, still owns his former right of redemption, but subject to a new lien by the purchaser. This is not the language of the statutes. His whole estate is taken from him. His remaining right is like a right of *pre-emption*, as if the purchaser had covenanted to convey to him at a certain price, paid in a certain time.<sup>1</sup>(b) But where the same equity of redemption is simultaneously attached by two creditors, both executions may be levied upon it, and each creditor will be entitled to a moiety of the proceeds, without reference to the relative amount of the debts. They hold, not in shares or proportion, but *per mie et per tout*. But as the attachment constitutes merely a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other.<sup>2</sup>(c)

<sup>1</sup> 12 Mass. 889-90.

<sup>2</sup> Sigourney v. Eaton, 14 Pick. 414.

(a) But, if mortgaged anew, the new equity of redemption may be taken. *Reed v. Bigelow*, 5 Pick. 281. In Kentucky, the debtor may validly convey his interest, after an execution sale of his equity of redemption. *Hibbet v. Spurrer*, 3 B. Monr. 470. In Maine, such interest is liable to be taken on execution. *Me. Rev. St.* 390.

(b) The following case further illustrates the same general principle:

A made a mortgage of certain land. August 8, 1811, his equity of redemption was sold on execution to B. Afterwards, on the same day, another deputy sheriff undertook to sell the same right, upon another execution, to C, and gave him a deed of it. August 18, the same right was sold and conveyed upon a third execution to D. D brings a real action for the land against A. Held, no title had vested in D. *Kelly v. Beers*, 12 Mass. 887.

(c) In levying executions, where simultaneous attachments have been made, an officer may seize the whole estate, but should only return a moiety, in case of two such executions, upon either of the executions. *Perry v. Adams*, Mass. Law Rep. Jan. 1842, p. 854. Where land is simultaneously attached upon two writs, and one of the attaching creditors levies upon the whole land by metes and bounds, the other may levy upon an undivided moiety or an undivided share, not exceeding such moiety, sufficient to satisfy his execution. *Durant v. Johnson*, 19 Pick. 544. Two executions were simultaneously levied; one upon the whole land by metes and bounds, the other upon fourteen-fifteenths of one undivided half of it. Held, the latter made the execution creditor a tenant in common with the former creditor of the whole, and not a moiety only, of the fourteen-

§ 4. It has been held, that a right in equity to redeem, being a mere *incorporeal hereditament*, will pass by sale on execution, though the land have been long in the possession of a disseisor.<sup>1</sup> In an earlier case, however, or a previous hearing of the same case, it was remarked, that an execution purchaser might maintain a real action for the land against a stranger, *unless the latter had disseised the mortgagor* before the sale.<sup>2</sup> The true principle upon this subject, and one which seems to reconcile the apparent contradiction between the former cases, has been settled in a case long subsequent to both of them.<sup>3</sup> It is here held, that, if the mortgagor is seised, at the time of the sale on execution, the sheriff's deed conveys to the purchaser the mortgagor's *actual seisin*, precisely as a deed by the mortgagor himself would have done; but if the mortgagor is not seised, then the sheriff's deed passes not a seisin, but *a right of entry*. In the latter case, it seems, the deed of the sheriff is not invalid, on account of an adverse possession by a stranger; (a) because, if this were the case, creditors would have no power to take an equity of redemption for their debts, where the mortgagor is disseised. The entry of the sheriff could not purge the disseisin, no entry being necessary to a sale. The judgment creditor could not enter, having no right before the levy; and the purchaser has no interest till after the sale. The mortgagor could not be expected to enter, for the purpose of having the land taken from him by execution. Hence, the sheriff's deed must pass *a seisin in law*. The purchaser may enter, and then

<sup>1</sup> Willington v. Gale, 18 Mass. 483.

<sup>2</sup> *Ib.*, 7 Mass. 189.

<sup>3</sup> Poignard v. Smith, 6 Pick. 172. See secs. 10, 11.

fifteenths of an undivided half. *Perry v. Adams*, 8 Met. 51.

It has been held, that, where an equity of redemption is *successively* attached by different creditors, a sale on execution by the second, before the first has recovered judgment, is void against all the others; and the third acquires the rights of the second. *Pease v. Bancroft*, 5 Met. 90 (But see Mass. Rev. Sts., chap 99, secs. 84, 85.) An officer may legally seize an equity of redemption on two executions, sell it on one, satisfy this

one with a part of the proceeds, and apply the balance to the other. *Bacon v. Leonard*, 4 Pick. 277. If an equity is taken by different officers, and the proceeds are more than sufficient to satisfy the executions in the hands of the officer selling, he is bound to pay the surplus to the other officers. *Denny v. Hamilton*, 16 Mass. 402. See *Forbush v. Willard*, 16 Pick. 42; *Littlefield v. Kimball*, 5 Shepl. 318; *Wade v. Merwin*, 11 Pick. 280.

(a) See Mass. Rev. St. 463.

bring a writ of entry upon his own seisin; or, perhaps, before entry, he might bring an action, founded upon the seisin of the mortgagor, to whose rights he has succeeded.

§ 5. The sale on execution, of a right in equity to redeem, will not operate as an *ouster* of the mortgagee, who has previously entered under his mortgage. Such sale is effectual in passing to the purchaser all the rights of the mortgagor; and an entry for the purpose of seizing and levying upon such right is no trespass. It is consistent with the rights of the mortgagee. But, for any subsequent entry, the mortgagee may maintain trespass against the purchaser, without a re-entry.<sup>1(a)</sup>

§ 6. Where a statute provides, that the sheriff's deed of a right in equity shall pass the title, in the same manner as a deed executed by the debtor himself; such purchaser becomes seised except as against the mortgagee, and may maintain an action for the land, without actual entry.<sup>2</sup> So, where the purchaser of an equity, sold upon execution, had tendered to the holder of the mortgage the amount due upon it; held, he had acquired a seisin, sufficient to sustain an action for the land against the mortgagor.<sup>3</sup>

§ 7. The form, in which executions are to be levied in the several States upon equities of redemption, will be particularly stated in another part of this work. Equities being subject to *attachment* as well as execution, in those States where this method of securing debts is adopted, the question has arisen, how an execution is to be levied, where a mortgage is discharged after attachment, and before sale.(b) And it has been held, that the mode of levy is to be determined by the situation of the mortgagor's estate at the time of attachment, and, if at that time the mortgage was extinguished, though before the levy a new mort-

<sup>1</sup> Shepard v. Pratt, 15 Pick. 82.

<sup>2</sup> Willington v. Gale, 7 Mass. 188.

<sup>3</sup> Porter v. Millett, 9 Mass. 101. See sec. 4.

(a) It has been held in Kentucky, that an equity of redemption cannot legally be sold, pending a suit to foreclose the mortgage, and if sold, though upon an execution prior to such suit, the mort-

gagee's title has priority. Addison v. Crow, 5 Dana, 279.

(b) In Maine, where an equity of redemption is attached, the creditor may require the mortgagee to state an account of his claim. Me. Rev. St. 584.

gage was made, a levy as upon an equity of redemption is void.<sup>(a)</sup> From this decision, it would seem to be a necessary inference, that the converse of the proposition must also be true; and, if the land is subject to mortgage at the time of attachment, but the mortgage is extinguished before the sale, that the levy cannot be made by metes and bounds, as upon a legal estate, but only by the sale of an equity of redemption. But, in a later case, a contrary doctrine seems to be advanced. It is said, that the attachment merely fixes a *lien* on the premises, without transferring the title or affecting the nature of the estate. The mode of levy, the act by which a title is to be transferred, it would seem, must be determined by the nature of the debtor's title at the time of the levy, and not at the time of the attachment. The equity of redemption is in fact gone, and it would seem to be absurd to pursue a mode solely applicable to a subsisting equitable estate, when such estate no longer exists. These remarks are made, without reference to any statutory provision.

(a) A mortgaged to B on the 15th of December, 1806, to secure \$500, and, on the 29th of April, 1807, mortgaged the same land to B, to secure \$300. On the 18th of July, 1807, A conveyed the land to C, subject to the mortgages. On the 28d of July, 1807, C mortgaged the land to B, to secure the sums of \$1,500 and \$837. On the 24th of July, 1807, B discharged A's mortgages, acknowledging full satisfaction. The sums secured by A's mortgages made a part of those secured by C's mortgage. On the 18th of May, 1807, D, a creditor of A, caused A's estate in the land mortgaged to be attached; and, in December, 1807, levied his execution upon A's equity of redemption, which was sold by the officer to E. Neither D nor the officer knew the fact, that B had discharged the mortgages made to him by A. E brings an action against B to recover the land. Held, if at the time of the sale on execution there was no subsisting incumbrance except the mortgage by C, which arose after the attachment, then the levy was void, being made in the form prescribed in relation to equities of redemption; and, if B's mortgage was still in force, then the purchaser's proper remedy was by a bill in equity to redeem. B either still continued the mortgagee, notwithstanding

the discharge, or the assignee of C, for whose benefit the mortgages were still to be considered in force. And E could not be held to gain an equitable title by his purchase, and at the same time treat the mortgages as extinguished, without any expense to him. Upon the possible supposition, that the mortgage had been redeemed by A, E could make no title except upon the ground that the incumbrances still subsisted for A's benefit, and to secure to him the money paid for E's use. E came in the right of A, and could not claim against the mortgages to B, who, if E had any title, was a mortgagee in possession, or the assignee of a subsisting mortgage, originally made to himself; and, as to E, claimed under mortgages not redeemed or discharged, and subject to which his title was acquired. As a general rule, it may perhaps be said, that the purchaser of an equity of redemption can aver no seisin or title against any other person than the execution debtor, or his immediate tenants or assigns. Hence, though E might recover against C, he could not recover against B, having no legal seisin or title, till B's mortgage was redeemed. *Forster v. Mellen*, 10 Mass. 421. See *Bryant v. Morrison*, 44 N. H. 288.



but the court consider the case as provided for by an express statute.<sup>1</sup>

§ 8. The lien, created by the attachment of an equity of redemption, may extend beyond the amount of the judgment recovered in the suit, and cover the whole amount for which the equity is sold upon execution. Thus, where the mortgagor, after such attachment, conveys his right in equity to a third person, and the equity is afterwards sold on execution, for a much larger sum than the amount of the execution; as the surplus belonged to the mortgagor, not to the purchaser from him, the latter cannot redeem, without paying the whole purchase-money paid to the sheriff.<sup>2</sup>

§ 9. A mortgage, made to defraud creditors, is as to them void, and creates no equity of redemption, liable to be taken on execution. In authorizing the sale of an equity of redemption, the legislature contemplate the existence of a *valid* mortgage. Moreover, a creditor may levy upon the land of his debtor, and thereby acquire *as good title as the latter had therein*; and, *in regard to his creditors*, a fraudulent grantor has a perfect title. Nor can one creditor, by attaching an equity of redemption, and thereby recognizing the mortgage as valid, deprive others of the right to treat it as void, by seizing the land itself.(a) Thus

<sup>1</sup> Freeman v. McGaw, 15 Pick. 83-84. See Mass. Rev. St. 550; Litchfield v. Cudworth, 15 Pick. 23; Mechanics, &c. v. Williams, 17, 488; N. H. Rev. St. 369; Pillsbury v. Smith, 25 Maine, 427; Good-

all v. Rowell, 15 N. H. 572; Abbott v. Sturtevant, 30 Maine, 40; Dougherty v. Smithcum, 8 Dana, 194.

<sup>2</sup> Gilbert v. Merrill, 8 Greenl. 295.

(a) An execution purchaser of an equity of redemption, who receives a deed from the officer for the benefit of the creditor, cannot dispute the mortgage as fraudulent, and on that ground claim the land as unincumbered.

The court remark, it was at the option of the creditor to treat the mortgage as invalid, and set off the estate by appraisal, or to treat it as valid, and sell the right of redemption. But he could not treat the mortgage as subsisting, so as to warrant a sale, and then, when he had taken his deed, treat the mortgage as a nullity, and claim the estate in fee. The creditor, by treating it as a subsisting

mortgage, is afterwards estopped to deny its existence; and the demandant, purchasing with notice for his use, is also estopped. And even if he had purchased without notice, having purchased the premises as *an equity of redemption*, which could not exist without a subsisting mortgage, he would be as much estopped to contest the mortgage as if it had been recited in his deed. Russell v. Dudley, 3 Met. 147.

But where A. a second mortgagee, took an assignment of the first mortgage, and a release of the equity of redemption from B, the mortgagor, and afterwards a creditor of B levied an execution upon



A mortgaged land to defraud his creditors. B, one of the creditors, attached A's equity of redemption. Pending this attachment, C, another creditor, extended an execution upon the land, treating it as unincumbered property. Afterwards, A's equity of redemption was sold on execution, and in completion of the attachment, to an innocent purchaser, D. In an action to recover the land, brought by C against D; held, the sheriff's sale was void, no equity of redemption having been created by the mortgage, and that C had a good title to the land. If D had claimed by a direct purchase from A himself, he would have taken the land free of incumbrance, as an innocent purchaser. But, claiming by a *statute title*, he was bound to prove everything necessary to constitute such title.<sup>1</sup>

§ 9 a. Where an equity of redemption is seized on execution, and the mortgage debt is then paid before sale, there may still be a sale of the equity, the proceedings having *relation* to the seizure.<sup>2</sup>

§ 9 b. In a late case it is held, that a levy as upon an equity after payment of the mortgage is void, though neither the creditor nor the officer had notice of such payment.<sup>3</sup>

§ 10. Where an execution is *extended* upon mortgaged real estate, and in the appraisal no deduction made for the mortgage; the creditor acquires a good title as against the debtor and those claiming under him.<sup>4</sup> But it has been held, that, to render such extent valid, it must distinctly appear in the return that the mortgage was disregarded in the appraisal.<sup>5</sup> An appraisal of the *estate* necessarily implies that no deduction was made for the mortgage.<sup>6</sup>

§ 11. The right of redeeming subsequent mortgages may be taken in execution.

<sup>1</sup> Bullard v. Hinkley, 6 Greenl. 289. See chap. 36; Perry v. Hayward, 12 Cush. 344; Verry v. Richardson, 5 Allen, 107; Gerrish v. Mace, 9 Gray, 285.

<sup>2</sup> Bagley v. Bailey, 4 Shepl. 151.

<sup>3</sup> Grover v. Flye, 5 Allen, 548.

<sup>4</sup> White v. Bond, 16 Mass. 400; Hovey v. Bartlett, 34 N. H. 278.

<sup>5</sup> Litchfield v. Cudworth, 15 Pick. 23.

<sup>6</sup> Mechanics', &c. v. Williams, 17 Pick. 488. See Jenks v. Ward, 4 Met. 404; Brown v. Worcester, &c., 8 Ib. 47; also Mass. Rev. Sts. 468-9, and Mass. Gen. Sts., providing that an equity may be set off, deducting the mortgage.

his equity and purchased it himself; held, in support of his title, such creditor might show that A obtained his mortgage and

release by fraud upon B, though B had not attempted to avoid them. Van Dusen v. Frink, 15 Pick. 449.

§ 12. Thus, the creditor of a mortgagor having attached an equity of redemption, the debtor made another mortgage, after which all his interest in the land was attached by another creditor. The equity first attached was then sold on execution, which was satisfied by a part of the proceeds; and, before the officer had paid over the surplus, the execution of the second creditor was delivered to him. Held, the surplus belonged to the second mortgagee; and the second creditor might levy on the right of redeeming the second mortgage.<sup>1</sup>

§ 13. In Massachusetts, if the mortgagor does not within a year redeem his equity of redemption, sold on execution, his whole interest is lost, and he cannot redeem the mortgage, though the purchaser does not redeem.<sup>2(a)</sup>

§ 14. Where rights in equity, of redeeming distinct parcels of land from several mortgages, are sold upon one execution, they ought to be sold separately, and not for a gross sum; for the debtor has a right to redeem one without redeeming others. But a third person cannot object to a joint sale.<sup>3(b)</sup>

§ 15. After three years from registration of a foreclosure certificate, a creditor of the mortgagor and execution purchaser of the equity of redemption cannot contest the mortgage as fraudulent against creditors, or the foreclosure as fraudulent for want of notice to him.<sup>4</sup>

<sup>1</sup> Clark v. Austin, 2 Pick. 528.

<sup>2</sup> Ingersoll v. Sawyer, 2 Pick. 276.

<sup>3</sup> Fletcher v. Stone, 8 Pick. 250.

<sup>4</sup> Taylor v. Dean, 7 Allen, 251.

(a) Under the Revised Statutes, ch. 78, secs. 44, 46, if the purchaser refuse to release the equity upon a tender by the debtor or his assignee of the sum due him therefor, a writ of entry lies to recover the equity. Hooker v. Hudson, 19 Pick. 467.

A subsequent demand for the money, made by the purchaser, but *after dark*, is unseasonable, and does not avoid the tender. Tucker v. Buffum, 16 Pick. 46. In Maine, where the execution purchaser redeems the mortgage, and within the year the mortgagor redeems the equity, the latter may redeem the mortgage from the former as he might from the mortgagee. Me. Rev. St. 557.

(b) The right to redeem an equity of redemption, sold on execution, is validly

assigned in equity by a common quit-claim deed, which remises, releases and quit-claims the party's right and interest in and to the mortgaged premises, *habendum* to the grantee, his heirs and assigns. Tucker v. Buffum, 16 Pick. 46. Where an equity is sold on execution, the purchaser takes the place of the debtor, and holds subject to all incumbrances. Crow v. Tinsley, 6 Dana, 402. As to the recording of the officer's deed, see Houghton v. Bartholomew, 10 Met. 188; Pratt v. Harvey, 4 Gray, 486; Rackleff v. Norton, 1 Appl. 274. As to *estoppel* in case of an execution sale, see Phelps v. Butler, 2 Ohio, 881; Davis v. Evans, 5 Ired. 525; Dougherty v. Linthicum, 8 Dana, 194; Goodall v. Rowell, 15 N. H. 572.

## CHAPTER XXXVI.

## MORTGAGE. WHEN VOID OR VOIDABLE.

1. General remarks.
2. Usury.
7. Infancy.

8. Eviction.
9. Want of consideration.
- 9 a. Fraud.

§ 1. In many respects, a mortgage is not distinguishable, with reference to the circumstances which render it void or voidable, from an absolute deed.<sup>(a)</sup> The extensive title of *Deed* will be considered hereafter, (see Vol. II,) and therefore the subject will be very briefly noticed in the present connection.

§ 2. Upon a bill for foreclosure, a mortgage may be declared void for *usury*.<sup>1</sup>

§ 3. If a lender seeks *to enforce his securities* in equity against the mortgagor or his assignee, usury is a defence, and, if it be

<sup>1</sup> De Butts v. Bacon, 6 Cranch, 252. See Richards v. Worthley, 5 Wis. 78; Vickery v. Dickson, 35 Barb. 96; Baxter v. M'Intire, 18 Gray, 168; Lockwood v. Mitchell, 7 Ohio (N. S.), 887; Harting v. Goldsmith, 1 Allen, 145; Heath v. Page, 48 Penn. 180; M'Craney v. Alden, 46 Barb. 272; Soule v. The Union, &c., 45 Barb. 111; Donnington v. Meeker, 8 Stockt. 362; Drury v. Morse, 8 Allen, 445; Cunningham v. Davis, 7 Ired. Equ. 5; Ballinger v. Edwards, 4 Ib. 449; Dyer v. Lincoln, 11 Verm. 300; Pearsall v. Kingsland, 8 Edw. 195; Hodgkinson v. Wyatt, 4 Ad. & Ell. (N.) 749; Blackburn v. Walwick, 2 Y. & Coll. 92; Morris v. Way, 16 Ohio, 469; N. Y., &c. v. American, &c., 8 Sandf. Ch. 215; Mumford v. American, &c., 4 Comst. 463; Mitchell v. Preston, 5 Day, 100; Tyson

v. Rickard, 8 Harr. & J. 109; Morgan v. Tipton, 8 McL. 389; Lane v. Losee, 2 Barb. 56; Miller v. Hull, 4 Denio, 104; Robertson v. Campbell, 2 Call, 354; Thomes v. Cleaves, 7 Mass. 361; Jackson v. Packard, 6 Wend. 415; Hodgkinson v. Wyatt, 4 Ad. & Ell. (N. S.) 749; Bush v. Livingston, 2 Caines' Cas. in Error, 66; De Butts v. Bacon, 6 Cranch, 252; Nichols v. Cosset, 1 Root, 294; Sherman v. Gassett, 4 Gilm. 521; Righter v. Statt, 8 Sandf. Ch. 608; Cotheal v. Blydenburgh, 1 Halst. Ch. 17, 681; Gambrill v. Rose, 8 Blackf. 140; Brooks v. Avery, 4 Comst. 225; Fox v. Lipe, 24 Wend. 164; Stoney v. American, &c., 11 Paige, 655; Neefus v. Vanderveer, 8 Sandf. Ch. 268; Jackson v. Colden, 4 Cow. 266; Warner v. Gouverneur, 1 Barb. 86.

(a) In Massachusetts, mortgages made for a gambling consideration are void; and, when declared void, the lands pass

to the heirs of the mortgagor. Mass. Rev. Sts. 887. See Gen. Sts.

made out, the court will order that the securities be delivered up and cancelled. The distinction is made, that, if a borrower of money upon usurious interest seeks to have the aid of a Court of Equity in cancelling or procuring the instrument to be delivered up, the Court will not interfere in his favor, unless upon the terms, that he will pay the lender what is really and *bona fide* due to him. But if the lender comes into Equity, to assert and enforce his own claim, under the instrument, there the borrower may show the invalidity of the instrument, and have a decree in his favor and a dismissal of the bill, without paying the lender anything; for the Court will never assist a wrongdoer in effectuating his wrongful and illegal purpose.<sup>1(a)</sup> And it is held, that parol evidence is admissible, to prove a deed absolute in form to have been given as security for usurious interest.<sup>2</sup> Where a mortgage contains a *power of sale*, under which the mortgagee is proceeding to foreclose, without the aid of a court of equity, and *the borrower files a bill for relief*; he has been held to pay so much as is lawfully due, before relief will be granted.<sup>3</sup> And a vendee under such power has the better equity, and will acquire a good title, though the mortgage is usurious. But if the mortgagee himself purchase through an agent, the mortgagor may recover the land.<sup>4</sup> Usury between the mortgagee and his assignee is no defence for the mortgagor.<sup>5</sup> And where a mortgage is assigned for the amount due upon it, and the mortgagor agrees to repay the assignee a sum exceeding this amount and legal interest, he cannot avoid the mortgage upon this ground, but will be required to pay only the lawful sum due.<sup>6</sup>

<sup>1</sup> 1 Story on Equ. (8d ed.) 77.

<sup>2</sup> Stapp v. Phelps, 7 Dana, 300; Cook v. Colver, 2 B. Mour. 72. But see 18 Mass. 448; 6 Greenl. 303.

<sup>3</sup> Fanning v. Dunham, 5 John. Ch. 122; Wilson v. Hardesty, 1 Md. Ch. 66.

<sup>4</sup> Jackson v. Henry, 10 John. 185.

<sup>5</sup> Jackson v. Dominick, 14 John. 435.

<sup>6</sup> Bush v. Livingston. 2 Caines' Cas. in E. 66.

(a) In Pennsylvania, a usurious contract is not absolutely void. Hence a mortgagee, in such case, may recover the amount loaned, with legal interest. Turner v. Calvert, 12 S. & R. 46; Wycoff v. Longhead, 2 Dall. 92. In Massa-

chusetts, it has been suggested as a doubtful point, whether, in a bill to redeem, the plaintiff can deduct *penalties for usury* from the mortgage debt. Robinson v. Guild, 12 Met. 328.

§ 4. A mortgage, made upon usurious consideration, is held void only as against the mortgagor, and those lawfully holding under him. Thus it is good in the hands of a lessee of the assignee of the mortgage. A purchaser of the equity of redemption, subject to payment of the mortgage, cannot impeach it; and it has been doubted by high authority, whether the purchaser of an equity of redemption can object, that the mortgage was made upon usurious consideration, or, as plaintiff, can have any relief in equity, without offering to pay the amount due.<sup>(a)</sup> But on the other hand it is held that a purchaser from the mortgagor may make this defence against an assignee of the mortgage. So a second mortgagee or a judgment creditor of the mortgagor.<sup>1</sup>

§ 5. If a judgment has been recovered upon a usurious contract secured by mortgage, and a new mortgage given, the mortgagor cannot resist a suit on the latter, upon the ground of usury.<sup>2</sup> So where a mortgagee sues upon a mortgage, and the mortgagor defends upon the ground of usury, but fails, and afterwards conveys his right in the land; the assignee cannot maintain ejectment against the mortgagee upon this ground, being estopped by the former judgment.<sup>3</sup>

§ 6. It is said, that, after foreclosure by entry and continued possession, the mortgagee has a perfect title to the land, though the mortgage debt was usurious.<sup>4</sup> But a mortgagor shall always be allowed to avail himself of the defence of usury, unless he has been guilty of *laches*. Thus where an equity of redemption was sold on execution, and after a year the purchaser took an assignment of the mortgage, the mortgagor having always re-

<sup>1</sup> Gordon v. Hobart, 2 Sumn. 401; Green v. Tyler, 89 Penn. 361; Green v. Kemp, 18 Mass. 515; Bridge v. Hubbard, 15, 108; Jackson v. Bowen, 7 Cow. 18; Mechanics, &c. v. Edwards, 1 Barb. 27; Morris v. Floyd, 5 Barb. 180; Thomaston, &c. v. Stimpson, 8 Shepl. 195; Doub v. Barnes, 1 Md. Ch. 127; Brooks v. Avery, 4 Comst. 225; Helfield v. Newton, 8 Sandf. Ch. 564; Briggs v. Sholes, 15 N. H. 52; Post v. Dart, 8 Paige, 639; Brolasky v. Miller, 1 Stockt. 807. See Waterman v. Curtis, 26 Conn. 241.

<sup>2</sup> Thacher v. Gammon, 12 Mass. 268; Mumford v. American, &c., 4 Comst. 468.

<sup>3</sup> Adams v. Barnes, 17 Mass. 365. See Grow v. Albee, 19 Verm. 540. Churchill v. Cole, 32 Verm. 98; McMurray v. Connor, 2 Allen, 205; Bush v. Cooper, 26 Miss. 599; Vinton v. King, 4 Allen, 564.

<sup>4</sup> Flint v. Sheldon, 13 Mass. 450. See Bard v. Fort, 8 Barb. Ch. 682.

(a) In North Carolina, usury cannot be set up as against a *bona fide* purchaser of land. N. C. St. 1842-48. 107.

tained possession; held, the latter might set up usury as a defence to an action of ejectment for the land.<sup>1</sup>

§ 7. The mortgage of *an infant* is *voidable* only, not void. Hence, where an infant mortgaged his land, and after coming of age made a deed of the land, recognizing and subject to the mortgage; the latter deed was held to be a confirmation of the former one, and the mortgagee recovered judgment against the second grantee.<sup>2</sup> So where A conveyed land to B, an infant, at the same time taking back a mortgage for the purchase-money; and B occupied after coming of age, and conveyed with warranty to C: held, both the occupancy and conveyance amounted to a confirmation of the mortgage.<sup>3</sup>

§ 8. To an action of ejectment by a mortgagee against the mortgagor, it is a good defence, that the latter has been *evicted* from the land by a paramount title; notwithstanding he has become a purchaser under such title, and continues to occupy the land.<sup>4</sup> But in case of a mortgage, in consideration of land purchased by the mortgagor, the title to a part of which failed, but without fraud on the part of the grantor; the mortgagor having entered, and the conveyance containing covenants of warranty: held, the facts furnished no defence to a bill for foreclosure.<sup>5</sup>

§ 9. It has been held, that *want of consideration*, for the note secured by a mortgage, is a good defence to a suit for foreclosure, brought by the mortgagee's administrator, even though the mortgage was given to defraud creditors. So where the consideration is less than the amount of the mortgage, the decree shall be rendered only for the real amount of such consideration. And the fact may be proved by admissions of the mortgagee.<sup>6</sup> So fraud upon a mortgagor avoids the mortgage, and a bill in

<sup>1</sup> Richardson v. Field, 6 Greenl. 85. See Hyland v. Stafford, 10 Barb. 558.

<sup>2</sup> President v. Chamberlin, 15 Mass. 220.

<sup>3</sup> Hubbard v. Cummings, 1 Greenl. 11.

<sup>4</sup> Jackson v. Marsh, 5 Wend. 44; Conklin v. Bowman, 7 Ind. 533.

<sup>5</sup> Edwards v. Bodine, 28 Wend. 109. See Withers v. Morrell, 8 Edw. 560; Bumpus v. Platner, 1 John. Cha. 218; Davison v. DeFreest, 2 Sandf. Cha. 456; Van Waggoner v. M'Ewen, 1 Green, Cha. 412; Jaques v. Elsler, 8, 462; Nat-

chez, v. Minor, 9 S. & M. 544; Banks v. Walker, 2 Sandf. Ch. 344; Johnson v. Gene, 2 John. Cha. 546; Bradford v. Potts, 9 Barr, 87. But see Van Riper v. Williams, 1 Green. Ch. 407. See also Trask v. Wilder, 50 Maine, 450; Smallwood v. Lewin, 2 Beal. 128.

<sup>6</sup> Wease v. Pierce, 24 Pick. 141; Abbe v. Newton, 19 Conn. 20; Mackey v. Brownfield, 18 S. & R. 289; Rood v. Winslow, 1 Dougl. (Mich.) 68. See Gilleland v. Failing, 5 Denio, 808.

equity lies to set aside a fraudulent mortgage, though the plaintiff is in possession, and might maintain it against the mortgagee at law. But the fraud must be committed by the mortgagee or his agents, or with his knowledge at the time.<sup>1</sup>

§ 9 a. It will be seen hereafter, that all deeds made to defraud creditors are void. There is no difference, in this respect, between mortgages and absolute deeds; though a distinction has been sometimes taken, with respect to this ground of avoiding a mortgage, between a suit at law and a bill in equity.<sup>2</sup>

§ 9 b. A promise by a mortgagee, to creditors of the mortgagor, to surrender his title, if they will take another mortgage from the mortgagor, and give him time of payment, is *prima facie* evidence that the first mortgage was not *bona fide*.<sup>3</sup>

§ 9 c. A conveyance from A to B is sufficient consideration for a mortgage of the land from B to C; and the payment by C of debts due to A, and of other sums, at the request of one having an interest in the land, is a good consideration on the part of C to sustain the mortgage to the extent of such payments, in the absence of fraud. And though the consideration named in the mortgage much exceeds the sum paid, this is only evidence of fraud, and may be rebutted.<sup>4</sup>

§ 9 d. A mortgage to secure another's debt is not *per se* fraudulent, for want of consideration.<sup>5</sup>

§ 10. Upon a bill to redeem, brought by a subsequent, against a prior mortgagee, the latter cannot defend, upon the ground that the second mortgage is fraudulent as against creditors; but, as showing the intention of certain acts, and in connection with a want of delivery of the deed, the evidence is admissible.<sup>6</sup>

§ 10 a. Where a mortgage was given, on the eve of bank-

<sup>1</sup> Marston v. Brackett, 9 N. H. 337; Briggs v. French, 1 Sumn. 505; Wooden v. Haviland, 18 Conn. 101; Burns v. Hobbs, 29 Maine, 278; Alkin v. Morris, 2 Barb. Ch. 140. See Hall v. Sands, 52 Maine, 855; Randall v. Howard, 2 Black, 585; Baily v. Smith, 14 Ohio St. 396; Allen v. Shackleton, 15 Ohio St. 145; Butler v. Viele, 44 Barb. 166; Wilcox v. Howell, 44 Barb. 396. As to mortgages obtained by threats of duress, see James

v. Roberts, 18 Ohio, 548; N. J. Rev. Sts. 824.

<sup>2</sup> See Bookover v. Hurst, 1 Met. Ky. 665; Prior v. White, 12 Ill. 261; Brown v. Scott, 51 Penn. 857; chap. 89.

<sup>3</sup> Parker v. Barker, 2 Met. 428.

<sup>4</sup> Ib.

<sup>5</sup> Marden v. Babcock, 2 Met. 99.

<sup>6</sup> Powers v. Russell, 18 Pick. 69. See Howard v. Howard, 3 Met. 548; Sprague v. Graham, 29 Maine, 160.



ruptcy, for a very old debt, the circumstances were deemed so suspicious, that the court would not interfere for a sale, upon the mortgagee's petition.<sup>6</sup>

§ 11. It is held, that, where a mortgage is made to one as trustee, upon a bill for foreclosure, the mortgagor is estopped to question the validity of the trust.<sup>1</sup> So, in Connecticut,<sup>2</sup> upon a bill for foreclosure, it is held that the *title* of the mortgagee cannot be inquired into. Hence where, after production of the note and mortgage, certain attaching creditors of the mortgagor set up, as a defence to such bill, that the mortgage was fraudulent and void against creditors; it was held that such evidence was inadmissible. The Court remarked, that, if the title to land *might* be brought in question in this process, then it must be local; whereas, by the established law, a bill for foreclosure need not be brought in the county where the land lies. In such bill, it is sufficient to aver, that the defendant executed *a deed on condition*; and of course any circumstances, showing the instrument to be *no deed*—such as forgery, want of witnesses, duress, fraud, coverture, &c.—may be shown in defence; but not circumstances merely *impairing its effect*. (Two justices dissented.)

§ 12. Where one mortgages land, to defeat the dower of his wife, and without consideration, the mortgage is void as to the widow and as to his creditors, but valid against himself and his administrator. A court of chancery, in such case, will enjoin the mortgagee from proceeding to a judgment and sale of the whole mortgaged premises, but will suffer him to sell, subject to the widow's dower. And if, by virtue of statutory provisions, a sale on mortgage defeats the right of dower, the court, upon a *scire facias* by the mortgagee against the administrator to foreclose, will let in the widow to defend; and, if there is a real debt, there shall be a verdict and judgment, giving to the mortgagee a lien on the whole interest as to the real debt, and for the whole amount subject to the widow's thirds; or, if the mort-

<sup>1</sup> Dewdney, 2 Mont. & Ayr. 72. See Williams v. Kelsey, 6 Geo. 365; Prior v. White, 12 Illin. 261; Kennaird v. Adams, 11 B. Mon. 102; Robinson v. Collier, 11 B. Mon. 332.

<sup>2</sup> Schenck v. Ellingwood, 3 Edw. 175; Bailey v. Lincoln, &c., 12 Miss. 174.

<sup>3</sup> Palmer v. Mead, 7 Conn. 149.

gage was fraudulently given, without consideration, and for the purpose of defeating the wife, a verdict and judgment for the plaintiff, subject to the widow's dower. But the same principle does not apply to the provision made for the widow in that State by the intestate acts, in lieu of dower. This is a *contingent* right, with none of the common law privileges of dower, and subject to be defeated by the husband's acts. Therefore, in the case supposed, the mortgage cannot be *wholly* avoided, merely upon the ground that the widow *might*, in case the intestate died without kindred, have been entitled to the whole estate.<sup>1</sup>

§ 13. We shall hereafter (see chapter 87, *Estoppel*) have occasion to consider at length a peculiar species of constructive fraud, as having the effect to avoid a title otherwise valid by reason of some unfair representation or concealment on the part of the owner. The same topic is here briefly noticed in reference to mortgages.

§ 14. A mortgage may be rendered void *as against third persons*, by some misrepresentation or concealment, on the part of the mortgagee, with respect to his incumbrance upon the land, whereby other parties are induced to purchase or advance money upon it, supposing the title to be clear. This kind of fraud is chiefly cognizable in equity, though even courts of law will often take notice of it. In many cases, equity and law have concurrent jurisdiction. The principle of equity is, that, where one seeks by misrepresentation or even improper concealment of facts, in the course of a transaction, to mislead the judgment of another to his prejudice, the court will generally interfere. Mere concealment or *looking on* has the same effect, as using express words of inducement. But, in general, it must appear, that the acts would not have been done, and that the party must have conceived they would not have been done, except upon such encouragement; though, in some cases, even the ignorance of the party misleading has been held to make no difference. In a case of this kind, chancery will not

<sup>1</sup> Killinger v. Reidenhauer, 6 Ser. & R. 531.

only refuse its aid to enforce the mortgage, but, upon a bill by the party injured, to *quiet his title*, will decree a perpetual injunction against enforcing the mortgage, declare it void, or order a release or reconveyance.<sup>1(a)</sup>

<sup>1</sup> Jeremy on Equ. Juris. 385-7-8; 1 Story on Eq. 875-7, *et seq.* (See Briggs v. French, 1 Sumn. 504; Bettes v. Dana, 2 Ib. 888; Foster v. Briggs, 8 Mass. 818; Barnard v. Pope, 14, 487; Spear v. Hubbard, 4 Pick. 148; Stone v. Lincoln, Middlesex, Oct. T. 1835; Evans v. Bick-

nell, 6 Ves. 182; Storrs v. Barker, 6 John. Cha. 166; Wendell v. Van Rensselaer, 1 Ib. 344; Lee v. Munroe, 7 Cranch, 368; 2 John. 578; Hobbs v. Norton, 1 Vern. 186; 2 Ib. 725; Dewey v. Field, 4 Met. 881.)

(a) Equity will relieve against a fraud of this nature, notwithstanding the constructive notice arising from registration of the prior incumbrance. Napier v. Elam, 6 Yerg. 108.

A having a mortgage of a leasehold estate, the mortgagor, B, borrowed the original lease of him, with the intention of obtaining another loan upon the land. Held, if A was privy to B's intention of taking up more money, A's mortgage should be postponed. Peter v. Russell, 2 Vern. 726.

The purchaser of mortgaged land, who had no notice of the mortgage, brings a bill in equity against the mortgagee, charging that the mortgagee *fraudulently* stood by, and witnessed the making of valuable improvements by the purchaser, and did not disclose his lien, or intimate that he had any interest in the property. Held, the charge of fraud required *an answer*, and a *demurrer* to the bill was overruled. Cater v. Longworth, 4 Ohio, 885.

A held a mortgage upon certain land. B, proposing to take another mortgage, consulted with A, who informed him that his (A's) mortgage was satisfied, and

that B might safely take a mortgage. Held, neither A nor his assignee, with notice, could set up a prior mortgage against B. Lasselle v. Barnett, 1 Black. 158.

A mortgagee promised by a writing not under seal to extend the time of payment; and a third person in consequence bought the estate from the mortgagor. Held, the mortgagee was bound by his promise. Hoffman v. Lee, 8 Watts, 352.

An attorney at law, holding a mortgage upon land, drew a conveyance of part of it to A, who had no notice of the mortgage, the attorney knowing that A paid a full price for the land. Held, neither the mortgagee nor his assignee could set up the mortgage against A. L'Amoureux v. Van Denburgh, 7 Paige, 316. See for some modifications of the general rule, Rangeley v. Spring, 8 Shepl. 180; Pickard v. Sears, 6 Ad. & Ell. 469; Wade v. Green, 3 Humph. 547. See also Jones v. Smith, 1 Hare, 48; Meux v. Bell, Ib. 78; Marston v. Brackett, 9 N. H. 836; Buswell v. Davis, 10 N. H. 418; Patterson v. Esterling, 27 Geo. 205; Carpenter v. Cummings, 40 N. H. 158.

## CHAPTER XXXVII.

## MORTGAGE. REMEDIES OF MORTGAGEE AND MORTGAGOR AT LAW.

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| <ol style="list-style-type: none"> <li>1. Distinction between a mortgage and trust as to remedy.</li> <li>2. Action at law by mortgagor, after payment; action at law by mortgagee, after payment.</li> <li>3. Concurrent remedies; form of judgment for mortgagee.</li> <li>4. Possession under a judgment, no payment.</li> </ol> | <ol style="list-style-type: none"> <li>5 &amp; notes. Title of mortgagee under a third person, no payment; no action at law by mortgagee in New York and South Carolina; tender in court by mortgagor; suit by execution purchaser; assumpsit by mortgagor; remedy by <i>scire facias</i>, &amp;c.; commitment of mortgagor; form of action.</li> </ol> |
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§ 1. It has already been remarked (chap. 31) that a mortgagee is often called a *trustee* for the mortgagor; that in some respects he is such, while in others the relation which he sustains is very different from that of a trust. One striking point of difference may be properly noticed here. A mortgagee may enforce his right by adverse suit, *in invitum*, against the mortgagor—which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. In general, a trustee is not allowed to deprive his *cestui que trust* of the possession; but a court of equity never interferes to prevent the mortgagee from assuming possession, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui*. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely, for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict

conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of his right. So the mortgagee is not prevented but assisted in equity, when he proceeds, not only to obtain possession, but absolute title by foreclosure.<sup>1</sup>

§ 2. Some remarks have already been made (chap. 33) upon the point, whether payment of the mortgage debt, after condition broken, *ipso facto* reverts the estate in the mortgagor.(a) With this question is of course connected the further inquiry, what is the proper remedy for a mortgagor, after such payment, to regain possession of the land. If, by payment, the legal estate is revested in him, he is of course entitled to maintain an action at law upon his legal title; but if otherwise, his only remedy is a bill in equity. In Massachusetts, it was early held, that the only remedy of the mortgagor in the case supposed is a bill in equity. And this doctrine has been adhered to in subsequent cases. It is placed upon the grounds, that the statute law provides for the discharge of a mortgage, after payment, upon the record, thereby implying that the legal estate remains in the mortgagee; and chiefly, that the bill in equity is an adequate and convenient remedy, and well adapted to the doing of impartial justice to all parties; on the one hand moderating the rigor of the common law for the benefit of the mortgagor, and on the other compelling him to do justice to the mortgagee. It is as beneficial to the mortgagor as a suit at law, and may sometimes be more so; for, if the evidence of payment be doubtful, the mortgagee may be compelled to answer under oath to the fact. It is certainly more beneficial to the mortgagee. If the mortgagor brought ejectment, the mortgagee could obtain no allowance for repairs; such allowance depending either upon the statute, or the rules of equity. It is unknown to the

<sup>1</sup> 2 Story on Eq. 278, n. 3; Cholmondeley v. Clinton, 2 Jac. & Walk. 182 to 189, &c.

(a) See Breckenridge v. Ormsby, 1 land; and Phelps v. Sage, 2 Day, 151, Mar. 58; Paxon v. Paul, 8 H. & McHen. 399, that it does, in Kentucky and Mary- contra, in Connecticut.

common law, which considers the mortgagee as absolute owner.<sup>1</sup> In the case from which these remarks are taken, the court proceeded to notice the objection, that, upon this principle, the mortgagee, after payment, might recover the land from the mortgagor, thereby working manifest injustice; and *the fact*, that he might so recover it, seemed to be admitted. But in a later case it is said, that this admission was inadvertently made; and distinctly decided, that if the mortgagor, after condition broken, have paid the debt, the mortgagee cannot recover possession of the land, because *the conditional judgment*, provided by statute, which authorizes a writ of possession *unless the defendant, within a certain time, pay the debt, &c.*, cannot, in such case, consistently be rendered.<sup>2</sup>

§ 3. Until satisfaction of the debt, and for the purpose of obtaining it, it is the general rule, that the mortgagee may at the same time institute distinct processes upon the debt and mortgage; the one directed against the person or the general property of the debtor, the other against the land mortgaged, solely and specifically.<sup>3(a)</sup>

<sup>1</sup> Hill v. Payson, 3 Mass. 560; Parsons v. Welles, 17 Mass. 419; Sherman v. Abbott, 18 Pick. 451; Sahler v. Siguer, 44 Barb. 406.

<sup>2</sup> Wade v. Howard, 11 Pick. 297.

<sup>3</sup> See 1 Hill. Mortg. 99.

(a) The mode of foreclosing a mortgage, whether by proceedings at law or in equity, is for the most part precisely, and very variously, regulated by statute. The view of the subject contained in this work is a mere summary, and the statutes referred to have been, many of them, no doubt, repealed or greatly modified by subsequent legislation. See, for a full account of statutory foreclosure and redemption, 2 Hilliard on Mortgages, chaps. 27 and 28.

In Massachusetts, Maine, New Hampshire and Rhode Island, (Mass. Rev. St. 684; 1 Smith's St. 168-4; N. H. L. 68; R. I. L. 210; Me. Rev. St. 555; York, &c. v. Cutts, 6 Shepl. 204. In Maine, unless the mortgage is set forth in the writ, the judgment will be absolute, if the defendant does not claim a right to redeem. Rackleff v. Norton, 1 Appl. 274. See Tufts v. Maines, 51 Maine, 398; Northy v. Northy, 45 N. H. 141;

Foss v. Hildreth, 10 Allen, 76,) in all real actions upon mortgage, after condition broken, the judgment shall or may be a conditional one, that, if the mortgagor, &c., pay to the mortgagee, &c., the sum adjudged due, within two months, no writ of possession shall issue—otherwise such writ shall issue. In Massachusetts, such judgment must be moved for by one of the parties; and, in that State and in Maine, cannot be claimed by a defendant who is not the mortgagor, and does not claim under him.

(In New Hampshire, where a mortgage is given to secure several notes, and an action brought for non-payment of one, and possession taken; the mortgagor cannot redeem, without paying such other notes as fall due while he remains in possession, within one year from the time they are payable. The same rule holds, in case of taking possession without suit. Deming v. Comings, 11 N. H.

§ 4. In consideration of the nature of a mortgage, as mere security for a debt, and the paramount purpose of a suit upon it, which is to enforce payment of such debt; an action to foreclose, though in form a *real action*, is not regarded as strictly such, nor subject to all the rules which govern real actions. Thus it may be brought against any party in possession—as, for instance, a reversioner, or particular tenant—who denies the mortgagee's right, refuses to yield possession, and prevents him from taking peaceable possession; whether strictly tenant of the freehold or not.<sup>1</sup> So a mortgagee may maintain a writ of

<sup>1</sup> Penniman v. Hollis, 18 Mass. 480; Amidown v. Peck, 11 Met. 467; Wearse v. Peirce, 24 Pick. 141; Peck v. Hapgood, 10 Met. 172; Keith v. Swan, 11 Mass. 216; Devens v. Bower, 6 Gray,

126; Aiken v. Gale, 87 N. H. 501; Wolcott v. Spencer, 14 Mass. 411; Shelton v. Atkins, 22 Pick. 71; Whittier v. Dow, 2 Shepl. 298.

474. In Rhode Island, judgment is moved for by the defendant.)

In Vermont, (1 Verm. Laws, 84; Rev. Stats. 215,) judgment, in such case, is rendered in common form, but the court, on application of the defendant, stay execution; and order that, if he pay the amount due in a time not exceeding one year, the judgment shall be vacated. Payment is to be made to the clerk, who shall give a certificate thereof, to be recorded, and also take a receipt from the plaintiff. No redemption is allowed after a writ of possession.

In New York, the action of ejectment cannot be brought upon a mortgage. Nor can a mortgagee at the same time maintain suits upon his bond and mortgage, on the ground that the mortgaged premises have been partially consumed by fire. 2 N. Y. Rev. St. 812; Engle v. Underhill, 8 Edw. 249. See Van Slyke v. Sheldon, 9 Barb. 278; also, for decisions upon this subject, 2 Hill. Mortg. 49, n. 6.

In South Carolina, (1 Brev. Dig. 174-5,) mortgagees are expressly prohibited from bringing any possessory action for the land; the mortgagor being deemed owner of the land, even after condition broken, and the mortgagee owner of the debt. Upon the recovery of judgment on the personal security, the judges of the court may order a sale of the land, giving, if they see fit, a reasonable extension of time, not exceeding six months; and allowing a credit of not more than

twelve months. This proceeding is to operate as a perfect foreclosure. But, at any time before sale, the mortgagor may prevent it, and entitle himself to an entry of satisfaction on the mortgage, by paying the debt and costs.

In New Jersey, where a mortgagee brings a suit either upon the mortgage or upon the bond secured thereby, if no suit in equity is pending at the time, and if the defendant brings into court the amount of debt and costs, the court will discharge him from the mortgage, and order a reconveyance of the premises, and a delivery to the mortgagor of all evidences of title. 1 N. J. L. 162; Den v. Spinning, 1 Halst. 471.

In New Hampshire, it has been held, that a mortgagor cannot have assumpsit against the mortgagee for the profits of the land, received by the latter between the time of entry to foreclose, and the time when the land was redeemed. Robinson v. Robinson, 1 N. H. 161.)

In Pennsylvania, after twelve months from the day of payment of the debt, or performance of the condition, named in the mortgage, a *scire facias* may be issued against the mortgagor, and, upon execution issued thereon, the land may be sold as upon other executions, or, for want of purchasers, delivered to the mortgagee, not subject to redemption. Purd. Dig. 194; Stat. 1842, 66. See Drexel v. Miller, 49 Penn. 246. If the mortgagee have released a part of the land, he may proceed against the remain-



entry against the owner of the equity, though, both at the time of the mortgage and the suit, a stranger was in possession, by title paramount to both plaintiff and defendant.<sup>1</sup> So if an action for foreclosure of a mortgage is brought against a tenant in possession, more especially where he is the mortgagor himself, such tenant cannot prevent a judgment for the plaintiff by transferring the whole or a part of the land, but his grantee will be bound by the judgment, and possession taken under it.<sup>2</sup> So it is held that the defendant may rely upon a tender.<sup>3</sup> But where, in a writ of entry on a mortgage, it appeared that the mortgagors were blind, and the defendant, their father, lived on the land with them, cultivated and improved it, as the sole manager and efficient agent; held, he was not *a tenant*, nor liable to the action.<sup>4</sup>

<sup>1</sup> Whittier v. Dow, 2 Shepl. 298.

<sup>2</sup> Hunt v. Hunt, 17 Pick. 118. See Sigourney v. Stockwell, 4 Met. 518.

<sup>3</sup> Powers v. Powers, 11 Verm. 262.

<sup>4</sup> Churchill v. Loring, 19 Pick. 465.

See, also, Wheelwright v. Freeman, 12 Met. 154; Raynham v. Snow, Ib. 157, n.; Root v. Bancroft, 10 Met. 44; Bradley v. Fuller, 23 Pick. 1; Lowell v. Daniels, 2 Cush. 234.

der, but the mortgagor may plead, that the sum claimed is greater than ought proportionably to be charged upon the land. Purd. Dig. 204. No sale or delivery of the mortgaged premises shall give any further term or estate in the land, than the land is mortgaged for. Ib. 292. A sale upon a mortgage shall not affect the prior lien of any other mortgagee. (The latter provision is made by an act passed April 6, 1880.) It had been previously held, that a sale on execution discharged all liens, prior and subsequent. Ib. 297. See Sts. 1851, 871; Ashhurst v. The Montour, 85 Penn. 80; Stevens v. North, Ib. 265.

(The purchaser holds the land discharged from the lien of the mortgage, under which the sale occurs. Pierce v. Potter, 7 Watts, 475; Berger v. Hiester, 6 Whart. 210. In case of ejectment on mortgage, the plaintiff acquires a mere possession of the land, and his right ceases upon payment of the debt. Colwell v. Hamilton, 10 Watts, 417. See Penns. Sts. 1845, 489; 1849, 621, 681.)

In Delaware, a mortgagee may have a writ of *scire facias*, after twelve months from breach of condition. The land is sold, as upon other executions. But the sale passes only the interest owned by

the mortgagee. If no sale can be made, the land may be set off by appraisement. Del. St. 1829, 205-6-7; Rev. C. ch. 111; secs. 55, 60.

In Illinois, the same remedy by *scire facias* may be had upon a mortgage. If the debt is payable by instalments, the last must be due. The land is sold, and subject to the same right of redemption, as upon execution. Illin. Rev. L. 876; St. 1841, 171. See Aldrich v. Sharp, 8 Scam. 268; Belingall v. Gear, 8 Scam. 575; Marshall v. Maury, 1, 231; State, &c. v. Wilson, 4 Gilm. 57; Delahay v. Clement, 8 Scam. 208; M'Cumber v. Gilman, 18 Illin. 542; Coates v. Woodworth, Ib. 654.

In Indiana, the mortgagee files a bill according to the course of the common law, upon which the court may render an equitable decree, and may order a sale of the land at auction. The statute provides, that the purchaser shall take the land free from incumbrances, and not subject to redemption, and that, in all sales on execution, the surplus proceeds shall be paid over to the debtor; but it further provides, (p. 245.) that no sale of property on the execution, by virtue of sec. 25, shall create any further term or estate in vendees, mortgagees or cre-

§ 5. Entry and possession, under a judgment upon mortgage, cannot be construed a payment of the mortgage debt. The whole is but a *process to compel* payment, and is only equivalent to an entry to foreclose, without a judgment. To consider it payment, would be to compel the mortgagee to become a purchaser, when he might choose to hold the land as security. But, after foreclosure, the estate may be valued, and he may be deemed to have received payment *pro tanto*.<sup>1</sup>

§ 6. Where a second mortgagee takes a conveyance of the land, from another person, holding a first and third mortgage,

<sup>1</sup> West v. Chamberlin, 8 Pick. 886; Hedge v. Holmes, 10 Pick. 881; Ewer v. Hobbs, 5 Met. 1. (See chap. 88.)

ditors, to whom it is sold or delivered, than the estate was mortgaged for. Ind. Rev. L. 244. See Shaw v. Hoadley, 8 Blackf. 165; Grimes v. Doe, Ib. 871; Morgan v. Woodward, 1 Smith, 321; Hough v. Doyle, 8 Blackf. 800; McMellen v. Farnham, 1 Cart. 160; Newton v. Newton, 12 Ind. 527; Brownfield v. Weicht, 9 Ib. 894; Wilkins v. DePauw, 10 Ib. 159; Cubberly v. Wine, 18 Ind. 858.

In Ohio, for the purpose of foreclosure, the land is appraised as for sale upon execution, and, if two-thirds of the valuation exceed the debt and interest, sold at auction, and the surplus proceeds are paid to the mortgagor; if not, the absolute title is transferred to the mortgagee, with no right of redemption. In the latter case, he may still recover the balance of his debt. Walk. 308; 1 Ohio R. 285; 3, 187; Heighway v. Pendleton, 15, 735; Frische v. Kramer, 16, 141. By a late statute, a sale shall in all cases be ordered. Ohio Laws, 1859, 84.

In Missouri, where the debt exceeds fifty dollars, the mortgagee may file a petition against the mortgagor and the tenant, to which any person interested may be a party. Judgment is rendered for the debt, &c., and an order passed for the sale of the property. If this is insufficient, execution may issue against other property. If payment is made to the officer, he gives a certificate, which is recorded. Misso. St. 409-10. See Ayres v. Shannon, 5 Mis. 282; Buford v. Smith, 7 Ib. 489; McNair v. Biddle, 8 Ib. 257; Riley v. McCord, 24 Ib. 265.

In New Jersey, it is said, a bond and a mortgage given to secure it are to be considered, for some purposes, as sepa-

rate obligations for the same debt. The creditor in enforcing payment may consider them as distinct. He may proceed singly upon the obligation; or he may proceed singly upon the mortgage, either by ejectment to recover possession, or by bill in Chancery to foreclose; or he may proceed upon both securities at the same time. If the mortgagee proceeds by ejectment, he will recover possession of the land, and retain it only till the debt is paid. He gains no title, but is a trustee for the mortgagor, being accountable for the rents and profits. If he proceed simply to sue on his bond, the execution may be levied indiscriminately on all the defendant's property, whether included in the mortgage or not. If the mortgaged premises are sold, the estate, conveyed by the sheriff to the purchaser, is in no manner affected by the circumstance that a mortgage had been previously given. The mortgagee may be considered as a party to the proceedings, and it would be questionable, at least, whether, having treated the property as the estate of the mortgagor, he should not be estopped from ever after setting up a claim under the mortgage. This is the general understanding of the country; the purchaser bids as if there were no mortgage; all parties are considered as joining in the sale; and, in case of any deficiency, the estate is considered as discharged of the claim. Harrison v. Eldridge, 2 Halst. 408-9. (So an entry for condition broken, though the land be worth more than the note, will be no bar to a suit upon the note. Portland, &c. v. Fox, 1 Appl. 99.) In Vermont, a suit to foreclose the mortgage is regarded as

after the latter has entered and foreclosed the first and third mortgages; to a suit by the second mortgagee upon his note, it is no defence, that the land and the rents and profits thereof are of greater value than the aggregate of the amounts secured by all the mortgages; because the plaintiff has acquired an absolute title to the land, wholly independent of his own mortgage.<sup>1</sup>

§ 7. Where husband and wife mortgage her land, and remain in possession till breach of condition, a suit to foreclose is properly brought against them both.<sup>2</sup>

<sup>1</sup> *Hedge v. Holmes*, 10 Pick. 380.

<sup>2</sup> *Swan v. Wiswall*, 15 Pick. 126.

a suit for the money due thereupon, and a tender is valid as in other cases. *Powers v. Powers*, 11 Verm. 262. In Maryland, the mortgagee cannot sue on the bond and obtain a foreclosure at the same time. *Andrews v. Scotton*, 2 Bland, 665. In Kentucky, the mortgagee may elect between three remedies; taking possession and receiving the profits; a suit at law; and a bill for foreclosure and sale. *Caufman v. Sayre*, 2 B. Monr. 205. In Indiana, one holding a bond, secured by mortgage, after proceeding upon the latter, cannot resort to any other action. But he may, in the first instance, commence a suit on the bond, sell the land mortgaged upon execution, and thus abandon his right under the mortgage. *Youse v. McCreary*, 2 Blackf. 245. The purchaser, in such case, will take a clear title. *Ib.* Or, in a suit upon the bond, the mortgagee may resort to any other property of the mortgagor, and still retain his mortgage lien. *Markle v. Rapp*, 2 Blackf. 268 & n. Upon a mortgage given as security for a note, a decree of foreclosure and sale was rendered, and a writ of error brought by the defendant to reverse such decree. Pending this writ, a suit was brought on the note. Held, these facts were no defence. *Brown v. Wernwag*, 4, 1; (acc. *Russell v. Hamilton*, 2 Scam. 57.) So, in Illinois and Alabama, the mortgagee may bring an action of ejectment, a suit to foreclose, and a suit on the bond, all at the same time. *Delahay v. Clement*, 3 Scam. 203; *Doe v. M'Loskey*, 1 Alab. (N. S.) 708. In New Hampshire, the mortgagee, pending an action at law upon the mortgage, may bring a bill in equity against the same defendant, as claiming under a

fraudulent title. *Tappan v. Evans*, 11 N. H. 811; acc. *Burnell v. Martin*, Doug. 417; *Hale v. Rider*, 5 Cush. 231; *Hughes v. Edwards*, 9 Wheat. 489; *Willis v. Levett*, 1 De Gex & Sm. 892; *Copperthwait v. Dummer*, 3 Harr. 258; *Att'y. &c. v. Winstanley*, 5 Bligh. 144; *Brainn v. Stewart*, 1 Sandf. Cha. 87. See *Ely v. Ely*, 6 Gray, 439; *Very v. Watkins*, 18 Ark. 546; *Morrison v. Buckner*, Hemp. 442; *Thornton v. Pigg*, 24 Mis. 249; *Mann v. Erle*, 4 Gray, 299; *Gerrish v. Mason*, *Ib.* 482; *Fairman v. Farmer*, 4 Ind. 486.

A statute in Massachusetts provides, that, in suits upon mortgages after condition broken, the court shall render judgment for the plaintiff, to recover so much as is due according to equity and good conscience. And this provision has been applied to effect an equitable adjustment in case of a tenancy in common and of successive mortgages.

A and B, tenants in common, mortgaged to C, to secure a joint and several bond. Afterwards, A mortgaged an undivided half of the farm to D. D assigned the latter mortgage to C, who took possession of the land thereupon for condition broken. C then brings a writ of entry against B, for an undivided half of the land, upon the first mortgage. Held, if the suit had been brought for the whole land against both A and B. B might have redeemed, by paying the whole debt. and would then have stood, in equity, as assignee of the mortgage, not only as against A to compel contribution, but as against any subsequent mortgagee—otherwise, by means of a second mortgage from A, B might be deprived of all security; and that, instead of com-

§ 8. Where A and B, holding distinct claims against C, take one mortgage to secure them, the mortgage is not joint, but several; each may enforce his claim by the appropriate remedy; and therefore, upon the death of A, B cannot maintain an action upon the mortgage, to enforce payment of A's debt.<sup>1</sup>

§ 9. It has been held in England, that, after a mortgagee has proceeded to commitment of the mortgagor in a suit upon the debt, he may still have a remedy upon the mortgage.<sup>2</sup>

<sup>1</sup> Burnett v. Pratt, 22 Pick. 558.

<sup>2</sup> Davis v. Battine, 2 Russ. & M. 76; acc. Tappan v. Evans, 11 N. H. 311.

selling B to adopt this course, and afterwards bring an action or bill against C, claiming under the second mortgage, to enforce his rights under the first, more especially as C had entered to foreclose for a debt voluntarily created after the first mortgage; the court would exercise its equitable powers in this suit, and render judgment only for the amount equitably due in relation to the land, which was *one moiety* of the debt, a moiety of the land having been taken by C to secure another debt from A alone. Judg-

ment for possession, unless the defendant within two months pay half the money due on the bond. It was remarked that such judgment would be no bar to a suit against B, upon the bond, for the balance due, because the facts upon which the judgment was founded were specially set forth. If A had been a mere surety for B, the whole amount being *equitably* due from B, a different rule would be adopted. Sargent v. McFarland, 8 Pick. 500.

## CHAPTER XXXVIII.

## MORTGAGE. REMEDIES IN EQUITY—FORECLOSURE AND REDEMPTION.

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| 1-14. Lapse of time.   | 10. Equity will not relieve, where there is a legal right. |
| 2. General principles of foreclosure; parties; practice in the several States. | 11. Fraud.   |
| 8. Foreclosure; whether payment of debt, &c.                                   | 12. Payment into court.                                    |
| 9. Right of redemption may be revived; mortgage cancelled by mistake.          | 18. Mortgagor cannot redeem on payment by a third person.  |

§ 1. It has been already stated, (chap. 31,) that a mortgagor may be barred of his right of redemption by lapse of time, and undisturbed possession of the land by the mortgagee. In addition to this general limitation, the law has provided more specific modes of barring or foreclosing an equity of redemption.

§ 2. Chancellor Kent says, a mortgagor's right of redemption may be barred or foreclosed by the mortgagee, after giving due notice to redeem. The ancient practice was, by bill in chancery to procure a decree for strict foreclosure, which had the effect of giving an absolute title to the mortgagee. This still continues to be the usual English practice; though, in some cases, the mortgagee obtains a decree for a sale of the land, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to priority.(a)

(a) The latter practice is adopted in New York, Maryland, Virginia, the Carolinas, Tennessee, Kentucky, Indiana, Michigan and Alabama. 4 Kent, 180-1; Mich. St. 1839, 222-3; Green v. Crockett, 2 Dev. & B. Equ. 398; Massina v. Bart-

lett, 8 Por. 277; Riley v. M'Cord, 24 Mis. 265; Davis v. Cox, 6 Ind. 481; Johnson v. Donnell, 15 Ill. 971; Beloe v. Rogers, 9 Cal. 128; Weimer v. Henitz, 17 Ill. 259.

(In Maryland, in case of a creditor's

§ 3. To a bill for foreclosure, all incumbrancers should be made parties, in order to prevent a multiplicity of suits, effect proper distribution of the proceeds, and give security and stability to the purchaser's title.<sup>1</sup> So all persons interested in the mortgage or the property should be made parties; including the heir, or devisee, or assignee, and personal representatives, of the mortgagor; tenants for life and remaindermen; for they may all be interested in the right of redemption, or in taking the accounts.<sup>2</sup> So, in general, the mortgagor must make all

<sup>1</sup> *Wilson v. Hayward*, 6 *Flori.* 171; *Mack v. Grover*, 12 *Ind.* 254; *Valentine v. Havever*, 20 *Mis.* 138; *Webb v. Mexan*, 11 *Tex.* 678; *Montgomery v. Tutt*, 11 *Cal.* 307; *Whitbred v. Lyall*, 39 *Eng. L. & Eq.* 174. But see *Bronson v. Railroad*, 2 *Black*, 524.

<sup>2</sup> 4 *Kent*, 184; *Slaughter v. Foust*, 4 *Blackf.* 381; *Wilkins v. Wilkins*, 4 *Port*, 245; *Hall v. Cushman*, 14 *N. H.* 171; *Champlin v. Foster*, 7 *B. Mon.* 104; *Smack v. Duncan*, 4 *Sandf. Ch.* 621; *Weed v. Beebe*, 21 *Verm.* 495; *Yelverton v. Shelden*, 2 *Sandf. Cha.* 481; *William-*

*son v. Field*, *Ib.* 538; *Goodrich v. Staples*, 2 *Cush.* 258; *Calverley v. Phelp*, 6 *Madd.* 282; *Miller v. M'Galligan*, 1 *Greene*, 527; *Brindernagle v. German, &c.*, 1 *Barb. Ch.* 15; *Osbourn v. Fallows*, 1 *Russ. & My.* 741; *Hunter v. Macklew*, 5 *Hare*, 238; *Smeathman v. Bray*, 8 *Eng. L. & Equ.* 46; *Burgess v. Sturgis*, *Ib.* 271; *Rafferty v. King*, 1 *Keen*, 618; *Goodman v. White*, 26 *Conn.* 322; *Farwell v. Murphy*, 2 *Wis.* 533; *Hull v. Lyon*, 27 *Mis.* 570; *Howard v. Gresham*, 27 *Geo.* 347; *Wright v. Dudley*, 8 *Mich.* 115.

bill for sale of mortgaged land, if the defendant in his answer assents to a sale, the court may decree an immediate sale for payment of the mortgage. *Gibson v. M'Cormick*, 10 *Gill & J.* 65. Time will be granted, only when the mortgagee applies for a sale. *Ib.* If the mortgage is payable by instalments, it may be foreclosed when the first falls due. *Salmon v. Clagett*, 3 *Bland*, 179. The sale of an infant's mortgaged estate must always be for his benefit. *Williams*, *Ib.* 194. In case of a decree for sale, the mortgagor must be allowed time to pay the debt. *Jones v. Betsworth*, 3 *Bland*, 194. But see 196, n. See, also, *Worthington v. Lee*, 2 *603*; *Lausdale v. Clerke*, 2, 358; *Atkinson v. Hall*, *Ib.* 372; *Wadrop v. Hall*, *Ib.* 666; *Hunter v. Grant*, *Ib.* 667; *Buchanan v. Shannon*, *Ib.*; *Worthington v. Lee*, *Ib.* 681. The mortgagee must be made a party, unless his whole interest is divested. *Ib.* 682. See *Md. L.* 187, 213, 1261.)

In Michigan, where a mortgage is payable by instalments, and the land consists of a single eighty acre lot or a farm, and a sale becomes necessary for any but the last instalment, portions may be sold as nearly square, and as

near to the northeast corner as possible. *Mich. St.* 1839, 227. A mortgage payable by instalments is to be treated like distinct mortgages. *Ib.* 228. In case of foreclosure, the sheriff immediately makes a deed to the purchaser, which is left with the register of deeds, and after one year delivered to the grantee, (or after two years, unless the mortgage was made as security for the price of the land,) in case the mortgagor does not in the meantime redeem. *St.* 1840, 146. If the land consists of distinct lots, they are separately sold, and only enough of them to satisfy the claim. A deed is made by the officer and recorded, and, unless the debtor redeem in two years, paying seven per cent interest, is delivered to the purchaser. *Stat.* 1844, 88; *Rev. St.* 500-3. See *Caswell v. Ward*, 2 *Dougl.* 374.

In Arkansas, the mortgagee files a petition, upon which a sale is ordered, like that on other executions. If the property proves insufficient, a new execution issues, on which other property may be taken. The officer gives a certificate, which is acknowledged and recorded. Before a sale takes place the property may be redeemed. *Ark. Rev.*



persons interested in the mortgage parties to his bill for redemption. In case of *trust*, it has been a matter of somewhat conflicting decision, whether the legal owner alone is to be made a party, or whether those equitably interested are to be joined. The latter course is recommended as necessary or desirable, unless the *cestui que trusts* are too numerous to be made parties, or the trust is a general one, for creditors.<sup>1</sup> So it is held in England, that subsequent judgment creditors of the mortgagor must be made parties to a bill for foreclosure.<sup>2</sup> But a different doctrine has been adopted in this country.<sup>3</sup> So, it is said, if two estates are embraced in one mortgage, and the equities of redemption devolve on different parties, the equitable owner of one cannot redeem without making the other owner a party.<sup>4</sup> So several mortgagees, joint tenants, must be parties to a foreclosure.<sup>5</sup> So if the estates of two persons are mortgaged together, both must be included in a bill to foreclose.<sup>6</sup> So where a bill to foreclose was brought by one of two mortgagees, each having but a certain sum; held, there could be no foreclosure or redemption, unless both mortgagees were before the court.<sup>7</sup> So where a joint mortgage is made to two, to secure several debts; they may file a joint bill for foreclosure.<sup>8</sup> But each creditor *may* foreclose alone; nor can he join the other as

<sup>1</sup> *Williamson v. Field*, 2 Sandf. Cha. 588; *King v. M'Vickar*, 8, 192; *Tylee v. Webb*, 6 Beav. 557; *Wood v. Williams*, 4 Madd. 186; *Cooté*, 575, 584, 588, 589; *Wright v. Bundy*, 11 Ind. 890; *Martin v. McReynolds*, 6 Mich. 70; *Wood v. Nisbet*, 20 Geo. 72; *N. J., &c. v. Ames*, 1 Beasl. 507; *Hays v. Dorsey*, 5 Ind. 99.

<sup>2</sup> *Adams v. Paynter*, 1 Coll. 580.

<sup>3</sup> *Felder v. Murphy*, 2 Rich. Equ. 58; *Mims v. Mims*, 1 Humph. 425. See *Pierson v. Merrick*, 5 Wis. 281; *Brainard v. Cooper*, 10 N. Y. (6 Seld.) 856.

<sup>4</sup> *Cooté*, 602.

<sup>5</sup> *Lowe v. Morgan*, 1 Bro. 868.

<sup>6</sup> *Cooté*, 577.

<sup>7</sup> *Palmer v. Carlisle*, 1 Sim. & St. 428.

<sup>8</sup> *Shirkey v. Hanna*, 8 Blackf. 408.

St. 580. In Alabama, in case of sale by order of chancery upon an incumbrance, one claiming under the mortgagor, but not a party, may redeem within five years. Clay, 829. The same right of redemption is allowed to a mortgagor as to an execution debtor; provided, the defendant in the execution, if in possession at the time of sale, shall deliver it without suit to the vendee. An execution creditor, whose debt is unsatisfied,

may redeem, as in other cases of execution sale. One who redeems is bound to pay the occupant for his improvements. *Ib.* 508. See Ala. L. 1849-50, 68.

It is inconsistent with the plan of the present work to state the various statutory provisions for foreclosure and redemption. For an extended view of the subject, the reader is referred to 2 Hilliard on Mortgages, chaps. 27 and 28.



defendant.<sup>1</sup> Nor can parties to the mortgage note, who did not join in the mortgage, be joined as defendants.<sup>2(a)</sup>

§ 4. It is said, "if a freehold estate be held by way of mortgage for a debt, it may be laid down as an invariable rule, that,

<sup>1</sup> Thayer v. Campbell, 9 Mis. 280.

<sup>2</sup> Wilkerson v. Daniels, 1 Iowa, 170. See Webster v. Vandeventer, 6 Gray, 428; Eggleston v. Barnes, 12 Ind. 604; Williams v. Hilton, 85 Maine, 547; Wiley

v. Pinson, 28 Tex. 486; Hull v. Lyon, 27 Mis. 570; Wilkerson v. Daniels, 1 Iowa, 179; DeCottes v. Jeffers, 7 Flori. 284; Armstrong v. Pratt, 2 Wis. 299.

(a) As to the proper parties where a mortgage has been assigned, see Coote, 354, 577; Christie v. Herrick, 1 Barb. Ch. 254; Hobart v. Abbot, 2 P. Wms. 648; M'Guffey v. Finley, 20 Ohio, 474; Borst v. Boyd, 8 Sandf. Ch. 501; Whitbeck v. Edgar, 4 Sandf. Ch. 427; Platt v. Squire, 12 Met. 494; Browning v. Clymer, 1 Smith, 298; Cushing v. Ayer, 25 Maine, 383; Lane v. Erskine, 13 Illin. 501; Gray v. Schenck, 4 Comst. 460; Shackelford v. Stockton, 6 B. Mon. 390; Glidden v. Andrews, 10 Ala. 166; Frische v. Kramer, 16 Ohio, 125; Comley v. Hendricks, 8 Blackf. 189; Watson v. Spence, 20 Wend. 260; Mann v. Cooper, 1 Barb. Ch. 185; Jones v. Steinbergh, Ib. 250; Muller v. Henderson, 2 Stockt. 320; Buchanan v. Munroe, 22 Tex. 587; Luning v. Brady, 10 Cal. 265; Hodson v. Treat, 7 Wis. 268.

As to the proper parties in case of the death of mortgagee or mortgagor, see Van Horn v. Duckworth, 7 Ired Equ. 261; Greenwood v. Rothwell, 7 Beav. 280; Lane v. Erskine, 13 Illin. 501; Shaw v. McNish, 1 Barb. Ch. 326; McIver v. Cherry, 8 Humph. 713; Guthrie v. Sorrell, 6 Ired. Equ. 18; Martin v. Harrison, 2 Texas, 456; Smith v. Webb, 1 Barb. 230; Batchelor v. Middleton, 6 Hare, 75; Bollinger v. Chouteau, 20 Mis. 89; Babbitt v. Bowen, 82 Verm. 437; Wallace's, &c. v. Holmes, 40 Penn. 427; Osborne v. Tunis, 1 Dutch. 633; Averett v. Ward, 1 Busb. Equ. 192; Belloc v. Rogers, 9 Cal. 123; Miles v. Smith, 22 Mis. 502; Perkins v. Wood, 27 Ib. 547; Riley v. McCord, 21 Ib. 235; Houghton v. Mariner, 7 Wis. 244.

Whether the widow or wife of a party to a mortgage is to be made party to a suit by mortgagor or mortgagee, see Mims v. Mims, 1 Humph. 425; Lewis v. Smith, 11 Barb. 152; Bard v. Fort, 8 Barb. Ch. 632; Carwardine v. Wisblade, 6 Eng. L. & Equ. 103; Denniston v. Potts, 11 S. & M. 36; Wood v. Mann, 3

Sumn. 318; Sargent v. Wilson, 5 Cal. 504; Rollins v. Forbes, 10 Ib. 299; Thornton v. Pigg, 24 Mis. 249; Powell v. Ross, 4 Cal. 197; Conant v. Warren, 6 Gray, 562.

As to the proper party in case of guardianship, see Pardee v. Van Arken, 8 Barb. 534. In case of insolvency, Collins v. Shirley, 1 R. & My. 638; Singleton v. Cox, 4 Hare. 326; Kerrick v. Saffery, 7 Sim. 317; Steele v. Maunder, 1 Coll. 535; Alexander v. Frarg, 9 Ind. 481.

In a bill for foreclosure, one claiming adversely to the mortgagor, and by title prior to the mortgage, cannot be made a party defendant, for the purpose of trying his title. Holcomb v. Holcomb, 2 Barb. 20; Jones v. St. John, 4 Sandf. Ch. 208; Lewis v. Smith, 11 Barb. 152.

Where a second mortgagee brings a bill in equity for sale or foreclosure of the premises, whether the first must be a party; see Mims v. Mims, 1 Humph. 425; Judson v. Emanuel, 1 Alab. (N. S.) 598; Vanderkemp v. Shelton, 11 Paige, 28; Holcomb v. Holcomb, 2 Barb. 28; Shineley v. Jones, 6 B. Mon. 274; Richards v. Cooper, 5 Beav. 304; Archdeacon v. Bowes, M'Clel. 153. It has been held that he need not be, where the second mortgagee sues the mortgagor and subsequent mortgagees. Richards v. Cooper, 5 Beav. 304. Where a mortgagor upon his marriage settled the land upon his wife and issue, and became bankrupt; held, his assignee need not be a party to a suit for foreclosure. Steele v. Mawder, 1 Coll. Cha. 535.

How far, in a bill for foreclosure, a decree shall be delayed, for the purpose of adjusting the respective rights and interests of different parties, defendants; see Renwich v. Macomb, 1 Hopk. 277; N. Y. &c. v. Cutler, 8 Sandf. Ch. 176; Duberly v. Day, 7 Eng. L. & Equ. 188; Robinson v. Turner, Ib. 188.

(in order to a sale,) the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance, where a creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open a door to the most shameful imposition and abuse."<sup>1</sup>

§ 5. Where the practice prevails, of foreclosure without sale, its severity is mitigated, by enlarging the time of redemption from six months to six months or for shorter periods, according to the equity arising from circumstances.<sup>2(a)</sup>

<sup>1</sup> Per Kent, Chr.; *Hart v. Ten Eyck*, 2 John. Cha. 100. See *Mendenhall v. West, &c.*, 86 Penn. 146, n.; *Wickenden v. Rayson*, 85 Eng. L. & Equ. 252; *De Haven v. Landell*, 81 Penn. 120; *McMillan v. Richards*, 9 Cal. 865; *King*

*v. McCully*, 88 Penn. 76; *Childs v. Childs*, 10 Ohio St. 889.

<sup>2</sup> 4 Kent, 181-2; *Coote*, 569; 2 *Hilliard on Mortg.* 40; *Jones v. Creswicke*, 9 Sim. 304.

(a) In Massachusetts, the mortgagee, after condition broken, may recover possession by action, or may enter openly and peaceably, if not opposed by the mortgagor or other person claiming the premises; and a continued peaceable possession for three years will foreclose the mortgage.

(Entry after breach of condition is presumed to be for the purpose of foreclosure. *Hunt v. Stiles*, 10 N. H. 466.)

In case of entry without a judgment, a memorandum or certificate thereof is made upon the deed, signed by the mortgagor or party claiming under him, and recorded; or else a certificate of two competent witnesses to prove the entry is made and sworn to, and recorded; and no entry is effectual for foreclosure, unless a certificate or deposition in proof thereof is thus made and recorded. Mass. Rev. St. 634. See *Boyd v. Shaw*, 2 Shepl. 58.

In case of entry before condition broken, the three years, limited for redemption, will not begin to run till breach of condition, and written notice that the possession is thenceforth to be held for condition broken or for foreclosure; unless the mortgagee make a new entry or commence an action. The same certificate or deposition, to prove such notice or new entry, shall be made and recorded, as above provided in case of other entries. *Ib.* 685-6.

(Entry by an attorney, not duly authorized, will be sufficient, if afterwards adopted in writing by the mortgagee. *Cutts v. York, &c.*, 6 Shepl. 190.

It has been held in Massachusetts, before the statute above referred to, that, if the mortgagee enter before, and continue in possession after, breach of condition, the three years began to run, upon the mortgagor's receiving actual or implied notice of his intention to hold for the purpose of foreclosure. *Erskine v. Townsend*, 2 Mass. 495; *Scott v. McFarland*, 18, 309; *Pomeroy v. Winship*, 12, 514. See *Taylor v. Weld*, 5, 109; *Thayer v. Smith*, 17, 429. It is not a sufficient entry for foreclosure, that the mortgagor signs a paper containing the words, "I hereby give possession." *Pease v. Benson*, 28 Maine. 886. But where a statute provides, that a certificate shall be evidence of entry and possession; proof is not admissible against such certificate, that there was no actual entry. *Oakham v. Rutland*, 4 Cush. 172. Entry on one of several lots, in the same county and town, for the purpose of foreclosure, is sufficient for all. *Shapley v. Rangeley*, 1 W. & M. 218. The mortgagee need not have his deed with him, nor make any express declaration of his intent, when he enters. An authority from the mortgagor to deliver possession may be verbal. It is sufficient, if the mortgagee goes to the land at the time, and afterwards takes possession and occupies, with the mortgagor's assent. *Skinner v. Brewer*, 4 Pick. 468. See further *Wright v. Tukey*, 8 Cush. 290; *Colby v. Poor*, 15 N. H. 198; *Merriam v. Merriam*, Mass. S. J. C., Oct., 1850; *Law Rep.*, July, '52, p. 169.

§ 6. By the English law, an equity of redemption may be foreclosed by the act of the mortgagor himself; for, upon a bill

Where a mortgagee, having entered for breach of condition, is placed under guardianship as a spendthrift, the guardian may restore possession to the mortgagor, and thus prevent a foreclosure. *Botham v. McIntier*, 19 Pick. 846.

The assignee of a mortgage having received rent from the tenant in possession, his administrator, on his death, called on the tenant to attorn or surrender, but he denied the right of the administrator, and refused to do it. The administrator then brought an action against him on the mortgage, without notice to the heirs or representatives of the mortgagor, who was dead, recovered a conditional judgment, sued out an execution, entered, and remained in possession three years. Held, the mortgage was foreclosed. *Shelton v. Atkins*, 22 Pick. 71.

A mortgagee, pending an action upon the mortgage, entered upon the land *in pais* for condition broken, and afterwards entered under a judgment in the suit. Held, the latter entry was a waiver of the former, and the three years for foreclosure dated from the latter. *Fay v. Valentine*, 5 Pick. 418. See *Cutts v. York, &c.*, 6 Shepl. 190; *Smith v. Kelley*, 27 Maine, 287; *Bellows v. Stone*, 14 N. H. 175; *Deming v. Comings*, 11 N. H. 474; *Rangely v. Spring*, 28 Maine, 127; *Hobbs v. Fuller*, 9 Gray, 98; *Hurd v. Coleman*, 42 Maine, 182; *Holbrook v. Thomas*, 88 Ib. 256; *Howard v. Handy*, 85 N. H. 815; *Worster v. Great Falls, &c.*, 41 N. H. 16; *Chamberlain v. Gardiner*, 88 Maine, 548; *Morris v. Day*, 87 Maine, 886; *Chase v. Gates*, 88 Maine, 868.)

In Maine, an entry to foreclose shall be made by process of law, by the written consent of the mortgagor, &c., or by the mortgagee's taking open and peaceable possession before two witnesses. Foreclosure may also be effected by a public notice in the newspaper, or a notice regularly served on the mortgagor, &c.; in each case to be recorded. 1 Smith's St. 161-2; Me. Rev. St. 555. See Sts. 1852, 226; *Cushing v. Ayr*, 25 Maine, 888; *Chase v. Palmer*, 25 Maine, 841.

(A written surrender, not recorded within thirty days, is wholly inoperative. *Southard v. Wilson*, 29 Maine, 56.)

Where a mortgagee took possession of the land, under an execution, in presence

of his own agent and the sheriff only; held, they were not the *two witnesses* required by law. *Gordon v. Hobart*, 2 Sumn. 401.)

In New Hampshire, the mortgagee may hold for foreclosure by a peaceable entry with or without legal process, after condition broken; provided, in the former case, he publish a notice; or by remaining in possession, with notice of his purpose, if he entered before breach of condition. The time of redemption is one year. And this rule is not affected by a subsequent statute, giving the court full Chancery power over mortgages.

If the mortgagee remain in possession, a year after condition broken, *with the mortgagor*; this is a sufficient possession to foreclose the mortgage. N. H. St. 1829, 529-80; Rev. St. 246; *Gibson v. Bailey*, 9 N. H. 168; *Wendall v. New Hampshire, &c.*, 9 N. H. 404; *Gilman v. Hadden*, 5 N. H. 30. See *Cushing v. Smith*, 3 Story Rep. 556; *Deming v. Comings*, 11 N. H. 474; *Green v. Davis*, 44 N. H. 71.

In Rhode Island, three years' possession is sufficient to foreclose a mortgage. Possession is to be taken, either by legal process, or by peaceable and open entry in presence of two witnesses, who shall give a certificate of the fact. The party giving possession shall acknowledge it to be voluntarily done before a magistrate, and both the certificate and acknowledgment shall be recorded. The court are empowered to hear in equity all bills of foreclosure, brought after the mortgagee has taken possession, by consent of parties, without legal process. R. I. L. 210-11. See *Daniels v. Mowry*, 1 R. I. 151.

The statute on this subject is adopted by the U. S. Court. *Dexter v. Arnold*, 8 Sumn. 152.

In this State, the general doctrine of foreclosure by *lapse of time*, independently of statutory provisions, has also been recognized. Thus, where a mortgagee had been in visible possession of the land for ten years, nine of them after condition broken, and, four years after the death of the mortgagor, conveyed to one having no actual notice of the mortgage, and affected by it only so far as it varied constructively from the registry; and the purchaser occupied eighteen years and made valuable improvements;

to redeem, the plaintiff is required to pay the debt by a given time, usually six months from liquidation of the debt, in default

and the mortgagor's estate, being insolvent, was administered by the mortgagee; held, the right of redemption, as against the purchaser, must be deemed to have been abandoned by all parties interested, and a bill for that purpose, brought by a devisee of one of the mortgagor's heirs, was dismissed. *Dexter v. Arnold*, 1 Sumn. 109.

But where a part of several parcels of land, mortgaged by one deed, have been conveyed by the mortgagee to a *bona fide* purchaser, against whom the right of redemption is barred by lapse of time; the mortgagor may still redeem such portions of the land as remain in the mortgagee's possession. 1 Sumn. 109.

In Vermont, the mortgagor is allowed by the decree a definitive time, sometimes one and two years, to redeem, and, in default, the equity of redemption is foreclosed. In Connecticut, the land mortgaged, upon foreclosure, is never decreed to be sold. The bill of foreclosure is not a proceeding *in rem*; there is no sale, and possession is not enforced. The mortgagor is allowed fifteen years to redeem, after entry by the mortgagee for breach of condition. Where, before foreclosing, a suit has been brought *on the note*, the costs of such suit become part of the mortgage debt. By a later act, in case of a suit upon a mortgage before it is due, a tender of the debt and costs defeats the action. So, if a part only is due, a tender of such part defeats the action, and stops the interest. *Smith v. Bailey*, 1 Shaw, 168; *Ib.* 267; 4 Kent, 181; 7 Conn. 152; 15, 19; Conn. Sts. 1840, 80; 1855, 105.

In New York, upon a bill for foreclosure or satisfaction, the court may decree a sale of the whole or a part of the land.

(It is held in Alabama, that the decree cannot properly leave it discretionary with the master to sell the whole or a part of the land. *Walker v. Hallett*, 1 Alab. N. S. 380.)

When a bill is filed for satisfaction, the court may not only compel a delivery of the land to a purchaser, but, on the return of the report of sale, may decree payment of any balance remaining due, and recoverable by law, either from the mortgagor or a surety, if the latter be joined in the bill; and issue executions, as in other cases. During and after such process, no suit at law shall be brought

for the debt, unless authorized by Chancery.

(If a suit at law has been commenced on the bond, a bill for foreclosure may be brought without discontinuing it; but no judgment will be rendered or execution issued in such suit, without leave of Chancery. If the suit is against one not party to the bill, against whom it is doubtful whether there could be a decree over, in case of deficiency, though made a party; and if the land is insufficient security for the whole debt; the court will allow the suit to proceed in order to settle the validity of a defence, but will not issue execution without leave of Chancery. *Suydam v. Bartle*, 9 Paige, 294. See *Thomas v. Brown*. *Ib.* 320.)

The bill must set forth whether any proceedings have been had at law upon the debt; and, if judgment has been recovered, the bill will be dismissed, unless the sheriff has returned on execution, that the debtor has no property except the mortgaged premises. Sales shall be made, and deeds given, by a master, and shall vest the same title in the purchaser that a foreclosure would have vested in the mortgagee, and shall be as valid as if executed by both mortgagor and mortgagee. 2 N. Y. Rev. Sts. 191-3.

(A decree of foreclosure and consequent sale, upon a bill filed against the mortgagor alone, do not bind purchasers from him. *Watson v. Spence*, 20 Wend, 260. Nor can they be ejected upon execution. *Fuller v. Van Geesen*, 4 Hill, 171.

A purchaser under a void decree, in possession of land, is regarded as a stranger, and cannot set up against the owner of the equity an outstanding title in the mortgagee, at whose suit the decree was obtained. *Ib.* The deed takes effect immediately, though the master's report is made afterwards. *Fuller v. Van Geesen*, 4 Hill, 171.

If the mortgagee become the purchaser, and agree in writing to convey to a third person, no redemption will be allowed, though the deed have not actually passed. *Merritt v. Lambert*, 7 Paige, 344.)

The surplus proceeds shall be brought into court for the use of the defendant or other party entitled, and, if not taken out in three months, invested for their benefit. If the bill is filed for the payment of an instalment or of interest, it shall be dismissed, upon the defendant's

of which the bill is dismissed; and this proceeding is a bar to a new bill, and equivalent to a foreclosure.<sup>1</sup>

<sup>1</sup> 4 Kent, 185.

paying the amount due, with costs, before the decree for a sale. If paid afterwards, proceedings shall be stayed, but a decree of foreclosure and sale entered, to be enforced upon any subsequent default, on a new petition, and by a further order. In such case, the court will ascertain, through a master, whether a portion of the land may be sold, sufficient to pay what is due, and decree accordingly. If a sale of the whole will be most beneficial, such sale will be decreed, and the whole debt paid, deducting interest on the portion not due, if not payable on interest; or the court may order such portion to be put out at interest for the benefit of the parties. 2 N. Y. Rev. St. 191-8. See *Williamson v. Champlin*, 8 Paige, 70; *Shufelt v. Shufelt*, 9, 187; *Sabin v. Stickney*, 9 Verm. 155; *Harris v. Fly*, 7, 421; *M'Carthy v. Graham*, 8, 480; *Van Hook v. Throckmorton*, Ib. 83; *Vechte v. Brownell*, Ib. 212; *Norton v. Stone*, Ib. 222; *Beekman v. Gibbs*, Ib. 511; *Post v. Leet*, Ib. 887; *Seaman v. Hicks*, Ib. 655; *Torrey v. Bank, &c.*, 9, 149; *Farmers', &c. v. Millard*, Ib. 620; *Ruckman v. Astor*, Ib. 517; *Manhattan, &c. v. Greenwich, &c.*, 4 Edw. Cha. 815; *Burr v. Stanley*, 4 Edw. Ch. 78; *York v. Allen*, 3 Tiffa. 104.

(In Kentucky, where a mortgage is payable by instalments, the mortgagee may enter upon the first breach and remain in possession, subject to account, but shall not have a foreclosure of the whole land. *Caufman v. Sayre*, 2 B. Monr. 208. See *Massina v. Bartlett*, 8 Por. 277; *Leverett v. Redwood*, 9, 79; *Walker v. Hallett*, 1 Ala. (N. S.) 379. Adopting the same practice as in New York.)

By later statutes, land sold under mortgage, or a decree thereon, may be redeemed in one year. So any distinctly sold portion of the whole. Ten per cent interest shall be paid. A tender may be made either to the officer or the purchaser, who shall give a certificate of the payment; or, in case of their refusal, absence, or disability, or if they are unknown, to the public treasurer. The certificate to be recorded. The mortgagee has possession after a sale, unless in eight days the mortgagor gives secu-

rity against waste, &c. Creditors may redeem in succession, according to their respective priority, paying seven per cent interest. The mortgagee need not make a claimant under a subsequent decree party to the bill. Provision is made for foreclosure by means of a public advertisement. Within fifteen months after an execution sale, the mortgagor may redeem the whole of the premises or any part separately sold, subject to redemption by any other creditor. N. Y. Laws, 1837, 455-6; 1838, 261-3; 1840, 289-90; 1842, 388, 409; 1844, 529; Sts. 1847, 508. See *Cameron v. Irwin*, 5 Hill, 276; *Wilson v. Troup*, 2 Cow. 195; *Arnot v. Post*, 6 Hill, 65; *Lamerson v. Marvin*, 8 Barb. 9; *Van Slyke v. Sheldon*, 9, 278.

In New Jersey, the statute provides, that possession by the mortgagee twenty years after default of payment shall bar the right of redemption. Upon a bill for foreclosure, the court may order a sale of the whole, or a sufficient portion of the land, either by a master, or by a sheriff upon *feri facias*. But the sale shall pass no greater estate, than the mortgagee would have acquired by foreclosure. Where a mortgagee sues either upon the mortgage or the bond, if there is no suit in equity pending at the time, and the defendant brings into court the amount of debt and cost; the court will discharge him from the mortgage, and order a reconveyance and a delivery to him of all evidences of title. The purchaser takes no greater estate, than the mortgagee would have done by foreclosure. If a part of the debt is not due, the whole land may be sold and the whole debt paid with a *rebate* of interest. 1 N. J. L. 412, 705, 162; 1 Rev. Sts. 917-18-20.

In Georgia, where application is made to the court for foreclosure of a mortgage, the court shall order that the debt be paid on or before the first day of the next term—the order to be served and published in a newspaper; and, if not complied with, the court may render judgment for the amount due, and pass a rule absolute for a sale of the land, as upon execution. The surplus money, if any, shall be paid to the mortgagor. If the mortgagor make affidavit of pay-



§ 7. In this country, the proceedings for redemption are usually prescribed by statute.(a)

ments or set-offs, which ought to be allowed him, the court shall submit the matter to auditors. *Prince*, 168, 423-4. See *Hobby v. Pemberton*, *Dudl.* 212; *Butt v. Maddox*, 7 *Geo.* 495.

In North Carolina, a strict foreclosure has been allowed. *Spiller v. Spiller*, 1 *Hayw.* 482. See chap. 87; *Ingram v. Smith*, 6 *Ired. Equ.* 97.

In Ohio, the mortgagee may have a decree of foreclosure, where the debt equals two-thirds of the value of the land; and he may demand a sale. In Tennessee, the mortgagor has two years to redeem, after confirmation of the master's sale, under a decree of foreclosure. 4 *Kent*, 181, n.; 5 *Ham.* 856; *Henderson v. Lowry*, 5 *Yerg.* 240.

In Iowa, foreclosure is obtained by civil action, a judgment for the amount due, and a sale. If the sale does not satisfy the debt, a general execution may issue. *Iowa Rev. Sts.* 1860, 65. See *Corley v. Hobart*, 8 *Clarke*, 858; *Carroll v. Reddington*, 7 *Ib.* 386; *Duncan v. Hobart*, 3 *Ib.* 387; *Deland v. Mershon*, 7 *Ib.* 70; *Montgomery v. Chadwick*, *Ib.* 114.

In Wisconsin, upon a bill for foreclosure, a sale is ordered, with a decree against the mortgagor for the balance of the debt. *Wis. Rev. Sts.* 428. See also *Sts.* 1857, 19; 1858, 134; 1859, 217, 240; *Babcock v. Perry*, 8 *Wis.* 277; *Pierce v. Kneeland*, 7 *Ib.* 224.

In Minnesota, a mortgage is foreclosed by sale upon a bill in equity, or, where there is an express power of sale, by a public advertisement. A decree may be had for payment of the balance. *Min. Rev. Sts.* 484, 487, 469. See *Sts.* 1858, ch. 61.

In California, foreclosure is effected by a sale, with execution for the balance of the debt. *Cal. Dig.* 200. See *Vallejo v. Randall*, 5 *Cal.* 461; *M'Millan v. Richards*, 9 *Ib.* 365; *Emeric v. Toms*, 6 *Ib.* 155; *Nagle v. Macy*, 9 *Ib.* 426; *Harlan v. Smith*, 6 *Ib.* 173; *Rollins v. Forbes*, 10 *Ib.* 299; *Rowe v. Table, &c.*, *Ib.* 441; *Bowen v. May*, 12 *Ib.* 348.

(a) In Massachusetts, a tender for the purpose of redemption may be made, even before entry for breach of condition. If not accepted, a tender shall not prevent a foreclosure, unless a suit thereon is commenced within one year thereafterwards. A bill for redemption, offering

to pay the money due, may be brought without previous tender; but the plaintiff shall pay costs, unless the defendant has unreasonably neglected or refused to render an account.

(See *Bourne v. Littlefield*, 29 *Maine*, 802. Filing a bill is the commencement of suit. *Van Vronker v. Eastman*, 7 *Met.* 157.)

Where, after entry of the mortgagee, it appears that he has not unreasonably neglected or refused to render an account, the court, upon a bill to redeem, may award to him, in addition to the balance due on the mortgage, interest thereon, from the expiration of three years after entry, to the time of rendering judgment, at a rate not exceeding 12 per cent. a year. Substantially the same provision as to tender is made in Maine. In the latter State, if the mortgage is given to secure the payment of money only, and the whole is due, after payment or tender, the mortgagor may, by a bill in equity, compel the mortgagee to give a deed of release, if he has neglected or refused to do it, though not in possession; or he may proceed, as above provided, without a tender.

(In the same State, a bill in equity to redeem lies against the State. The statute relating to tender does not apply to suits in the United States Court. *Gordon v. Hobart*, 2 *Sumn.* 401.)

Where the mortgagee, or one claiming under him, has entered for breach of condition, the mortgagor, or any one claiming under him, may redeem within three years, by bringing a bill in equity. The court, upon a hearing, may render judgment according to equity and good conscience, and award execution accordingly; and, if the defendant fails to appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue. In New Hampshire, payment or tender will render the mortgage void. If the mortgagee refuse to release or to state an account upon a written request, the mortgagor may petition the court, and, upon his bringing the money into court, if merely tendered previously, the court shall order a discharge, and an attested copy of the decree shall be recorded in the registry of deeds. If the mortgagee refuse to state an account, the court shall ascertain the amount due, and make a

§ 8. The question has frequently arisen, whether the foreclosure of a mortgage operates as payment or extinguishment of the debt,<sup>(a)</sup> or whether the mortgagee may still maintain an action at law, for the balance due him, after deducting the fair value of the property. The better opinion is said to be, that such

similar decree. *Mass. Rev. Sts.* 686; *Sts.* 1850, ch. 21; *Sts.* 1858, 909; *Me. L.* 1837, 439-40; *Rev. St.* 555; *N. H. St.* 1829, 530-1; *Rev. St.* 246.

(If the mortgagor would avail himself of a tender made by a third person, he must bring a bill in reasonable time. *Bailey v. Willard*, 8 *N. H.* 429. A tender must be unconditional. *Wendell v. N. H. &c.*, 9, 404. See *Currier v. Webster*, 45 *N. H.* 226; *Brown v. Simons*, 44 *N. H.* 475; 45 *Ib.* 211; *Holton v. Brown*, 18 *Verm.* 224. If a mortgage is assigned just before the right of redemption expires, for the purpose of preventing a tender, the time may be enlarged. *Deming v. Comings*, 11 *N. H.* 474.)

In Massachusetts, after the death of the mortgagor, only his heir or assignee can redeem. In Maine, the executor also may do it. *Smith v. Manning*, 9 *Mass.* 422; *Me. Rev. St.* 557.

The statutory provision in Massachusetts, authorizing a mortgagor to bring a bill for redemption, without actual tender, after having demanded an account from the mortgagee, has been the subject of judicial construction in several cases.

A mortgagee was asked by the assignee of the mortgagor, at the office of the former, in W., what was due on the mortgage. He answered that he owned the whole estate; and, to a second inquiry, that the records would show. Being asked what money would answer, he replied, nothing but specie; and that, if tendered, he should act his pleasure about receiving it; and, if he took it, he would discharge upon the records. He also said, that his papers were at C., (distant eight or nine miles from W.,) and he could not ascertain the sum due. Held, a sufficient demand and refusal, to sustain the bill; but not such an *unreasonable* refusal, as would subject the defendant to costs. *Willard v. Fiske*, 2 *Pick.* 540.

A mortgagor asked the mortgagee, when absent from the town where the latter resided, to make out and furnish in reasonable time an account of the sum due. He replied, that, if the mortgagor

would call upon him at home, he would furnish all the information in his power. Without thus applying, the mortgagor brought a bill to redeem. Held, it would not lie. *Fay v. Valentine*, 2 *Pick.* 546.

But where, upon a demand made, the mortgagee said, he had no other account to render than one rendered two years before, which turned out to be erroneous; held, a sufficient demand and refusal to sustain a bill for redemption. *Battle v. Griffin*, 4 *Pick.* 6.

Such demand may be valid, though accompanied by other demands and proposals, which the mortgagee is not bound to notice. *Allen v. Clark*, 17 *Pick.* 47. The account should state, not only the amount due, but the items. *Ib.* In New Hampshire, unless the demand for an account is immediately complied with, the right of redemption lasts till it is. *Wendell v. N. H. &c.*, 9 *N. H.* 404.

In Maine, where the mortgagee, or any one claiming under him, has entered for condition broken, the mortgagor, or any one claiming under him, may redeem within three years after such entry, by bringing a bill in equity. The court, upon a hearing of the bill, may render judgment according to equity and good conscience, and award execution accordingly; and, if the defendant does not appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue. 1 *Smith's St.* 159-63.

(If a mortgagee of land in Maine, in possession for breach of condition, require, as the terms of redemption, payment of more than is due, the party paying may recover back the money in Massachusetts, in an action for money had and received. *Cazenove v. Cutler*, 4 *Met.* 246. See *Cushing v. Ayer*, 25 *Maine.* 388; *Pease v. Benson*, 28 *Mass.* 336.)

(a) It does so operate, if the property equals the debt in value, even though the foreclosure is effected by an assignee, holding only a part of the mortgage debt. *Johnson v. Candage*, 31 *Maine.* 28; *Bassett v. Mason*, 18 *Conn.* 131.



action may be brought.(a) This question also involves the further one, whether the foreclosure is thereby opened, and the right of redemption revived.<sup>1</sup> Judge Story says, if foreclosure of a mortgage operated as payment of the debt, it would frequently prove, in literal exactness of language, *mortuum vadium*, a dead and worthless security. If the mortgagee is compellable to make an election, the pursuit of a remedy upon the personal security is an abandonment of the pledge, while an appropriation of the latter is an abandonment of the debt. In a case therefore of suspected insolvency, he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck.<sup>2</sup> The English authorities, upon both the points above stated, seem somewhat confused and contradictory. It was held, in an early case, that a suit upon the bond after foreclosure opened the foreclosure, and let in the mortgagor to redeem. And Lord Thurlow is said to have declared, that after foreclosure, so long as the mortgagee kept the estate, he must take it *in satisfaction*, because there was no means of ascertaining how far it paid the debt;(b) but, after having sold it, he might recover the balance due, in a suit upon the bond. On the other hand, in the case of *Perry v. Barker*, Lord Eldon inclined to the opinion, that, after sale, no suit would lie upon the bond, because the plaintiff had disabled himself to reconvey the estate; but, at the same time, he remarked that Lord Thurlow had decided that such action would lie, either with or without a sale. In a subsequent hearing of the same case, Lord Erskine held, that a foreclosure was no bar to a suit upon the bond; but that the mortgagor was thereby enabled to redeem, and, if the mortgagee had sold the land, he would be allowed time to get it back. But he also held, that, where this was impracticable,

<sup>1</sup> 4 Kent, 188. See Coote, 570-1; *McCotter v. Jay*, 3 Tiffa. 80.

<sup>2</sup> *Hatch v. White*, 2 Galli. 154; (*Omalv*

*v. Swan*, 8 Mas. 474 ) See *Cullum v. Emanuel*, 1 Ala. (N. S.) 28.

(a) *A fortiori*, after mere entry to foreclose. See ch. 87.

(b) In the case of *Lockhart v. Hardy*,

9 Beav. 849, the Master of the Rolls expressed the same opinion.

Chancery would restrain the suit by a perpetual injunction.<sup>1</sup> Judge Story questions the correctness of the rule, which allows a court of equity to restrain such suit, before the creditor has received full satisfaction; and also that, by which the suit is held to have the effect of opening the foreclosure. A foreclosure may well be deemed a *purchase*, at the full value of the land, if less than the debt, and, if greater, at the amount of the debt. Where the value much exceeds the debt, a foreclosure can very rarely take place; it is, therefore, of itself, *prima facie* evidence of inferior value. By taking the land, the creditor incurs an inconvenience. If it afterwards fall in value, he is the loser, and, therefore, he ought to be benefited by any rise in value. If, after foreclosure, the mortgagee should seek further relief *in equity*, there might be ground for enforcing the principle of reciprocal equity; but there seems to be no ground, upon which equity should decree an injunction, in such case, against the enforcement of *legal rights*. And, even if it should thus interfere, where the mortgagee still retains the estate, it would seem that, after a sale, he ought to recover the balance remaining due. But, at all events, all decisions concur in the principle, that *at law* foreclosure does not bar a suit for the balance of the debt.<sup>2</sup> Judge Story proceeds to remark, that, whatever may be the doctrine of Chancery upon the subject, when acting upon its own peculiar principles alone, yet, where a statute expressly limits the right of redemption to a certain time after possession taken, and negatives it afterwards, a foreclosure cannot be opened by a suit upon the bond.(a)

<sup>1</sup> Dashwood v. Blythway, 1 Equ. Cas. Abr. 817; Tooke v. —, 2 Dick. 785; Perry v. Barker, 8 Ves. 527; *Ib.*, 18 Ves. 197.

<sup>2</sup> Hatch v. White, 2 Galli. 159-60-1. See Hall v. Hall, 46 N. H. 240; Butler v. Seward, 10 Allen, 466.

(a) In Connecticut and Mississippi, after foreclosure, the mortgagee may maintain an action for so much of his debt as the estate is insufficient to satisfy, estimating the value at the time when the right of redemption expires. And in Connecticut, the bringing of such action shall not open the foreclosure. Conn. St. 194. Stark v. Mercer, 8 How. 877. See The Derby, &c. v. London, 8 Conn.

62; Coit v. Fitch, Kirby, 254; McEwen v. Welles, 1 Root, 202; Southard v. Wilson, 29 Maine, 56; Stark v. Mercer, 8 How. 877.

In New York, it has been decided that a foreclosure is not opened by bringing a suit for the debt. Lansing v. Goelet, 9 Cow. 346.

(Declaration on a bond. Plea, that the bond was executed to secure a mortgage,

§ 9. The right of redemption may be revived by the acts of the mortgagee, or by special agreement, even after foreclosure. Thus the foreclosure is waived by a subsequent acceptance of the money due, or a part of it.<sup>1</sup> So a mortgagee, having taken legal possession of the land for foreclosure, afterwards agreed in writing with the mortgagor, that he would reconvey, whenever the debt should be satisfied from the rents and profits, or otherwise. After the lapse of three years from entry, the mortgagor brought a bill to redeem, and a redemption was decreed.<sup>2</sup> So, where the assignee of a mortgage, having purchased the land at a sale made under a decree for foreclosure, agreed with the mortgagee, for valuable consideration, to hold the land as security for the sum paid for the assignment, and *in trust* for the assignor; decreed in equity, that the assignee should reconvey to the assignor upon payment of the sum stipulated, deducting equitable allowances for profits and waste.<sup>3</sup> On the other

<sup>1</sup> Batchelder v. Robinson, 6 N. H. 12; Moore v. Beasom, 44 N. H. 215; Freeman v. Atwood, 50 Maine, 478; Strong v. Blanchard, 4 Allen, 538; Deming v. Comings, 11 N. H. 474; 27 Maine, 287; Joslin v. Wyman, 9 Gray, 68. But see

Fisher v. Shaw, 42 Maine, 82; Hurd v. Coleman, Ib. 182; Hobbs v. Fuller, 9 Gray, 98.

<sup>2</sup> Quint v. Little, 4 Greenl. 495.

<sup>3</sup> Southgate v. Taylor, 5 Munf. 420.

which was foreclosed, and the premises sold, whereby the debt was satisfied. Replication and proof, that the premises did not sell for enough to pay the bond and mortgage. General demurrer and joinder. Judgment for the plaintiffs. *The Globe, &c. v. Lansing*, 5 Cow. 380.)

But, in Vermont, it was held to be reasonable, though not actually decided, that the foreclosure should be opened, and that the mortgagor, on being sued, might file his bill to redeem, on payment of debt and costs; and that the mortgagee, when he brings the suit, should have power to reconvey. In the same State, an action may be maintained upon promissory notes, though secured by a mortgage which has been foreclosed, and though, with others secured in the same way, they were described in the bill of foreclosure; if not presented to the master on taking the account, nor included in the decree. *Lovell v. Leland*, 3 Verm. 581; *Langdon v. Paul*, 20 Verm. 217. See *Cooper v. Cole*, 38 Verm. 185; *Lawrence v. Fletcher* 8 Met. 165; 10, 344; *Leland v. Loring*, 10, 125.

In Massachusetts, (Mass. Rev. Stat. 688,) the Revised Statutes provide, that, where a mortgagee sues after foreclosure for the balance of his debt, the mortgage shall have the right to redeem at any time within one year from judgment recovered.

The mortgagee may sue upon the mortgage note, after entry for condition broken, and before foreclosure. It is no defence, that the value of the property equals the amount of the note. *Bank, &c. v. Fox*, Maine S. J. C., April T., 1841—Law Rep. July, '41, p. 121. See *Briggs v. Richmond*, 10 Pick. 396. In New Hampshire, after foreclosure, the property is treated as payment *pro tanto*. If more notes than one were secured, and one only was due at the time of entry, the payment shall be applied to this one. *Hunt v. Stiles*, 10 N. H. 466. See *Green v. Cross*, 45 N. H. 574. In Maine, where a mortgage is foreclosed, the value of the land shall go to extinguish the debt, wholly or *pro tanto*. *Southard v. Wilson*, 29 Me. 56.

hand, where a mortgaged estate has been sold, and the mortgagee discharges the mortgage, upon the supposition that the sale is valid, and it is afterwards set aside, the mortgage will be revived in equity. Thus a mortgagee purchased the mortgaged estate at a sale upon execution, and, having received a deed from the officer, entered satisfaction on the mortgage. Upon a bill in equity filed by the debtor, to set aside the sale as irregular and void, it was decreed that the sale be set aside, and the deed cancelled; but also, that the complainant should pay the amount due to the defendant, within a certain time, or else the mortgage be foreclosed and the land sold.<sup>1</sup>

§ 10. Upon the general principle, that equity interferes only where there is no adequate remedy at law; a widow, claiming dower, cannot maintain a bill in equity to redeem, where, under the circumstances, she might maintain a suit at law. Hence, the bill must allege, either that the husband mortgaged the land before marriage, or that the wife joined in a mortgage made after marriage; in either case, the title of the wife being a mere equity, and not a legal estate.<sup>2</sup> On the other hand, in case of a mortgage made before marriage, the widow cannot have a remedy at law against the mortgagee, or one holding under him.<sup>3</sup>

§ 11. In general, a mortgagor may redeem, after the mortgagee has purchased the land, at a sale made under a judgment for the debt, where such purchase is allowed. But if the judgment was recovered as against an absconding and fraudulent debtor, redemption will be refused, upon the maxim, that "he who hath done iniquity, shall not have equity."<sup>4</sup>

§ 12. Where the mortgagor, in a suit for redemption, pays money into court, and the defendant disputes his right to redeem, and prevails, the defendant is not entitled to retain the money. The payment is a *provisional* one, an offer to pay money in discharge of the debt, and for the purpose of removing the incum-

<sup>1</sup> Zylstra v. Keith, 2 Des. 141.

<sup>2</sup> Messiter v. Wright, 16 Pick. 151.  
See Dickinson v. Gunn, 12 Allen, 547.

<sup>3</sup> Van Duyne v. Thayre 19 Wend.

162. See Collins v. Torry, 7 John. 278;  
Coates v. Cheever, 1 Cow. 475; Cooper  
v. Whitney, 3 Hill, 95.

<sup>4</sup> Dabney v. Green, 4 H. & Mun. 101.

brance. The defendant, by his defence, denies that there is any debt secured by mortgage, and his own formal act shows that he has no claim to the money.<sup>1</sup>

§ 13. Where the mortgagor has contracted to convey the right in equity to a third person, who thereupon, on his own account, pays the mortgage debt to the mortgagee, and the mortgagor afterwards rescinds the bargain; the latter cannot avail himself of such payment, on a bill in equity to recover the land.(a)

<sup>1</sup> Putnam v. Putnam, 18 Pick. 181, 182.

(a) Bill in equity to redeem a mortgage. Two of the plaintiffs, purchasers of an equity of redemption, contracted with one Richardson, to sell him the land for \$5,000, he providing for the redemption and for payment of the mortgage debt, amounting to \$3,000 nearly, and securing the surplus to the plaintiffs; the defendants, the mortgagees, having agreed to convey the land to Richardson, if not redeemed, and to pay him the amount due for redemption, if it should be seasonably demanded. Richardson paid the mortgage debt to the defendants; who, in fulfilment of their agreement, gave a bond to Richardson conformable thereto. Two of the plaintiffs were parties to this arrangement. Their inducement was, that the third plaintiff was absent at sea, and therefore a title could not be made to Richardson except through the defendants, and also an apprehension by the defendants, that the mortgagors might have a right to redeem without the consent of the plaintiffs. Hence, it was agreed that Richardson

should take his title from the defendants, after a foreclosure of their mortgage. Held, the intention and effect of the transaction was, that the defendants assigned the mortgage to Richardson, subject to the remaining equity, the plaintiffs releasing their equity of redemption, on being paid or secured their shares of the surplus over the mortgage debt; that the bargain between two of the plaintiffs and Richardson did not depend upon the consent of the absent plaintiff, as the title was to come through the defendants; that Richardson's payment to the defendants must be considered as made for himself, upon a purchase of the land, not in discharge of the mortgage, which would defeat the object; that, although the absent plaintiff had no opportunity to assent to the bargain or otherwise, yet, as the other plaintiffs were unable to redeem, the transaction was the best that could be done for him in preventing a foreclosure; and that the plaintiffs were not entitled to redemption. Howard v. Agry, 9 Mass. 179.

## CHAPTER XXXIX.

### MORTGAGE. EQUITABLE MORTGAGES AND LIENS.

#### 1. Deposit of title deeds.

#### 4. Lien for purchase-money; lien of purchaser after payment.

§ 1. In equity, it has been held that, if the owner of an estate *deposit the title deeds* with a creditor, this constitutes a mortgage of such estate, as against the owner himself, and any purchaser from him having actual or constructive notice of the fact; which mortgage, like others, may be enforced by a bill and decree for sale or foreclosure.<sup>(a)</sup> Thus, a lease having been pledged by a person, who afterwards became bankrupt, to the plaintiff, as security for a loan, the pledgee filed his bill for a sale of the leasehold. Held, this was a delivery of the title for a valuable consideration; that the court had nothing to do but to supply the legal formalities; and, in all these cases, the contract is not *to be* performed, but is executed. The court afterwards ordered the lease to be sold, and that the plaintiff be paid his money.<sup>1</sup> So where the title deeds of an estate were deposited with the plaintiff as security, and the defendant, fourteen years afterwards, when the owner was upon the eve of bankruptcy, took a mortgage, ante-dated, and purporting, but untruly, to be for money

<sup>1</sup> Russel v. Russel, 1 Bro. 269, & n. (In a note to this case, it is said, Lord Thurlow held, the deposit of deeds *entitled the holder to have a mortgage*, and to have his lien effectuated; and, although there was no special agreement to assign, the deposit affords a presumption that such was the intent.)

(a) As to equitable mortgages, see 2 Dea. & Chit. 398; 3 My. & K. 417; 8 You. & Coll. 55. In case of foreclosure of an equitable mortgage, six months are allowed to redeem. Thorpe v. Gar- side, 2 You. & Coll.\* 730. See Coote 220. Such mortgage cannot prevail against a creditor without notice, who afterwards recovers a judgment. Whitworth v. Gangain, 3 Hare, 416.

then advanced; and the defendant had notice of the deposit, but avoided inquiring for what purpose it was made: held, in a bill brought by the plaintiff against the defendant for foreclosure, that the latter should either pay the plaintiff's demand, or stand foreclosed, &c. The court remarked, that the deposit of title deeds as security is evidence of an agreement to make a mortgage, and the agreement is to be carried into execution by the court against the mortgagor, or any one claiming under him, with notice express or implied.<sup>1</sup>

§ 2. This doctrine has been strongly opposed, since its first introduction in 1783, by very distinguished judges; though now said to be firmly established. And it is construed strictly, and not extended by any implication. Thus, it is held, that all the deeds must be actually and *bona fide* deposited with the mortgagee himself. Nor will a mere parol agreement to deposit or to mortgage be enforced.<sup>2(a)</sup>

<sup>1</sup> Birch v. Ellames, 2 Anst. 427.

<sup>2</sup> 4 Kent 149-50; Pain v. Smith, 2 My. & K. 417; Lewthwaite v. Clarkson, 2 Y. & Coll. 872. See 8 Ib. 55; Hodge v. Att'y-Gen., Ib. 842; Tylee v. Webb, 6 Beav. 552; Rogers v. Maule, 1 Y. & Coll. Cha. 4; Ede v. Knowles, 2 Ib. 172; Meggison v. Foster, Ib. 886; Rolleston v. Morton, 1 Dr. & War. 195; Mandeville v. Welch, 5 Wheat. 284; Hockley v. Bantock, 1 Russ. 141; Langston, 17 Ves. 280; Ashton v. Dalton, 2 Coll. 565; Bri-

zick v. Manners, 9 Mod. 284; Sims v. Helling, 9 Eng. L. & Equ. 45; Hiern v. Mill, 18 Ves. 114; Boson v. Williams, 8 Y. & J. 150. Whether the rule is adopted in the United States, see 2 Greenl., Cruise, 85 n.; Rockwell v. Hobby, 2 Sandf. Ch. 9; Day v. Perkins, Ib. 359; Hall v. M'Duff, 11 Shepl. 311; Clabaugh v. Byerly, 7 Gill, 854; Gardner v. McClure, 6 Min. 250; Edwards', &c. v. Trumbull, 50 Penn 509

(a) Lord Eldon said, the decision, that a mere deposit of deeds shall be evidence of an agreement for a mortgage, is much to be lamented. It has led to discussion upon the truth and probability of evidence which the very object of the statute of frauds was entirely to exclude. In another case, the same judge declared, that a deposit of deeds should not be considered as a mortgage, except in a clear case; and he refused so to treat it in the cause before him. *Ex parte Haigh*, 11 Ves. 408-4, and n. See *Whitbread's case*, 19 Ves. 211; *Coote*, 222.

Sir William Grant remarked, that the mere fact, that one man's title deeds are found in another's possession, is not conclusive of any purpose to mortgage the estate. It may exist without any contract whatever. Where the deposit is made when the money is advanced, it is obvious that the purpose of the deposit

must be, to secure the repayment of the money, and there is little to be supplied by other evidence. The connection is not so direct, between a debt antecedently due and a subsequent deposit; nor is the inference so plain. And, where the deeds are delivered, not as a present security, but only for the purpose of enabling the attorney to draw a mortgage, which has been agreed for; the principle is wholly inapplicable. (See *Keyes v. Williams*, 8 Y. & Coll. 55.) The deposit of deeds is indeed held to imply an obligation to execute a conveyance, whenever required. But, in such case, the primary intention is, to execute an immediate pledge; with an implied engagement to do all that may be necessary to render the pledge effectual for its purpose. But, in the case supposed, there was no intention to put the deeds into pledge. Nor does the death of the owner,



§ 3. It is understood to have been the old rule in the English Chancery, that, if a first mortgagee voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee without notice, and in possession of the deeds; because he thereby enabled the mortgagor to impose upon others, who, in the absence of a registry, could look for their security only to the deed, and the possession of the mortgagor. Chancellor Kent, however, is of opinion, upon a review of the cases, that there is not the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; or, if it once existed, that it has been changed. He says, the settled rule is now, that this circumstance will not defeat a prior mortgage, unless accompanied with fraud or gross negligence, or a voluntary, distinct and unjustifiable concurrence, on the part of the first mortgagee, to the retaining of the deeds. And, in the United States, where the registry system generally prevails, the alleged rule is still less applicable. Hence, where a leasehold is mortgaged, the leaving of the lease with the mortgagor is no evidence of fraud, because the registry is a beneficial substitute for the deposit of the deed, and gives better and more effectual security to subsequent mortgagees.<sup>1(a)</sup>

§ 4. Analogous to the lien just mentioned, is the equitable lien which the vendor of land has against the purchaser, for the price of the land, or such part of it as remains unpaid. Chancellor Kent says, this right, said to be derived from the civil law, is well established in England, and has been recognised in the States of Kentucky, New York, Connecticut, Ohio, Tennessee, North Carolina, Indiana, and by the Supreme Court of the United States. In Connecticut, however, it has been some-

<sup>1</sup> *Berry v. Mutual, &c.*, 2 John. Ch. 608; *Johnson v. Stagg*, 2 John. 510.

before making the proposed mortgage, give any effect to the transaction as a deposit. *Norris v. Wilkinson*, 12 Ves. 197-8-9. See *Chapman v. Chapman*, 8 Eng. L. & Equ. 70.

So Lord Eldon remarked, that it was an error to suppose, that a deposit of deeds can refer to nothing but an intention to subject the estate. A deposit may be of considerable use, without any

such object. The right to hold the deeds, and so to work out payment, is of great value. *Ex parte Hooper*, 19 Ves. 479.

(a) It has been held in Massachusetts, that the Supreme Court has no jurisdiction of suits in equity for foreclosure or redemption of *equitable* mortgages. *Eaton v. Green*, 22 Pick. 526.

what qualified. In Pennsylvania, the right was formerly assumed to exist, but has been since denied. The same author and Judge Story give the following general view of the law upon this subject. To constitute this lien, no possession is required, and it applies equally, whether the transaction is a sale, or a mere executory contract. Although sometimes placed upon the footing of an express agreement or assent, it is now held to be independent of such consideration. It is sometimes termed a charge, and a *constructive trust*; neither *jus in re* nor *jus ad rem*. This lien appears to have been sanctioned in the States of New York, New Jersey, Maryland, Virginia, Tennessee, Texas, Mississippi, Georgia, Alabama, Missouri, Michigan, Illinois, Indiana, Ohio, Kentucky and Vermont; but rejected in Massachusetts, Maine, Pennsylvania and North Carolina. Whether it is adopted or rejected in South Carolina and Delaware, seems somewhat doubtful. In Connecticut, the court remark, "we have not yet had occasion to resort to it." In Iowa, the lien is adopted by a recent statute.<sup>1</sup>

§ 5. It can be enforced only in a court of equity, and, in general, only where the vendor is without remedy at law.<sup>2</sup>

§ 6. The doctrine applies to forced sales, by operation of law.<sup>3</sup>

<sup>1</sup> 2 Sugd. (Amer.) 824 n.; 1 Hill. Mortg. 671; 1 Washb. R. P. 536; Iowa R. S. 651; Atwood v. Vincent, 17 Conn. 588; White's Lead. Cas. in Equ. 386, n.; 4 Kent, 151; 2 Story Eq. 461. See Magruder v. Peter, 11 Gill & J. 217; Richardson v. Ridgely, 8, 87; Ridgely v. Iglehart, 3 Bland, 547; Ellicott v. Welch, 2, 244; Melny v. Cooper, 2 Bland, 199; Magruder v. Peter, 11 Gill & J. 217; Green v. Fowler, 11 Gill & J. 108; Foster v. Trustees, &c., 3 Ala. (N. S.) 302; Burks v. Chrisman, 8 B. Mon. 50. See Dawson v. Mitchell, 4, 218; Singleton v. Gayle, 8 Por. 271; 1 Sm. & M. 197; Gilman v. Brown, 1 Mas. 191; 4 Wheat 255; Williams v. Roberts, 5 Ham. 25; Foster v. Trustees, &c., 3 Alab. (N. S.) 302; Marshall v. Christmas, 3 Humph. 316; Hallock v. Smith, 3 Barb. 267; Briscoe v. Bronaugh, 1 Tex. 326; Manly v. Slason, 21 Verm. 271; Honore v. Bakewell, 6 B. Monr. 67; Hopkins v. Garrard, 7, 312; Thornton v. Knox, 6, 74; Woodward v. Woodward, 7, 116; Ewing v. Beauchamp, 6, 422; Hoggatt v. Wade, 10 Sm. & M.

148; Kilpatrick v. Kilpatrick, 28 Miss. 124; Thredgill v. Pintard, 12 How. 24; Scott v. M'Culloch, 18 Miss. 13; Boon v. Barnes, 28 Miss. 186; Beirne v. Campbell, 4 Gratt. 125; Glasscock v. Robinson, 13 Sm. & M. 85; Way v. Patty, 1 Smith, 44; Taft v. Stephenson, 9 Eng. L. & Equ. 80; Miller v. Stump, 3 Gill, 304; Lynam v. Green, 9 B. Mon. 363; Crane v. Palmer, 8 Blackf. 120; Bisland v. Hewett, 11 S. & M. 164. As to the parties by whom the lien may be enforced, see Kleiser v. Scott, 6 Dana, 138; Betton v. Williams, 4 Flor. 11; Growning v. Behn, 10 B. Mon. 388; Planters', &c. v. Dodson, 9 Sm. & M. 527; Green v. Demoss, 10 Humph. 371; Wellborn v. Williams, 9 Geo. 86; Dixon v. Dixon, 1 Md. Ch. 220; Grandin v. Anderson, 15 Ohio St. 286.

<sup>2</sup> Pratt v. Van Wyck, 6 Gill & J. 498; Eyler v. Crabbs, 2 Md. 137; Slack v. McLagan, 15 Ill. 242; Walker v. Sedgwick, 8 Cal. 398; Scott v. Crawford, 12 Ind. 410. But see Richardson v. Baker, 5 J. J. Mar. 328.

<sup>3</sup> Mims v. Macon, &c., 3 Kelly, 342.

§ 7. The lien is held to be valid against heirs, a widow, all purchasers without consideration or with notice, devisees, purchasers under a sale for payment of debts after the vendee's death, and holders of subsequent general liens. So against a conveyance to secure a pre-existing debt, or an assignment for benefit of creditors. But not against creditors holding under a *bona fide* conveyance, or subsequent purchasers or mortgagees without notice, or a *bona fide* purchaser from a fraudulent purchaser.<sup>1</sup> Upon the point, however, whether the lien shall prevail in any case against creditors of the vendee, the law does not seem perfectly settled. The very strong and binding case of *Bayley v. Greenleaf*, in the Supreme Court of the United States, favors the opinion that it shall not thus prevail.<sup>2</sup>

§ 8. The prevailing rule seems to be, that an assignee of the claim for the price has a lien on the land.<sup>3</sup>

§ 9. It has been sometimes held, that the lien may be claimed by parties not directly representing the vendor, upon the ground of equitable substitution; as by sureties for the price, by whom it has been paid, or by a purchaser from the vendee.<sup>4</sup>

§ 10. Very many of the cases upon this subject turn upon an alleged *waiver* of the lien. The prevailing rule of law seems to be, that an intention to retain the lien is presumed, and the burden of proving a waiver is imposed upon the vendee. The taking a distinct personal security, such as a bond or note, for the price, is no waiver. But it is otherwise with the taking of collateral security; more especially if given in pursuance of the original agreement. A distinction has been sometimes made

<sup>1</sup> *White v. Casanape*, 1 Har. & J. 106; *Kilpatrick v. Kilpatrick*, 28 Miss. 124; *Neil v. Kinney*, 10 Ohio St. 67; *Hoggatt v. Wade*, 10 Sm. & M. 148; *Warren v. Fenn*, 28 Barb. 838; *Kline v. Lewis*, 1 Ashm. 81; *Badham v. Cox*, 11 Ired. 456; *Green v. Demoss*, 10 Humph. 371.

<sup>2</sup> 7 Wheat. 46. See also *Gann v. Chester*, 5 Yerg. 205; *Roberts v. Rose*, 2 Humph. 147; *Farrell v. Heelis*, Amb. 724.

<sup>3</sup> *Honore v. Bakewell*, 6 B. Mon. 67; *Terry v. George*, 37 Miss. 589; *Moore v. Raymond*, 15 Tex. 554; *Kelly v. Payne*, 18 Ala. 37; *Wilder v. Smith*, 12 B. Mon.

94; *Betton v. Williams*, 4 Flori. 11. But see *Webb v. Robinson*, 14 Geo. 216; *Brush v. Kinsley*, 14 Ohio, 20; *Dixon v. Dixon*, 1 Md. Ch. 220.

<sup>4</sup> *Kleiser v. Scott*, 6 Dana. 138; *Ghiscilin v. Fergus*, 4 Har. & J. 522; *Planters' &c. v. Dodson*, 9 Sm. & M. 527; *Peet v. Beers*, 4 Ind. 46; *Fisher v. Johnson*, 5 Ib. 492. But see *Glasscock v. Glasscock*, 17 Tex. 480; *Truesdell v. Callaway*, 6 Mis. 605; *Bradford v. Marvin*, 2 Flori. 468; *Skaggs v. Nelson*, 25 Miss. 88; *Crane v. Caldwell*, 14 Ill. 468; *Stansell v. Roberts*, 18 Ohio, 148.

between a mortgage upon other land, and a mortgage upon the land sold, which constitutes an absolute waiver of the implied lien.<sup>1</sup>

§ 11. The lien of a vendor will be barred by the lapse of twenty years; but not, it would seem, by a limitation which merely bars the personal claim.<sup>2</sup>

§ 12. The lien is enforced by a bill in equity. The usual decree is for a sale, unless the debt shall be paid by a certain day.<sup>3(a)</sup>

§ 13. The rule, of an equitable apportionment of the debt among different parcels subject to one incumbrance, applies to the vendor's lien. Such parcels are to be sold in the inverse order of their alienation.<sup>4</sup> See p. 602.

§ 14. A sale vests in the purchaser an absolute title.<sup>5</sup>

§ 15. It is held, that, if a part only of the purchase-money is due, and the vendor enforces the lien for that part; he cannot do it for the balance.<sup>6(b)</sup>

<sup>1</sup> Coote, 286; 1 Hill. Mortg. 696; Mackreth v. Symmons, 15 Ves. 844; Vail v. Foster, 4 Comst. 812; Walker v. Sedgwick, 8 Cal. 898; Shelby v. Perrin, 18 Tex. 515; Johnston v. Union, &c., 87 Miss. 526; Schanck v. Arrowsmith, 1 Stockt. 814; Van Doren v. Todd, 2 Green Ch. 897; Boos v. Ewing, 17 Ohio, 500; Young v. Wood, 11 B. Mon. 123;

Neil v. Kinney, 10 Ohio St. 67; Cleveland v. Martin, 2 Head, 128.

<sup>2</sup> 1 Hill. Mortg. 708.

<sup>3</sup> Barker v. Smark, 8 Beav. 64; Eskridge v. McClure, 2 Yerg. 84.

<sup>4</sup> Crafts v. Aspinwall, 2 Comst. 291; Wright v. Atkinson, 8 Sneed, 585.

<sup>5</sup> Amory v. Reilly, 9 Ind. 490.

<sup>6</sup> Codwise v. Taylor, 4 Sneed, 846.

(a) In a very late case it is said, "a purchaser (vendor) cannot, if he require the aid of the court, act differently from a mortgagee—he must institute a suit." Per Lord Romilly, M. R., Att'y, &c. v. Railway Co., Law Rep. (Eng.) Equ., Apr. and May, 1866, p. 638. Thus such lien cannot be enforced as part of a decree for specific performance. Ib. 635.

(b) The history of the doctrine, that the vendor of land has a lien for the unpaid purchase money, is thus given by Chancellor Walworth, in the case of Fish v. Howland, 1 Paige, 24–30.

The earliest case is Chapman v. Tanner, in 1684. 1 Vern. 267. In that case, Lord Guilford held, that the vendor of land, to one who had become bankrupt, had a lien for the price, upon a principle of natural equity, and did not stand as a general creditor. But it is said, there was a special agreement that the seller

should retain the title deeds. Amb. 726, 1 Bro. 424, n. b.

In Bond v. Kent, (2 Vern. 281,) a mortgage was given for a part of the price, and a note for the rest. Held, there was no lien for the latter sum.

In Coppin v. Coppin, (2 P. Wms. 291,) Lord King held, there was a lien, notwithstanding the indorsement of a receipt for the price upon the deed.

In Pollexfen v. Moore, (8 Atk. 272,) Lord Hardwicke charged the land with the lien in the hands of an heir. But the conveyances were there retained.

In Burgess v. Wheat, (1 Eden, 211,) the general principle is recognized.

In Tardiff v. Schrugan, (cited 1 Bro. 428,) a man conveyed an estate to his two daughters, in consideration of an annuity and they gave a joint bond therefor. One of them married and died, and her husband, having a life interest in a

moiety of the land. refused to pay any part of the annuity. Upon a bill filed by the other sister and her husband, Lord Camden held, that a moiety of the annuity was a lien upon the land in the hands of the defendant; and decreed, that he should pay a moiety of the arrears, and keep down a moiety of the future payments.

In *Farwell v. Heelis*, (Amb. 724,) Lord Bathurst held, that taking the bond of the purchaser, payable at a future time, was a discharge of the lien. (It is said, however, that this case has been often overruled.)

In *Blackburn v. Gregson*, (1 Bro. 420, 1 Cox, 90,) the same question was agitated, but not decided.

In *Austin v. Halsey*, (6 Ves. 475,) where a legatee claimed the privileges of the vendor in asserting a lien, Lord Eldon recognized the rule, that the vendor has such lien, as against the purchaser, unless the contract clearly shows a contrary intent.

In *Nairn v. Rouse*, (6 Ves. 752,) Sir William Grant admitted the general rule, but remarked, that, if the vendor does not trust to the lien, but carves out a security for himself, it is doubtful whether the lien is or is not waived.

In *Elliott v. Edwards*, (3 Bos. & P. 181,) the holder of a lease assigned it, with a proviso that the assignee should not transfer, &c., until payment of the price, and took security from a third person. Held, the vendor still had a lien for the price.

In *Hughes v. Kearney*, (1 Sch. & Lef. 132,) the purchaser gave his note for the purchase-money, which was put into the hands of a third person as trustee, until the incumbrances upon the estate could be ascertained and paid off therefrom, and the balance to be paid to the vendor. Held, the balance of the purchase money, included in the note, was a lien upon the land in the hands of an heir.

In *Mackreth v. Symmons*, (15 Ves. 829,) where a bond was given for the purchase money, there was held to be a lien. Lord Eldon intimated, that taking a mortgage upon another estate, as security, might not be a waiver.

In *Grant v. Mills*, (2 Ves. & Bea. 806,) the lien was held not to be waived, by the purchaser's drawing bills upon himself and partner, obtaining an acceptance of them, payable at a future time, and delivering them to the vendor. The bills were viewed, not as security, but only as a mode of payment. So, in *ex parte Peake*, (1 Mad. 346,) it was held, that a

bill, and in *ex parte Loaring*, (2 Rose's Cas. in Bank. 79,) that a negotiable note, on time, which was discounted and afterwards dishonored, was no waiver of the lien. The same point was settled as to a note or bond, payable on time, in *Sanders v. Leslie*, 2 Ball & Bea. 514. A more recent case is referred to in a note of *Simons & Stuart*, settling the same point as to a bond, although in that case there were peculiar covenants, and other circumstances which were held to make an exception to the rule. *Ex parte Parkes*, 1 Glynn & Jame. 228. But in *Winter v. Lord Anson*, (1 Sim. & Stu. 484,) where the purchaser gave his bond, payable at the death of the vendor, with interest annually, and a receipt for the money was indorsed upon the deed; held, the vendor's intention was evidently to part with the estate immediately, and to wait for the price, and therefore there was no lien.

The American cases upon the subject are said to be uniform, (1 Paige, 29,) with a single exception in South Carolina, (*Representatives, &c. v. Comptroller*, 2 Des. 509,) where it was held, that a bond payable on time defeated the lien.

In Kentucky, the general rule is said to be recognized in *Francis v. Hazlerigg*, (Hard. 48,) and *Cox v. Fenwick*, (8 Bibb, 183,) but it is also held, that, if the vendor takes distinct and independent security, such as the promise of a third person; or if other circumstances indicate that the vendor does not rely upon the land; the lien is waived. The same principle is recognized in Virginia, (*Cole v. Scott*, 2 Wash. 141; *Wilson v. Graham*, 5 Munf. 297,) and by the Circuit and Supreme Courts of the United States; and the general rule by Chancellor Kent. *Garson v. Green*, 1 John, Cha. 808.

In reference to this lien, as illustrating by analogy a lien of a different description. Judge Story remarks as follows:

"There is not, I believe, any remedy now in the State courts to enforce the lien of a vendor for the purchase money of an estate sold by him, even when expressly stipulated for; but yet, in *Gilman v. Brown*, (1 Mason R. 191,) S. C. (4 Wheat. R. 255,) the Supreme Court entertained no doubt, that such a lien, when express or implied, was valid, and might be enforced in the courts of the United States possessing equity jurisdiction, although not remediable in the State courts." *Fletcher v. Morey*, 2 Story, 567. Whether this doctrine is to be fully sustained, and, as its necessary result, a vendor of real estate to have a lien for

the purchase-money in Massachusetts, where the Supreme Court is now invested with full equity jurisdiction; is a point not known to have been yet judicially settled.

A lien, similar to that just described, is the lien of a purchaser of land, who has paid the purchase-money *prematurely* or *by surprise*, that is, before receiving a conveyance. This right, however, has been asserted in very few cases, and the existence of it seriously questioned. 2 Story, 468, n. It has been held in Kentucky, that, where an execution sale is void, the purchaser still has a lien upon the land for the purchase money, because

it has gone to the debtor's use; and Chancery will restrain a suit for the land by injunction, till it is paid. *Shepherd v. McIntire*, 5 Dana, 576. See *Christopher v. Blackford*, 1 B. Monr. 197; *Burgess v. Wheate*, 1 W. Bl. 150; Sugd. 258; *Mackreth v. Symmons*, 15 Ves. 845; *Oxenham v. Esdalle*, 3 Y. & J. 264; *Ludlow v. Grayall*, 11 Price, 58; *Finch v. Winchelsea*, 1 P. Wms. 284; *Small v. Attwood*, 1 Younge, 507; *Rockwell v. Hobby*, 2 Sandf. Cha. 9; *Blackburn v. Pennington*, 8 B. Mon. 217; *Coote*, 265; *Payne v. Atterbury*, Harring. Ch. 414; *Lowell v. Mutual, &c.*, 8 Cush. 132; *Smith v. Gage*, L. Reg. May, -68, p. 438; *Regan v. Walker*, 2 Chand. 188.

## CHAPTER XL.

## LIEN OF MECHANICS, ETC., FOR LABOR AND MATERIALS.

§ 1. In connection with mortgages and equitable liens, may be considered a lien, unknown to the common law, and originated of late years by express statutes in many of the States; viz., the lien of *mechanics* and *material-men* or furnishers of materials, upon the buildings which they erect or provide for. There is a general similarity of legislation upon this topic; and a brief synopsis of the principal points for which the statutes provide, followed by a summary of the leading decisions in which the statutes have been construed, will constitute the whole view of the subject which the limits of the present work allow.

§ 2. Originally, this lien seems to have applied only as between a party furnishing materials or performing labor and the person with whom he contracted for such materials or labor. Also, for the most part, to have been confined, more especially with reference to labor, to contracts in writing. The latter limitation still to some extent remains, but, in reference to the former, the prevailing statute law now gives to the operative or material-man a claim to the property which derives an accession of value from his outlay; whether the labor and materials are furnished directly to the owner of such property, or to a third party who contracts with the owner; subject, of course, to prior liens and incumbrances, and with the requisite provisions, by way of notice and otherwise, for protecting the land-owner against any double liability. Generally, for the purpose of notice, registration of a written contract is required. In order to retain and perfect the lien, a suit must usually be brought within



a limited time after the claim accrued, varying, in the several States, from sixty days to one year. Sometimes the suit is in the form of a petition, to which all persons interested shall be made, or may become parties, resulting in an equitable adjustment among them, by way of distributing the proceeds of a sale or otherwise. Sometimes the case is expressly made one of chancery jurisdiction, and a foreclosure provided as upon a mortgage; while in other States jurisdiction is expressly given at law, or concurrent jurisdiction in law and equity. Sometimes the lien is secured by attachment, which shall have precedence of all others. It was provided by an early statute in Pennsylvania, that the party might either file his claim with the prothonotary, bring a personal action, or a *scire facias*. A similar alternative was provided in Kentucky. Usually the suit follows the course of other actions, and an execution issues, upon which the property is sold, and the officer ordered to make distribution of the proceeds or to bring the money into court for that purpose. It has been sometimes provided, as in Ohio, that the court might order a lease of the property to satisfy liens. In Missouri, by an early statute, if suit was brought in common form, execution issued against the property in question, only to the amount of the plaintiff's proportional lien, if the defendant was owner or possessor at the time of the contract, and also against his property generally; if by *scire facias* against the original debtor and all owning or possessing the property, then against the property alone. And elsewhere execution has been allowed against the defendant's property, generally. As already suggested, the lien is usually made subject to incumbrances existing at the time it accrues. Specific provision is sometimes made, as in Massachusetts, for the case of prior *attachments*, as also those subsequent to the lien. So also for the adjustment of the priorities among successive liens. The peculiar provision was made in Illinois,<sup>1</sup> that no incumbrance, *either prior or subsequent*, shall have priority, with regard to a building or materials, over the claim of the person who erected or supplied

<sup>1</sup> Rev. L. 447; Stats. 1839-40, 147-50.

them. And, in Tennessee, the lien was made paramount to all legal process except a judgment prior to the commencement of the building.<sup>1</sup> It is sometimes expressly provided that the lien may attach to *particular* estates or equities of redemption. Provision is sometimes made for the prosecution of the suit in case of the death of either creditor or debtor. Also, that the statute remedy shall not bar a common law action for the debt. Also for the joining of different claimants in one petition, and sometimes, as in Illinois, that all persons interested may become parties to the proceeding. Specific provision is also made for a public discharge of the claim, upon payment; sometimes like that of a mortgage, and sometimes under a heavy penalty for its omission. On the other hand, in Indiana,<sup>2</sup> the lien might be discharged by the debtor by the filing of a bond. In New Hampshire,<sup>3</sup> if the land-owner failed to perform in full, and in consequence the creditor did the same; the latter had a lien *pro tanto*. In Rhode Island, (*ub. sup.*) a *tenant* has no lien for repairs. In Maine,<sup>4</sup> where one hires a lot or mill-privilege for the purpose of erecting a building thereon, a mechanic's attachment gives a prior lien upon his interest. In Missouri, in case of leased land, the building will be held, and also the lessee's interest in the lease, unless forfeited, in which case the building may be removed, a ground-rent being paid to the lessor.(a)

<sup>1</sup> Tenn. Sts. 1825, 82; 1829, 47.

<sup>2</sup> Sts. 1834, 165-7.

<sup>3</sup> Rev. Sts. 250.

<sup>4</sup> Sts. 1837, 418-9.

(a) With reference to the precise nature of the remedy in question, it is said, rules both of law and equity are applicable to a proceeding to enforce a mechanic's lien. *Greenough v. Wigginton*, 2 Greene, 485. (But whether equity can interfere in this class of cases, see *Coteman v. Freeman*, 8 Kelly, 187.) It is held that the usual time allowed in equity should be allowed before sale of the property. *Mills v. Heeney*, 86 Ill. 173. A reasonable time. *Rowley v. James*, 81 Ill. 298.

In reference to the *constitutionality* of this class of statutes, it is held that such lien is a constitutional remedy as to future debts. *Blauvelt v. Woodworth*, 81 N. Y. (4 Tiff.) 285. But not as against

an owner who contracted for the erection of a building before the passage of the law. *Donahy v. Clap*, 12 Cush. 440. It is valid as against a corporation, though the corporation are expressly prohibited from *incumbering* the property. The proceeding is only a remedy for recovering a debt, the incurring of which is not forbidden. *University, &c. v. Reher*, 48 Penn. 804.

With regard to *the party* who is liable to be affected by the lien in question; it is held, that, if the employer is either an intruder upon, or a particular tenant of the land, the general owner cannot be affected by the lien. A law, giving this effect to a contract between third per-

sons, would be void for unconstitutionality. Hence, to a petition in such case, the general owner may become a party defendant. *Thaxter v. Williams*, 14 Pick. 49. See *Holdship v. Abercrombie*, 9 Watts, 52. So an execution sale under the lien law passes only the title of the party in possession when the building was erected. *O'Conner v. Weaver*, 4 W. & S. 228; *Evans v. Montgomery*, 1b. 218.

So it is held that the lien law only prefers such lien to every other lien or incumbrance, which attached upon the building *after its commencement*. *Jones v. Hancock*, 1 Md. Ch. 187.

If, when the lien attaches, the person causing the building to be erected has no title to the premises, but a mere right, resting in contract, to a conveyance, on performance of a condition, which is afterwards lost by his failure to perform the condition: subsequent proceedings to enforce the lien will convey no right or title to the purchaser. *Scales v. Griffin*, 2 Doug. 54. And a party who, having verbally contracted for the purchase of land, proceeds to erect buildings upon it, can subject the land to a mechanic's lien only to the extent of his own interest therein. *Laud v. Muirhead*, 81 Miss. 89.

So a mortgage is not affected by a lien subsequently accruing. *Hoover v. Wheeler*, 28 Miss. 814; *Troth v. Hunt*, 8 Blackf. 580; *Zyle v. Ducomb*, 5 Bin. 585; *Leigh v. Bean*, Ashm. 207; *Browne v. Smith*, 2 Browne, 229, n. More especially where the mortgagor is not bound to make the repairs in question. *Reid v. Bank, &c.*, 1 Sneed, 262.

But rents accruing after the lien attached, and rightfully received by the administrator of the mortgagor, may be subjected to the lien. 28 Miss. 814.

In September, a party filed a claim for work done between May and September, and offered in evidence a written admission made in September, that the claim was correct. In July, he had mortgaged the property. Held, such admission could not prejudice the interest of the mortgagee, and the mortgagee, claiming the property, might appear to and defend the action. *Carson v. White*, 6 Gill, 17.

If the property be ordered to be sold, and some of the defendants hold incumbrances older than the lien, those incumbrances, in the order of the dates, should be preferred to the complainant's. *Close v. Hunt*, 6 Blackf. 254.

The defendants, in such case, who are incumbrancers, not being in fault, are not liable for costs. 1b.

But where a carpenter finished a dwelling-house on the 17th of November, 1842, and filed his claim in the office of the clerk of the county, on the 17th of January, 1848, and on the 22d of December, 1842, the owner, then in possession of the house, mortgaged it to a person having no actual knowledge of the lien; held, the lien was prior to that of the mortgage. *Vandyne v. Vanness*. 1 Halst. Ch. 485.

February 25, A and B, to secure their lien, filed their account in the clerk's office, as required by the statute, an abstract of which was entered on the judgment docket. At the April term, they instituted an action of assumpsit on the account, and obtained judgment against the owner of the land; execution was issued against the specific property, and sale made. On the 19th of March, the owner had executed a mortgage on the property. Held, the title acquired under the sale was paramount to the mortgage; that the bringing of an action of assumpsit did not waive the lien; that the declaration in such action may be in the usual form, and need not refer to the lien; that the execution may issue against the specific property; and that the filing of the account and affidavit, and entering an abstract upon the judgment docket, is notice to all the world of the lien. *Spence v. Etter*, 3 Eng. 69.

An unfinished house was sold and a mortgage given back for the price, and immediately recorded. The mortgagee proceeded with the building. Held, persons furnishing labor and materials, after the mortgage was reeorded, had a claim prior to the mortgage. *American, &c. v. Pringle*, 2 S. & R. 188.

Where the owner of land subject to a mechanic's lien mortgages it, but remains in possession, the mortgagee is not entitled to notice of the petition. *Howard v. Robinson*, 5 Cush. 119.

Where a mortgagee in possession erects a house, the mortgage has precedence of the lien. *Ferguson v. Miller*, 6 Cal. 402.

The lien of a judgment recovered against the proprietor, after the commencement of the work, and before its completion, is paramount to that acquired by the mechanic, by filing his account, &c., after the completion of the work. *McCullough v. Caldwell*, 8 Eng. 281.

A building partly completed was bought at sheriff's sale by A, and a deed given him. A judgment being recovered against A, after completion of the building, it was sold thereupon, as A's. Held, in distributing the proceeds, the judg-

ment creditor had priority of a mechanic, who worked for A, in completing the building. *Stevenson v. Stonehill*, 5 Whart. 801.

A furnished materials for a mill, which B credited upon land held by him under articles, and of which he afterwards took a deed, giving C, the vendor, a judgment for the price which was entered on the same day. Held, C's lien should prevail over A's. *Stover v. Neff*, 50 Penn. 258.

Many questions have arisen as to the property to which this lien may attach. See *Hopper v. Childs*, 48 Penn. 822.

It is held that there is no mechanic's lien against a lessee for years, for work and materials for buildings erected by him on the ground leased. *Haworth v. Wallace*, 2 Harr. 118; *Lyman v. King*, 9 Ind. 8.

So buildings and fixtures, erected by a lessee for years, for the purposes of trade, are not the subject of a mechanic's lien in favor of creditors of the lessee. *Church v. Griffith*, 9 Barr, 117.

In California, a lien upon a leasehold is subject to all the conditions of the lease. Only a forfeiture, not a surrender, of the lease, will defeat the lien. *Gaskill v. Trainer*, 8 Cal. 884.

Although after surrender the landlord make improvements. *Gaskill v. Moore*, 4 Cal. 238.

A church is the subject of a mechanic's lien. *Presbyterian Church v. Allison*, 10 Barr, 418. See 5 Allen, 540.

It is held that a carpenter's lien extends to so much of the tract of land on which the house is built, as, with the house, would be required to discharge it. *Van Dyne v. Van Ness*, 1 Halst. Ch. 485.

A lien embraces the quantity of ground necessary to the proper use of the building, as intended at its commencement. *Pennock v. Hoover*, 5 Rawle, 291; *McDonald v. Lindall*, 8 Ib. 492. It is also held to carry with it such right to the land, as will enable the party to use the building for its legitimate purposes. *Roby v. University*, 86 Verm. 564; 28 Penn. 156.

A building partly brick and partly frame, having been repaired, was removed, and afterwards a cellar was dug under it and walled up, a new chimney built, and the house newly weather-boarded and plastered. Held, this was a building *erected and constructed* within the meaning of the lien law. *Burling, &c., Ashm.* 377; *Olympic, &c.*, 8 Browne, 275.

But the addition of a basement to a frame house, fitted for occupancy, is not an *erection* within the law. *Miller v. Oliver*, 8 Watts, 514. See *Howett*, 10 Barr, 379.

The lien attaches to an engine, by which a steam saw-mill is propelled, it being part of the building. *Morgan v. Arthurs*, 3 Watts, 140. So, it seems, one who furnishes lumber for the shelves of a vault has a lien. *Harker v. Conrad*, 12 S. & R. 801. But not, in Pennsylvania, on a steamboat. *Walker v. Anshutz*, 6 W. & S. 519. The lumber may be delivered at a shop distant from the building. So, it need not be actually used, or in a usual or necessary manner. *Hinchman v. Graham*, 2 S. & R. 170; *Harker v. Conrad*, 12, 801; *Harmon v. Cummings*, 48 Penn. 822.

There can be a lien only on the building or land. *Bayliss v. Sinex*, 21 Ind. 45. Not on materials, though used on a building, unless so agreed. *Bennett v. Shackford*, 11 Allen, 444.

A lien may be maintained for work done on a new building, though not separate and distinct from older buildings. The lien attaches to the whole building. *Nelson v. Campbell*, 28 Penn. 156.

The lien attaches to land only as incident to the building. And if the building is destroyed by fire, the lien is gone, so far as relates to the land and to materials left standing after the destruction of the building, and to buildings appurtenant only to the main one. *Wigton, &c.*, 161.

There can be no sale of a building alone. *N. Pres., &c. v. Jevne*, 82 Ill. 213. After a parol partition, only the party's own share is liable. *Otis v. Cusack*, 48 Barb. 546.

Where one contracted, for a sum in gross, to plaster several houses, the fact, that work is done on one within six months from filing the joint claim, will not cause the lien to attach to the others, on which no work was done within that time. *Wilson v. Forder*, 30 Penn. 129.

As has been stated, the prevailing statutory law now provides a lien, not only for the party immediately contracting with the owner, but for sub-contractors and operatives.

Where a *scire facias* to enforce a mechanic's lien is brought against the contractor, who was the principal debtor, and also against the owner of the building, the plaintiff cannot, after discontinuing against the former, proceed to judg-

ment against the latter. *Wibbing v. Powers*, 25 Mis. 599.

In New York, if the claim is by a sub-contractor, no judgment can be ordered against the owner, personally; still less against a grantee of the owner. *Quimby v. Sloan*, 2 E. D. Smith, 594.

Where the plaintiff has performed his agreement with the contractor, but, from the contractor's failure to fulfil his engagement with the owner, no claim can be enforced against the owner, the plaintiff may have judgment against the contractor. *Grogan v. Mayor*, 2 E. D. Smith, 698. See *Pike v. Irwin*, 1 Sandf. 14; *Monteith v. Evans*, 8 Ib. 65.

A lien against an owner, in favor of a sub-contractor, exists only where the work or materials are contemplated by the contract between the owner and first contractor. *Broderick v. Poillon*, 2 E. D. Smith, 554; *Quinn v. Mayor, &c.*, Ib. 558; *Walker v. Paine*, Ib. 662; *Grogan v. Mayor, &c.*, Ib. 698.

Where the building is erected by a purchaser of the lots, for his own benefit, the vendor is not the owner of the building, although the legal title to the lots has not yet been actually transferred, and a claimant cannot have a lien against him. *Gay v. Brown*, 1 Ib. 725.

An owner of land, who agrees to advance money to be applied towards the erection of buildings, and, when the buildings are finished, to convey the land to the builder in fee, receiving a mortgage for his advances, is not an owner of the building under the lien law. *Miller v. Clark*, 2 Ib. 548; *Loonie v. Hogan*, Ib. 681.

Where there is neither allegation nor proof that the defendant is the owner of the building, the claimant cannot recover; but where the defendant in the marine or justices' court goes to trial and to judgment without raising any objection on this ground, the judgment will not be reversed for the want of such proof. *Dixon v. La Farge*, 1 Ib. 722.

The claimant must show that the work and materials were done and furnished in conformity with the terms of a contract with the owner of the building. 1 E. D. Smith, 722. And see *Gay v. Brown*, Ib. 725.

Also that work has been done, for which the owner is actually liable, according to his contract for the erection of the building. *Pendleburg v. Meade*, Ib. 728.

In Missouri, there need be no contract between the owner of a house and a sub-contractor, to give the latter a lien. He

has only to give the notice required by the statute, after doing the work. *Urin v. Waugh*, 11 Mis. 412.

In Pennsylvania, it has been held that a journeyman is not entitled to a lien. *Jobson v. Boden*, 8 Barr, 468. But the word *employed* (in furnishing materials, &c.,) does not mean one who follows the supplying of such materials as a regular business, but applies to any one who actually supplies them. *Savoy v. Jones*, 2 Rawle. 848.

Where a mechanic, &c., has agreed with a builder or architect to furnish labor or materials for the building of a third person, such builder, &c., must be made a party. *Barnes v. Wright*, 2 Miles, 198.

Where one specially contracts to furnish all materials and erect a building for a certain sum, it has been held, that he cannot recover a balance due upon its completion by filing a claim under the lien law. *Hoatz v. Patterson*, 5 Watts & S. 537.

Where a building contract provides, that the contractor shall give security in \$500 that no liens shall be entered on the houses, a lien filed by the contractor himself is nevertheless valid; the provision applying only to liens of other persons and sub-contractors. *Young v. Lyman*, 9 Barr, 449.

The Missouri act applies, only where one person undertakes and completes the building. A suit must be instituted within ninety days after filing the lien. *Lee v. Chambers*, 13 Mis. 236.

In Illinois, only those who furnish labor or materials, by contract with the owner, have a lien for the price. *Dawson v. Harrington*, 12 Ill. 300.

It is the prevailing policy of the statutes upon this subject, to *consolidate* the claims and remedies of mechanics and material-men, both with reference to the parties and the property chargeable with the lien.

In Pennsylvania, a *joint* lien may be filed against several houses belonging to one person. If two houses, contracted for together, are contiguous, the party may either file one lien against all, or a separate one against each, making a rateable apportionment of the amount claimed. *Pennock v. Hoover*, 5 Rawle, 291. See *Croskey v. Coryell*, 2 Whart. 283; *McCall v. Eastwick*, 2 Miles, 45; *Donahoo v. Scott*, 2 Jones, 45; 5 Allen, 406.

The thirteenth section of the Pennsylvania act of 1836 authorizes a joint claim against two or more buildings owned by



the same person, but not a joint claim against two or more separate blocks of buildings, situate on different streets. *Chambers v. Yarnall*, 8 Harr. 265; *Young v. Chambers*, Ib.

In the case of a claim against a block of buildings, joint entries in the book of original entries of the material-man, for lumber furnished for the same and another block, unaccompanied by any other evidence that the lumber was furnished for the block in question, are not admissible in evidence. Ib.

A material-man filed his claim in *scire facias*, against A as owner, and B as contractor, in which the defendants prevailed. A new *scire facias* was then brought against C as owner, and B as contractor. Held, the judgment was no bar, as a former recovery. *Hampton v. Broom*, 1 Miles, 241.

Where a mechanic's claim is filed against a mansion-house, barn, wagon-house, &c., on one farm, to which they are all appurtenant, and are intended to be occupied and used together, there is no necessity for an apportionment of the claim among the several buildings. *Lanman's Appeal*, 8 Barr, 473.

A material-man, who has indiscriminately furnished materials to a contractor, for the erection of two houses, belonging to different owners, may divide his bill, and file a separate lien against each house. *Davis v. Farr*, 1 Harr. 167.

In Rhode Island, in case of distinct lots, belonging to different owners, liens cannot be enforced in one petition. *Butler v. Rivers*, 4 R. I. 88.

With reference to parties connected with the original creditor or debtor; in case of an insane and insolvent owner, and a guardian, the suit may go on. *Pratt v. Seavey*, 41 Maine, 870.

If no lien has been created prior to the death of the owner, and the title has passed to another; no lien can be acquired against a subsequent owner, by proceedings founded on claims arising under a contract with the deceased owner. *Crystal v. Flannelly*, 2 E. D. Smith, 588.

The plaintiff filed notice of a lien two days before the contracting owners had conveyed in trust for creditors. Notice was served both on the owners and the assignees. Held, the legal title, having gone out of the contracting parties before notice of such notice, the lien never attached. *Quimby v. Sloan*, Ib. 594.

The administrator of the defendant may properly be made a party; and, if the plaintiff takes a judgment, without

making the heirs a party, he does it at his peril. *Mix v. Ely*, 2 Greene, 518.

No proceedings under the lien law can be maintained against *executors*, unless title to the property passed to them. *Crystal v. Flannelly*, 2 E. D. Smith, 588.

Upon a contract with the husband, or with the wife, the plaintiff cannot have a judgment against both, to enforce a lien upon her property. *Hauptman v. Catlin*, 1 E. D. Smith, 729; U. S. Dig. 1852; *Husband, &c.* See 18 Ohio St. 181.

A wife, by joining with her husband in a written contract with a mechanic, for furnishing labor or materials for erecting a building on her land, does not thereby create a lien on her estate, and therefore cannot properly be joined with her husband in a petition. But such contract creates a lien on the husband's estate, and, if she be joined, the petitioner may discontinue as to her, and proceed against the husband. *Kirby v. Tead*, 18 Met. 149; *Rogers v. Phillips*, 8 Eng. 866. *Contra*, *Greenough v. Wigginton*, 2 Greene, 485.

By such a contract it was provided, that the last payment should be made "upon the entire fulfilment of the contract, in all its parts, on or before the first day of May," 1844. Also, that, if any difficulty should arise, it should be submitted to two housewrights. The building was not completed on the first of May, but was completed on or before the tenth day of June. A difficulty arose, as to the construction and execution of the contract, and the parties submitted it, on the twelfth day of June, to two housewrights, who decided, on the fourteenth day, that the husband and wife should pay to the mechanic a balance less than \$480; and, on the thirteenth day of December, the mechanic filed a petition, that the land might be sold, and the proceeds applied to the discharge of the balance found due him. Held, the lien on the husband's estate was not dissolved at the filing of the petition, by virtue of the provision, "that the lien shall be dissolved at the expiration of six months after the time when the money due by the contract, or the last instalment thereof, shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months." Ib.

At the time of the contract, the parties had not had a child born alive; but, after the mechanic filed a petition, they had a child born alive. Held, the lien extended to the husband's estate as tenant by the curtesy initiate. Ib.

A married woman cannot be an *employer*, so as to charge the land, unless she has a separate estate therein, with a power of charging it; neither can a husband, since the (Ky.) statute of 1846, in regard to property of married women, charge his estate in the curtesy in his wife's lands, unless she join with him in the contract for labor. *Fetter v. Wilson*, 12 B. Mon. 90.

In Rhode Island, there is no lien as against a wife without her written consent. *Briggs v. Titus*, 7 R. I. 441. As to a lien where the title is fraudulently taken in the husband's name, see *Peck v. Hensley*, 21 Ind. 844.

It has been seen that by express provision, and for the purpose of speedy adjustment, among all parties interested, though distinctly or even adversely, in the same property; the strict rules of pleading are often dispensed with. It is held, however, that it is not necessary to make subsequent lien-holders parties to the action. *Kaylor v. O'Connor*, 1 E. D. Smith, 672.

In New York, application to bring in the contractors as parties may be made on the appearance of the parties in court, pursuant to the notice to appear, and on due notice of an intention to apply for the order. *Sullivan v. Decker*, *Ib.* 699.

A prior lienholder is not a necessary party, unless the plaintiff seeks to impeach or set aside his lien, or claims a higher equity. *Ib.*

The court have the power to add other parties, if their presence seems necessary. *Ib.*

Where the claim is by a sub-contractor, or employee, or vendor of the contractor, the latter is a proper party, and will be ordered by the court to be brought in, on the defendant's application, upon proper notice. [INGRAHAM, J., dissenting.] *Ib.*

Where a claimant has followed the precise course pointed out by the statute, no demurrer lies, because he has not made the contractor a party. *Foster v. Skidmore*, *Ib.* 719.

Application to make the contractors parties should, in general, be made by the defendant's motion or petition. *Ib.* See *Chamberlain v. O'Connor*, 1 E. D. Smith, 665; *Lehretter v. Koffman*, 1 E. D. Smith, 664; *Kaylor v. O'Connor*, *Ib.* 672; *McPheters v. Lumbert*, 41 Maine, 469.

It need not be alleged that the defendant owed the contractor, at the time when the plaintiff—a sub-contractor—

filed his claim. *Doughty v. Devlin*, 1 E. D. Smith, 625.

The word *owner* in the lien law is the correlative of *contractor*; meaning the person who employs him, and for whom the work is done. *McDermott v. Palmer*, 11 Barb. 9.

Proceedings may be had to enforce and bring to a close a lien, either by the claimant against those affected by the lien, or by the owner, who may require the claimant to proceed within thirty days or be barred of his lien. *Carpenter v. Jaques*, 2 E. D. Smith, 571.

Where the claimant had furnished materials to the contractor and effected a lien, but notice of account and settlement was served on the owner only, it was held, that the court, having jurisdiction, erred in dismissing the cause for this reason, but should have proceeded as in other cases where one only of two defendants has been served. *Lowber v. Childs*, 2 *Ib.* 577.

In Pennsylvania, where several mechanics file liens against the same buildings, a sheriff's sale upon one of them defeats and discharges all the others, and the purchaser takes a clear title. The proceeds of sale are rateably divided among the whole. *Anshutz v. McClelland*, 5 Watts, 487.

In Illinois, although it might be proper to order a sale by a master or commissioner, yet the same result is produced by a special execution to the sheriff. The return of that officer would be a report of the sale, which, if not made in pursuance of law, might be set aside, and another sale ordered. *Kelly v. Chapman*, 18 Ill. 580.

The decree need not direct to whom the surplus money, if any, arising from the sale, should be paid. That may remain subject to a future order of the court. *Ib.*

Questions of *time* are of course of great importance. They are, however, generally dependent upon express statutory provision. See *Russell v. Bell*, 44 Penn. 47; *Donovan v. Donovan*, 9 Allen, 140; *Hubbard v. Brown*, 8 *Ib.* 590.

The lien must exist at the time of the work done or material furnished. No change of the relation between other parties can create it. *Clark v. Kingsley*, 8 Allen, 548.

The lien commences with the completion of the work, or the delivery of the materials, under the contract, the requisites of the act being complied with. *McCullough v. Caldwell*, 8 Eng. 231.

The six months allowed for filing such



claim do not begin to run, until extra work done at the request of the owners is finished, although the work which had been specially contracted for had been previously completed. *Johns v. Bolton*, 2 Jones, 339.

When a work was completed, the mechanic took a note for the price due, which note became due May 1, 1848. Held, proceedings instituted March 27, 1849, were commenced within a year after the wages became due. *Mix v. Ely*, 2 Greene, 513.

Under the lien law for the city of New York, (St. 1844, p. 389,) a mechanic's lien is limited to one year from its commencement, notwithstanding the recovery of a judgment thereon against the owner, before the end of the year. *Freeman v. Cram*, 3 Comst. 305.

The commencement of a building, within the meaning of the lien law, is the first labor done on the ground, which is made the foundation, and to form a part of the work suitable and necessary for its construction; and this is unchanged by any change in the ownership of the land and building, or in the plan, provided the original design of its character remains. *Pennock v. Hoover*, 5 Rawle, 291.

If, after such lien has accrued, the employer die, a bill to enforce it may be filed against the heirs. *Pifer v. Ward*, 8 Blackf. 252.

With regard to the forms of proceeding in suits upon the lien law, the description of the debt and the premises, numerous cases have been decided, often turning upon points of mere local application, and, therefore, not requiring extended notice. It has been held, in general, that the statute must be strictly pursued; and the particulars of the claim fully stated. *Greene v. Ely*, 2 Greene, 508; *Quimby v. Sloan*, 2 E. D. Smith, 594; *Jackson v. Sloan*, Ib. 616.

The proceeding is a *civil action*. *Doughty v. Devlin*, 1 E. D. Smith, 625. The defendant may demur. Ib. So the petitioner must prove the contract as alleged, and he cannot abandon the contract set out, and recover upon a *quantum meruit*. *Carroll v. Craine*, 4 Gilman, 563.

The remedy is additional to such other remedies as a party may have, and may be proceeded with concurrently with them. *West v. Fleming*, 18 Ill. 248.

The complainant must show a claim. *Croukright v. Thomson*, 1 E. D. Smith, 661; *Foster v. Poillon*, 2 Ib. 556.

Where the claim is for work done under an agreement with the contractor, the

plaintiff cannot enforce the lien for work done for the owner. *Hauptman v. Halsey*, 1 E. D. Smith, 668.

Under the (Tenn.) St. 1846, c. 118, the lien does not enure to one who merely furnishes to the owner of a building lumber for its construction or repair. *Stevens v. Wells*, 4 Sneed, 387.

To enforce a lien upon a building for materials, the materials must have been, by the express terms of the contract, furnished for the particular building. *Houghton v. Blake*, 5 Cal. 240.

There may be a lien for labor, though invalid for materials. *Fellow v. Minot*, 7 Allen, 412.

Liens for labor and for materials are equal. *Moxley v. Shepard*, 3 Cal. 64.

But are not valid for either labor or materials; unless allowed by law for both, where the prices are not separated in the contract. But there may be a lien for extra work. *Mulrey v. Barrow*, 11 Allen, 152; *Graves v. Bemis*, 8 Allen, 578.

And the same rule is adopted as to payments. *Driscoll v. Hill*, 11 Allen, 154.

The lien is valid only for the material furnished and used. *Hunter v. Blanchard*, 18 Ill. 318.

The amount to be recovered is to be upon the principle of *quan. mer.* and *valeb.* *Hauptman v. Catlin*, 1 E. D. Smith, 729.

Much strictness has been required, in stating the place where the property is located. Hence, where the statute extended the provision to the village of L., and a building was described in the original lien and the *scire facias*, as between the turnpike and the village, and was proved to be upon an out-lot adjoining it; held, the act did not apply. *Tilford v. Wallace*, 3 Watts, 141. But see *Springer v. Keyser*, 6 Whart, 187; *Davis v. Church*, 1 W. & S. 24; *Sullivan v. Johns*, 5 Whart. 366.

But, if there is a want of common certainty in a description of a lot of land by the number thereof, the defendant must show wherein the defect or uncertainty consists. *O'Halloran v. Sullivan*, 1 Ib. 75.

A claim for materials, under the Pennsylvania statute, without specification of kind or quantity, is bad. *Lauman, &c.*, 8 Barr, 473. See *Noll v. Swineford*, 6 Barr, 107. But a reference to a special contract, in a mechanic's claim, is unnecessary, under the Pennsylvania statute of 1845. *O'Brien v. Logan*, 9 Barr, 97.

The statutory plea of the owner, that the house or land is not liable, compels the material man to prove a compliance with the statute. *Tomlinson v. Degraw*, 2 Dutch. 73.

A plea to an action by a material man, relying on the fact that the action was not commenced against the owner and builder, as required by the statute, must expressly aver that fact. *Ib.*

The nature of an interest to be sold under a decree of sale is sufficiently ascertained by a lease, which is referred to and described in the decree of the court. *Gaskill v. Moore*, 4 Cal. 238.

Items of claims were set forth thus: "June 30, 1847. To building 63 2-3 perches, at \$1.50, and materials, \$95.50." "July 29. To 18 perches in cellar doors, at \$1.50, \$19.50." Held, the date was presumed to be the time when the work was completed, and the quantity ascertained. *Donahoo v. Scott*, 2 Jones, 45.

(A mechanic who adopts a statement of his claim, signed by his attorney at law, is entitled to the benefit of it by his *sci. fa.* *Ib.*)

A petition alleged, that payment was to be made as the work progressed, and, if any balance should remain when the work was completed, that was to be paid as the parties could agree. Held, this was a sufficient statement of the time of payment. *Mix v. Ely*, 2 Greene, (Iowa,) 513.

The omission, from the body of a mechanic's claim, of the initial letter of the middle name of the owner, is immaterial. *Knabb's Appeal*, 10 Barr, 186.

Claim against a house, (describing it,) "and the lot of ground and curtilage appurtenant to said building," "for work and labor done within six months last past, for and about the erection and construction of the said building and appurtenance." Held, not sufficiently certain. *Barclay, &c.*, 1 Harr. 495. See *Shaw v. Barnes*, 5 Barr, 18.

Where there is a contract to erect houses for a specified sum, and it has been wholly or partially performed, if the completion has been dispensed with by the owners, it is not necessary to set forth the items of work, materials, &c., in the claim filed. *Young v. Lyman*, 9 Barr, 449.

Where the copy of a bill annexed to a mechanic's claim sets forth an impossible date, as "1846," for "1845," the variance is not fatal, if the real date of furnishing the materials be proved. *Hillary v. Pollock*, 1 Harr. 186.

Where a claim for a lien on buildings, &c., under the Pennsylvania act of 1826, on account of bricks furnished, was dated Nov. 7, 1847, and alleged that the whole number was furnished within six months last past, and a bill of particulars was

annexed which specified June 8, 1847, as the date of the last delivery; held, the time when the bricks were furnished was alleged with sufficient certainty. *Calhoun v. Mahon*, 2 Harr. 56.

A description of the lot, as "number 751, in the city of Dubuque," is sufficient; so also "a brick house upon the said lot, to be 20 feet by 30, two stories high, and a cellar." *O'Halloran v. Sullivan*, 1 Greene, 75.

In New York, a claimant may foreclose a lien in the common pleas, or, provided the amount does not exceed \$100, in a justice's court; the jurisdiction of the justices' courts is not exclusive, but concurrent. *Jaques v. Morris*, 2 E. D. Smith, 639.

A complaint to foreclose under the law of 1851, is defective, unless it state that materials were furnished and labor performed at or before the time of filing the notice of lien. *Ib.*

Where a plaintiff, in a *sci. fa.* upon a mechanic's claim, in Pennsylvania, has been nonsuited, he may file another claim for the same demand, and proceed thereon, though the former claim remains on the records of the court. *Bournonville v. Goodall*, 10 Barr, 188.

Taking a bond with warrant of attorney, and entering judgment on it, are not *filing a claim or instituting a suit*, within the meaning of the lien law. *Williams v. Tearney*, 8 S. & R. 58.

In a suit to enforce a mechanic's lien, the defendant may set off a claim for unliquidated damages, founded upon the plaintiff's breach of contract to erect the building. *Bayne v. Gaylord*, 3 Watts, 801.

So in *scire facias* against the owner and the contractor, the contractor may set off a claim due him from the plaintiff. *Gable v. Parry*, 1 Harr. 181.

A lien may be good, though something is wrongfully added to the claim, if by mistake. *Hubbard v. Brown*, 8 Allen, 590.

Notice is usually made a prominent requisite to the enforcement of this lien. The plaintiff cannot recover more than is claimed in his notice, with interest and costs. *Protective, &c. v. Nixon*, 1 E. D. Smith, 671. See *Peck v. Hensley*, 21 Ind. 344.

And, in regard to the preliminary notice of the claim, it is held that any defect is fatal, notwithstanding an appearance; and is not amendable. *Beals v. Cong.*, &c., 1 E. D. Smith, 854.

But, after appearing and contesting the

claim, the defendant cannot object that the contractor was not named in the notice. *McBride v. Crawford*, 1 E. D. Smith, 658.

A claim must state that the work was done and the materials furnished within the statutory period from the entry of the claim, but dates must be given, either on the face of the claim, or by reference, by which the allegation can be substantiated. If the work is done under one entire contract, one date only need be stated, and the evidence must show that the date of actual completion was within the six months; but the date alleged and the date proved need not be the same. *Fourth, &c. v. Trout*, 28 Penn. 153. See, further, *Tinker v. Geraghty*, 1 E. D. Smith, 687.

So, although the notice is informal, a judgment will be good. *Ib.*

A notice must state "the intention to claim the benefit of the lien." *Hess v. Poultney*, 10 Md. 257.

Also the nature and kind of materials, and the amount claimed. *Thomas v. Barber*, 10 Md. 880.

The erection of a building as an entire job may be so stated. *Davis v. Hines*, 6 Ohio (N. S.), 478.

*Payment* may consist in giving the contractor credit for a debt due from him, according to agreement. *Allen v. Carman*, 1 E. D. Smith, 692. See *Briggs v. Titus*, 7 R. I. 441; *Stewart v. McQuaid*, 48 Penn. 195.

It is a good defence that there is nothing due on the contract with the owner. *Spalding v. King*, 1 E. D. Smith, 717.

In case of defective work, there may be a *recoupment* without previous notice. *Gourdier v. Thorp*, 1 E. D. Smith, 697.

In New York, notwithstanding payment to the county clerk, under Stat. 1851, the plaintiff must prosecute his claim before the court. *Dunning v. Clark*, 2 E. D. Smith, 535.

A, having purchased lumber from B, to be used in a building, came into possession of a note signed by B, payable in lumber to a larger amount than that received by A, and afterwards purchased of B more lumber, exceeding the amount of the note. A and B agreed that the note should go to the account of another building, upon which B lost his lien by neglecting to file his claim seasonably. C purchased the former building before the latter was commenced. B files a lien claim against the former building, for the whole amount of lumber furnished.

Held, B's claim was extinguished *pro tanto* by the note, and could not be enforced for the whole, as against C. *Hopkins v. Conrad*, 2 Rawle, 816.

The lien is waived by taking negotiable notes, payable after the time when the lien would take effect, and actually negotiating them, notwithstanding the promisee takes them up, and offers to surrender them in court. *Green v. Fox*, 7 Allen, 85.

Though a suit is brought on the lien, another lies against the contractor. *Gridley v. Rowland*, 1 E. D. Smith, 670.

Taking the contractor's note does not affect a lien; and notice may be filed, although the lien cannot be enforced, before the note is due. *Miller v. Moore*, *Ib.* 789.

The claimant may enforce his lien, unless the term of credit was so long that the lien shall have expired by the statute limitation, or unless the steps taken by the owner, while the credit was running, have defeated it. *Ib.*

The plaintiff had a claim on the defendant for work, &c., for which the defendant gave his note to the plaintiff, who transferred it. The note was protested and judgment recovered against the defendant by the indorsee; but the execution was returned unsatisfied. After protest the plaintiff filed a notice of lien which he now sought to foreclose, and produced the note to be cancelled; but by what means he was again possessed of it did not appear. Held, that the production of the note, without showing that the judgment recovered thereon was satisfied by him, or that the title was again in him, was not enough to warrant a recovery. *Teaz v. Chrystie*. 2 *Ib.* 621.

There may be a lien against the owner, though the builder has agreed to extinguish all liens. *Mulrey v. Barrow*, 11 Allen, 152.

The fact that the materials furnished, for which a lien is claimed, were charged to the contractor individually with reference to the building, does not preclude the plaintiff from showing that they were furnished on the credit of the building; and, whether the materials so furnished were actually used in the construction, is immaterial. *Presbyterian, &c. v. Allison*, 10 Barr, 418. The acceptance of a note by a mechanic is not a waiver of his lien, unless it was so intended. *Greene v. Ely*, 2 Greene (Iowa), 508; *Mix v. Ely*, 1 *Ib.* 518.

Where a promissory note has been

given for part of the debt for which a mechanic's lien has been filed, the amount may be recovered by the claimant, who holds the note which had been dishonored. *Johns v. Bolton*, 12 Penn. 339.

Nor is an agreement to receive payment, partly in cash, and the balance in lumber at fair prices, whenever called for, &c., and the acceptance of a guaranty from a third person, for the fulfillment of this contract, a waiver. *Hinchman v. Lybrand*, 14 S. & R. 82.

Where the contract provides for "satisfactory paper," the lien is not discharged by taking the employer's note or draft, though accompanied by a receipt "in full to date." *Wheeler v. Schroeder*, 4 R. I. 383.

Under the lien law of 1853, matter affecting the existence of the lien is no bar to an action against the builder for

the materials. *Tomlinson v. Degraw*, 2 Dutch. 78.

It has been held in New Jersey, that proceeding by personal action against the debtor is not a waiver of a carpenter's lien. *Van Dyne v. Van Ness*, 1 Halst. Ch. 485. But it is decided otherwise in Pennsylvania, where the defendant prevails in the first suit. *Whelan v. Hill*, 2 Whart. 118.

The lien is good, if full performance is waived. *Stewart v. McQuaid*, 48 Penn 191.

See, as to some miscellaneous points, *N. Pres., &c. v. Jevne*, 82 Ill. 218; *McBride v. Longworth*, 14 Ohio St. 349; *Russell v. Bell*, 44 Penn. 47; *Redington v. Fry*, 48 Maine, 578; *McPheters v. Lambert*, 41 Me. 469; *Morrison v. Minot*, 5 Allen, 408; *Rathbun v. Hayford*, Ib. 406; *Peabody v. Eastern, &c.*, Ib. 540; *Bank, &c.*, 29 Penn. 330.

## CHAPTER XLI.

## REMAINDER. VESTED AND CONTINGENT REMAINDERS.

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| 1. Definition—cannot be after a fee.                                   | the termination of a life; limitation after a life, where the term for years is short. |
| 2. By what words created.  |  |
| 3. Vested or contingent; when contingent.                              | 8. Exceptions to fourth class—Shelley's case—"designatio personæ," &c.                 |
| 6. Classification of contingent remainders.                            | 9. Ch. J. Willes' division of contingent remainders.                                   |
| 7. Exception to third class—limitation for a long term—remainder after |  |

§ 1. A REMAINDER is defined as a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. Thus, if A, being an owner in fee, convey the land to B for ten years, remainder to C and his heirs forever, B is tenant for years, with a remainder to C in fee. Both these estates subsist at one time, and both are parts of one entire estate, making together the absolute and perpetual inheritance of the land. The former is said to be merely *carved out* of the inheritance. Hence, where the fee-simple is first conveyed, this being the whole estate, no remainder can be validly limited upon it. Thus where land is conveyed to A and his heirs, and, if he die without heirs, remainder to B in fee, the remainder is void. So, where land was devised to one corporation and its successors, so as they paid a certain annual sum to another and its successors, on failure of which, the estate of the former to cease, and the latter to have it; held, the latter limitation was void.<sup>1</sup> And the same rule applies to a limitation

<sup>1</sup> Co. Lit. 148 a; 4 Kent, 196-7; 1 Abr. Strobh. Eq. 87. See Woodson v. Smith, Eq. 186; Dyer, 88 a. Buist v. Dawes, 4 1 Head, 276.

after a remainder in fee. Thus, where a will, after giving an estate in fee in remainder to children, provided that, if, their mother survived them, it should go to her; held, the children took a vested remainder in fee, and not a contingent remainder.<sup>1</sup> Upon the same principle it has been held, that even upon a conditional, base or qualified fee, no remainder can be limited, because the entire fee passes, leaving only a possibility of *reverter* in the grantor. Thus, if lands be given to A and his heirs, so long as B has heirs of his body, or till B returns from Rome, remainder to C in fee; the remainder is void as such, though it might be good as a *shifting use*, or executory limitation. This principle, however, has been doubted. And upon an estate tail, since the statute *de donis*, a remainder may be validly limited.<sup>2</sup>

§ 2. The estate above described may be created, without the use of the word *remainder*, by any expressions of equivalent meaning; as, for instance, that after the death of A the land shall *revert and descend* to B, &c.<sup>3</sup>

§ 3. Remainders are either *vested* or *contingent*. The former is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; or where, if the precedent estate should terminate immediately after its creation, the remainder would then take effect. In other words, a vested remainder is a present interest, though to be enjoyed in future; an immediate right of present enjoyment, or a present fixed right of future enjoyment. And there may be many successive remainders, all of which shall be vested. Thus, if the land be limited to A for life, remainder to B in tail, remainder to C in fee; B's remainder is vested, because, if A should immediately die, B would take; and C's is vested, because, if A should immediately die, and also B, without lineal heirs, C would take.(a)

§ 4. A vested remainder is in general subject to the same dis-

<sup>1</sup> Blanchard v. Brooks, 12 Pick. 64.

<sup>2</sup> Co. Lit. 18 a; Edward Seymour's Case, 10 Rep. 97 b; Gardner v. Sheldon, Vaugh. 269; Willion v. Berkley, Plow.

285; 4 Kent, 198-9; Peppercorn v. Pea-

cock, 8 Man. & G. 356; Doe v. Simpson,

5, 780.

<sup>3</sup> 2 Cruise, 238.

(a) As to *merger* in case of conditional fees, see Doe v. Simpson, 4 Bing. N. 833.



positions with an estate in possession. It gives a legal or equitable seisin, and may be sold on execution.<sup>1</sup>

§ 5. On the other hand, a remainder is contingent, when it is limited to take effect on a condition, which may never happen, or be performed, or not till after the determination of the preceding estate.<sup>2(a)</sup>

§ 6. Mr. Fearn divides contingent remainders into four classes. First, where the remainder depends on a contingent determination of the prior estate, by the act either of a third person or of the prior owner himself. Thus, if A convey to the use of B till C returns from Rome, and after such return to remain over to D in fee; here B's estate will end, and D's take effect, only upon a particular event, which may possibly never happen. So where one conveys to the use of A in tail, until he does such an act; then to B in tail; B has a contingent remainder.<sup>3</sup> Second, the remainder may be limited to take effect only upon the happening of an event, which is wholly independent of the mode of termination of the prior estate. Thus, if a lease for life be made to A, B and C, and, if B survive C, remainder to B in fee, the

<sup>1</sup> 1 N. Y. Rev. St. 723; Willes, 387; 4 Kent, 201; 1 Prest. on Est. 94-8; Bowling v. Dobyn, 5 Dana, 438; Jackson v. Sublett, 10 B. Mon. 467; Wiley v. Bridgman, 1 Head, 68.

<sup>2</sup> 2 Cruise, 238.

<sup>3</sup> Fearn, 5; Arton v. Hare, Poph. 97; Large's Case, 3 Leo, 182.

(a) But it is said, that in some instances a vested remainder would seem to possess the essential qualities of a contingent estate. 4 Kent, 204.

A remainder in fee, limited upon an estate tail, is *vested*, because the latter must at some time come to an end. 1 Steph. 302.

Devise to the wife of the testator during widowhood; and, upon her marriage, one-half the estate to go to a son. Another clause devised to the son, upon the death of the widow, *the remaining part* of the testator's landed property. The introductory clause of the will expressed an intent to dispose of all the testator's property. The widow having married, held, the son was entitled to possession of one moiety of the estate, and that he took a vested remainder in the other; that the remainder was subject to execution, and the purchaser entitled to pos-

session upon the death of the widow, notwithstanding the son's death during her life. The son took a vested remainder in the whole estate, because it depended upon a certain event, the death of the widow, who took a life estate by implication, determinable as to a moiety by her marriage. The conditional limitation to the precedent estate, to wit, the second marriage, gave the son possession of a moiety on the happening of that event. Chapin v. Marvin, 12 Wend. 538.

It was remarked by Lord Chief Justice Willes to the House of Lords, that "the notion of a contingent remainder is a matter of a good deal of nicety; and if I should trouble you with all that is said in the books concerning contingent remainders, and the instances that are put of them, I am afraid it would rather tend to puzzle than enlighten the case." Willes, 387.



remainder does not depend upon the manner of termination of the prior estates, but upon B's survivorship. In other words, the prior estates are subject to no contingency, but must expire by their natural limitation. The contingency is in the remainder only.<sup>1</sup> So in case of a devise to the use of A, the heir at law, for life; and from and after his death to the use of B in fee, in case B should survive A; but, if she should die living A, to the use of A in fee: B has a contingent remainder.<sup>2</sup> So a testator by his will directed that certain land "be equally divided between my children, A, B, C, D and E, or so many as are alive when divided," at a time prescribed. Held, that none other than the children named could participate in the devise; not the issue of one dying before the devise should take effect.<sup>3</sup> Third, the remainder may be limited upon an event which, though it must happen at some time, may not occur till after the termination of the prior estate; in which case, as will be seen hereafter, the remainder becomes void.(a) Fourth, the remainder may be

<sup>1</sup> Co. Lit. 878 a; *Ryder*, 11 Paige, 185.

<sup>2</sup> *Doe v. Scudamore*, 2 B. & P. 289.

<sup>3</sup> *Morton v. Morton*, 2 Swan, 818.

(a) Conveyance to A for life, and, after the death of B, remainder to C in fee. If A should die before B, C's remainder could never take effect. Hence it is contingent. *Boraston's Case*, 8 Rep. 20 a.

Devise to G for life, and at his death in fee-simple to his eldest son then living. A son is afterwards born. This is a contingent remainder in fee in the son, dependent upon his being alive at the death of G. *Baylor v. Dejarnette*, 18 Gratt, 152.

A testator devised land to his wife, and proceeded to devise "to any child or children of mine which I shall leave at my decease, and to their heirs, and to all the G's (children of his wife,) who shall be living at my wife's decease, equally to be divided among them all, the reversion and remainder of said real estate after the death of my wife, in equal portions to each of them and their heirs in common; and if none of the G's be living at the decease of my wife, then the said reversion shall remain to my said child or children and their heirs." The wife survived all her own children, and the son and only child (by a former wife) of the testator, and died. Held the

wife's children had only a contingent remainder, which never vested; and the estate vested in the testator's son, either as devisee or heir, and descended to his heirs, not to the collateral relations of the testator. *Dixon v. Pickett*, 10 Pick. 517.

A testator gave his daughter the income, &c., during the life of her husband; and, if she survive him, to her, her heirs, &c., a moiety of the estate—the other moiety to her children in fee; and, if she survive her husband and all her children, to her, her heirs, &c.; and if she should die, living her husband, then to him the income, &c., of a moiety for life, and the residue of the estate to her children in fee. The husband and four children of the daughter were living, at the making of the will, the death of the testator, and at her death. Held, she took a life estate for the joint lives of herself and husband; that her children took a vested estate in one moiety; that the remainder to them in the other moiety was contingent, depending upon the event of her dying before or after the husband; that, if she should survive him, she would take it in fee; if he should survive her, he

limited to persons not in existence or ascertained at the time of such limitation. Thus, in case of a conveyance to A for life, remainder to the right heirs of B, who is living; inasmuch as *nemo est hæres viventis*, and until B's death it cannot be known who his heirs will be, and he may die before A; the remainder is contingent.<sup>1</sup> So upon a conveyance to A and B for their joint lives, remainder to the heirs of the survivor; since it is uncertain which of them will survive the other, the remainder is contingent.<sup>2</sup>

§ 7. An exception to the third class above enumerated, is where the prior estate is for a very long term, and the remainder is limited upon the death of the particular tenant, or of a third person. Here the improbability of such person's outliving the prior estate is so great, that the remainder is held to be not contingent but vested. As the life cannot exceed the term, and the term must determine with the life, the limitation from the expiration of the life is in effect a limitation from the end of the

<sup>1</sup> See *Woodson v. Haviland*, 18 Conn. 101.

<sup>2</sup> *Biggot v. Smyth*, Cro. Car. 102.

would take a life estate in this moiety, with remainder to her children; and that, as he did survive her, the children took a vested remainder. *Blanchard v. Brooks*, 12 Pick. 47.

Devises to two grandchildren, with this proviso, "if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three-fourth parts shall be equally divided between A, B and C," &c. The grandchildren lived many years after they arrived at full age, and then both died without issue. Held, the devise over to A, B and C, &c., never took effect. *Doe v. Watson*, 8 How. (U. S.) 268.

A testator gave all his personal estate to his wife; also, all his real estate in fee, except two lots of land. Those parcels he devised to his wife for life, and, after her death, in case his daughter A (his only child) should die without having married, or without leaving any child or children, one parcel to his nephew B, and the other to his nephew C. The daughter survived the mother, but afterwards died without issue. Held, the nephews took contingent remainders in fee, which would take effect, only in case the daugh-

ter died childless during the life of the widow; that the daughter, in the meantime, took the fee by descent; and that, on her surviving the widow, the remainders fell, and she became entitled to the premises absolutely. *Wolfe v. Van Nostrand*, 2 Comst. 486.

A testator devised certain lands, slaves, bank stock, &c., to his executors, in trust, to apply the rents and profits to the support of A and his family, until he should be thirty-five years of age, and, if his business habits should then be good, then to convey the same to A absolutely; otherwise, in trust, to settle the same, so as to give the use and profits to A for life, with remainder over to such child or children as he might leave living at his death; but, if he should leave no child, then remainder over to the children of B. A died before he arrived at the age of thirty-five. Held, A took only a life estate, subject to be enlarged to an absolute estate on the contingency mentioned; and that, on his death before the happening of the contingency, the remainder took effect, and the absolute estate vested in his children. *Mooney v. Evans*, 6 Ired. Eq. 368.

term.<sup>1</sup>(a) But where the term is so short that there is a probability of its terminating before the life, the remainder is contingent. Thus in case of a limitation to A for twenty-one years, if he live so long, after his death to B in fee, the remainder is contingent.<sup>2</sup> And, in some cases, the same rule has been adopted where the possibility seemed very remote. Thus a devise was made to A for sixty years, if he live so long; from and after his death, to B, his son, in tail. A was forty years old (at the date of the will.) Held, this limitation could not be construed to mean from the death of A *during the term*, or to give A a term for sixty years, if he should so long live, and vest the inheritance immediately in B; but that, if A should outlive the term, which was possible, B could not take, and therefore the remainder was contingent.<sup>3</sup>

§ 8. To the fourth class of contingent remainders, there are three exceptions. The first arises out of the rule in Shelley's case, so called.<sup>4</sup> The principle settled by that case is, that, where a freehold estate is limited to a person, remainder to his heirs, or the heirs of his body; instead of his taking a particular estate, with a contingent remainder to his heirs, the whole inheritance vests at once in him. This point, which has been the subject of great discussion, will be more particularly considered hereafter.(b) Upon a similar principle, where the grantor or

<sup>1</sup> 2 Cruise, 244.

<sup>2</sup> Pollexen, 67.

<sup>3</sup> Beverley v. Beverley, 2 Vern. 181.

<sup>4</sup> 1 Co. 104; 2 Rolle's Abr. 417.

(a) Conveyance to the use of A for ninety-nine years, if he live so long, and, after his death, of B in fee. B's remainder is vested. Weale v. Lower, Pollexen, 67.

A person covenants to stand seized to the use of himself for life, remainder to A for eighty-nine years, if B, his son, should live so long; remainder, after B's death, to C, another son, in tail. C takes a vested remainder. 2 Cruise, 244; cites Lord Derby's Case, Lit. R. 870.

A conveyed to the use of himself for life, remainder to the feoffees for eighty years, if B, and C, his wife, should so long live; if C survived B, to the use of C for life; after her death, to the use of the son of C and B in tail; for default of such issue, to the use of D and E in tail,

remainder to A's right heirs. A died, and C died leaving a son, who died without issue. In a suit between D and E, and the heir of A; held, the remainder in tail to the first son of C and B, and the remainder to D and B, were vested remainders, the law not regarding the possibility that B and C would outlive the term of eighty years. Napper v. Sanders. Hut. 119.

(b) See Shelley's Case—Deed, Devise. Under the "act regulating the descent of real estate," passed June 18, 1820, in New Jersey, (R. L. 774, sec. 1,) the estate of the children of a devisee for life, with remainder to his heirs, is a contingent, and not a vested remainder, during the life of the life tenant. Den v. Demarest, 1 N. J. 525.

devisor of an estate limits the remainder to his own heirs; instead of a contingent remainder to the heirs, the effect is, to leave the reversion in fee in himself. Thus, where one devised his estate to his widow during her widowhood, and, after her death or marriage, ordered that it should be distributed in the same manner as if it had not been devised; held, no valid remainder was created, but the reversion in fee, expectant upon the wife's life estate, descended to the testator's heirs at law.<sup>1</sup> (See *Reversion*.) A third exception is, where the term *heirs* is plainly used as *designatio personæ*; as, for instance, in case of a limitation to a man and the heirs of his body, *now living*. So, if an estate is devised to a person *and his heirs* during his natural life, remainder over after his death; the word *heirs*, if it have any legal effect, is *designatio personæ*, meaning that those who are the heirs apparent shall enjoy *with the devisee* during his life; and he takes only a life estate. This construction, however, is confined to *devises*.<sup>2</sup>

§ 9. Mr. Fearne's fourfold classification of contingent remainders is simplified to two general classes by Lord Ch. J. Willes; viz: 1. Where the person to whom the remainder is limited is not *in esse*; 2. Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate.(a)

<sup>1</sup> *Whitney v. Whitney*, 14 Mass. 88. But see *Bates v. Webb*, 8 Mass. 458.

<sup>2</sup> 4 Kent, 212; *Throop v. Williams*, 5 Conn. 98.

(a) His lordship's language is, however, that there are but two sorts of contingent remainders *which do not vest*. This would hardly imply that he supposed there were any other contingent remainders which do vest, were it not for some expressions in a subsequent part of the same opinion; where, putting the case of the grant of an estate by A to B for ninety-nine years, determinable in B's life; he says, if B outlive the term, surrender, &c., A may enjoy the estate again—therefore, he has a contingent

*freehold* during B's life. It must be a *vested interest*, for it was never out of him. If A had a *contingent freehold*, he might grant it over; and if he do, it must be of the same nature it was before—a *vested freehold*. In these remarks, the words *vested* and *contingent* seem to be used not as contradictory, but synonymous, or at least consistent terms. *Smith v. Parkhurst*, 3 Atk. 188; *Willis*, 387-9; *Throop v. Williams*, 5 Conn. 99; 1 N. Y. Rev. Stat. 723; 1 Wooddeson 191.

## CHAPTER XLII.

## REMAINDER. VESTED AND CONTINGENT REMAINDERS.

1. Contingency of remainder depends on *present* capacity of taking effect.
2. Law favors vested remainders.
4. Remainder may be vested, though not to take effect upon every possible termination of prior estate.
5. Intervention of contingent estate—remainder not thereby contingent, unless the estate is a fee.
7. Contingent estates may be *devised*, as substitutes for each other.
10. Cross remainders.
11. Prior limitation to trustees and their heirs till a certain event.
12. Where one of concurrent remainders, &c., vests—the rest defeated.
- 12 a. Successive remainders—whether the contingency named affects only one or the whole; limitation after an estate, depending on a contingency which never happens
14. After the conditional termination of an estate, which never takes effect.
15. After the conditional termination of an estate which takes effect, but terminates otherwise.
16. Words importing not a contingent remainder, but when a remainder shall come into possession.
19. Remainder upon condition *subsequent*.

§ 1. FROM the preceding remarks it sufficiently appears, that the question, whether a remainder is vested or contingent, does not depend upon *the certainty or uncertainty of its ever taking effect in possession*; but upon its present capacity of thus taking effect, if the possession were to become vacant.<sup>(a)</sup> Thus, if there be a lease for life to A, remainder for life to B, B's remain-

(a) It has been said, that, in some cases, even without this capacity, a remainder may be vested. The true principle would therefore seem to be, that, *with this quality*, a remainder *must* be vested, and *may* be vested without it. Cornish, 102.

"A vested remainder is one that takes effect in interest and right immediately on the death of the testator; although it may not take effect, indeed, if it be a remainder, it cannot take effect in possession and enjoyment, until the death of the devisee for life, or other determina-

tion of the particular estate." "A present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. In general, the law favors that construction, which holds a remainder vested, rather than that which considers it contingent, when the question is doubtful." Per Shaw, C. J. *Brown v. Lawrence*, 8 Cush. 397.

der is vested, although he may die before A. But, if there be a lease for life to A. remainder for life to B after the death of C, inasmuch as B's estate would not necessarily vest upon the present determination of A's estate, the remainder is contingent. The latter illustration, however, shows how a remainder contingent in its creation may become vested; for, upon the death of C, B's remainder undergoes this change, because, from that time, if at any moment A's estate should cease, B's would immediately take effect. Hence, also, it appears that a contingent remainder passes through two stages before it becomes an estate in possession. Thus, in the case supposed, upon the death of C, living A, B's contingent remainder becomes a vested remainder; and then, upon the death of A, the vested remainder becomes a vested estate.<sup>1</sup> So a remainder in fee, limited by will to the eldest son of the first taker, to whom an intermediate life estate is given, is contingent, until the birth of such son; but, on the happening of that event, before the termination of the life estate, it becomes a vested estate in remainder.<sup>2</sup>

§ 2. These observations lead naturally to a consideration of the more minute distinctions between vested and contingent remainders. It may be remarked at the outset, that, as the court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the fee in abeyance; so neither does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to *support* the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment.<sup>3</sup> Upon this ground, a devise, appearing to depend upon an event that is sure to happen, is vested, if the happening of the event does not form a part of the description of the devisee, and if the suspensive expressions can, consistently with, or by aid of, other parts of the will, be

<sup>1</sup> Fearn, 829, 881; Willes, 887; Williamson v. Field, 2 Sandf. Cha. 588; Bentley v. Long, 1 Strobh. Eq. 48. See Vorley v. Richardson, 85 Eng. L. & Eq. 402; Hunt v. Dorsett, *Ib.* 346.

<sup>2</sup> Wendell v. Crandall, 1 Comst. 491.

<sup>3</sup> 6 Cas. 175; Wilkes v. Lion, 2 Cow. 888; Ives v. Legge, 3 T. R. 489, n.; Den v. Demarest, 1 N. J. 525; Wolfe v. Van Nostrand, 2 Comst. 436; Johnson v. Valentine, 4 Sandf. 86; Womrath v. McCormick, 51 Penn. 504.

probably interpreted as referring not to the vesting of the title, but to the vesting of the enjoyment.(a)

§ 3. Whenever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder; such remainder is vested. But whenever the preceding estate, with the exceptions above named,(b) is limited so as to determine only on an event which is uncertain, and may never happen; or to a person not *in esse* or not ascertained; or so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect;—the remainder is contingent.<sup>1</sup>

§ 4. The definition, given above, of a vested remainder, does not require that it should be so limited as to take effect upon every possible determination of the particular estate. It seems to be sufficient, that the preceding estate is made to determine upon an event which certainly must happen, although it may determine upon other events which may not happen, and although it is only upon a determination in the latter mode, that the remainder will take effect. Thus, if an estate be limited to A for life, remainder to B for the life of A, inasmuch as the death of A is a certain event, and, if A's estate should terminate by forfeiture or surrender, the remainder would take effect; it is a vested remainder.<sup>2</sup>(c)

<sup>1</sup> Fearne, 329; Chapin v. Marvin, 12 Wend. 538.

<sup>2</sup> Fearne, 279-86; 4 Kent, 202; Cholmley's Case, 2 Co. 51 a.

(a) Devise as follows: "At and after the decease of my said wife and in case she should marry, and when my youngest child shall arrive at the age of twenty-one years, then it is my will, that all my estate shall be distributed by my executors, agreeably to the intestate laws of this Commonwealth; provided always, nevertheless, that in case all my said children shall die without leaving lawful issue, during the lifetime of my said wife, then, and in such case, I give, devise,

and bequeath to my said wife, all my estate, real, personal and mixed, to her and her heirs and assigns forever." Held, that the children of the testator took a vested interest under the will. Letchworth's, &c., 6 Cas. 175.

(b) See chapter 41.

(c) Conveyance to the use of A for ninety-nine years, if he should so long live; from and after his death, or other sooner determination of the estate limited to him for ninety-nine years, to the use



§ 5. Where a contingent limitation intervenes between the particular estate and a remainder to a person *in esse*, the latter may be vested, provided the intervening limitation be not in fee. So, where neither remainder-man is *in esse* at the time, but the latter is born before any one in whom the former estate can vest.<sup>1</sup> Thus there was a limitation to A for life, remainder to his first and other sons in tail, remainder to B and his sons in the same way. B has a son born, but A has none. B's son takes a vested remainder, subject to be defeated by the birth of a son to A. The last limitation is said to be executed *sub modo*, so as to open and separate itself from the particular estate, whenever the contingency happens.<sup>2</sup>

§ 6. Where the intervening estate is contingent for some other cause than that the party to whom it is limited is not *in esse*, if the contingency does not extend also to a subsequent remainder, this may be vested.<sup>3</sup> But where the prior limitation is in fee, no subsequent remainder can be vested.<sup>4</sup>

§ 7. Although a remainder cannot be limited after a fee, yet it may be created, to vest in the event of the first estate's never taking effect: or several estates in fee may be limited contin-

<sup>1</sup> Fearn, 222.

<sup>2</sup> Uvedall v. Uvedall, 2 Rolle Abr. 119; Bowles' Case, 11 Rep. 80.

<sup>3</sup> Napper v. Sanders, Hut. 119.

<sup>4</sup> Luddington v. Kyme, 1 Ld. Raym. 208; 12 Pick. 64.

of trustees and their heirs during A's life, to preserve contingent remainders; and, after the end or other sooner determination of the said term, to the use of A's sons in tail, remainder over. Held, first in the King's Bench, and afterwards in the House of Lords, that the estate of the trustees was a vested, not a contingent remainder, because the trustees were persons *in esse* at the time, and the commencement of the remainder did not depend on any matter collateral to the determination of the particular estate. Lord Ch. J. Willes remarked, that, upon any other construction, in case of the death of the trustees during A's life, no estate would vest in their heirs, which would prove the universal practice, of inserting the word *heirs* in such settlements, to be wholly useless and unmeaning. and that many thousand settlements would be overturned; in preference to which, he would adopt precedent for law,

and follow the maxim "*communis error facit jus*." That if a limitation were made to A for ninety-nine years, determinable on his life, with no remainder, the grantor would retain a vested reversionary interest, which would take effect on the expiration, forfeiture, or surrender of the term, and this interest he might grant over, and thereby create a vested remainder in the grantee. *Berrington v. Parkhurst*, 8 Atk. 135; Willes, 827-39; 6 Bro. Parl. Ca. 352.

(The limitation in this case seems to have been most inartificially worded. The words, "from and after A's death," were admitted on both sides to be wholly senseless, being immediately followed by "during A's life." Moreover, the limitations to the trustees and to A's sons, though successive, were to take effect, it would seem, upon precisely the same contingency, the termination of the term for years.)

gently as substitutes for each other; some to take effect on failure of the others, and in their room. Such remainders are said to be not expectant, but contemporary; the latter not contrary to, but concurrent with the former. It is not a fee mounted upon a fee, but a contingent remainder with a double aspect, or on a double contingency. And the limitation is not good as a remainder, if it is to *succeed*, instead of being *collateral* to, the contingent fee. Thus, in a limitation to A for life, remainder to his issue in fee, and, in default of such issue, remainder to B, the remainder to B is good, being collateral to the contingent fee in the issue. But, if the remainder to B is limited upon the event of the issue's *dying under age*, though it may be good as an executory devise or shifting use, it is void as a remainder, being dependent on an event, which rescinds a prior vested fee.<sup>1</sup>(a)

<sup>1</sup> 1 Ld. Raym. 208; Doug. 505 n.; 4 Kent, 199-201; Buist v. Dawes, 4 Strobb. Equ. 87.

(a) Devise to A for life, and, if he should have any issue male, to such issue and his heirs forever; and if he should die without issue male, then a part of the lands to B in fee, and a part to C in fee. Held, all these several limitations in remainder created contingent remainders in fee. If A should have issue male, the fee would vest in him; if not, then it would vest in B and C. Luddington v. Kyme, 1 Ld. Raym. 208; Barnardiston v. Carter, 8 Bro. Parl. Ca. 84. See Blanchard v. Brooks, 12 Pick. 65.

Devise to A for life, and, after his death, to his children equally, and their heirs; and in case he dies without issue, to B and C and their heirs equally, &c. Held, the two last limitations were both contingent remainders in fee. Goodright v. Dunham, Doug. 265. So, where there was a devise to A for life, remainder to trustees, &c., remainder to all the children of A, begotten or to be begotten by B, and their heirs forever, &c., remainder over; held, according to the clear intent, the children of A took a fee; but, for want of such children, the subsequent limitation would have taken effect. Doe v. Perryn, 8 T. R. 484.

A devised to his daughter B, for her life; then to *her male heir*, C, if alive at her death, in fee; otherwise, to her next male heir in fee. Held, that B did not take an estate tail; that nothing vested

in C during the life of B, because he was to take only if he should be living at her death, and therefore, till her death, the fee vested nowhere; that the estate to C was contingent, notwithstanding his being designated by name; that the fee-simple, which was to vest on the death of B, was not an executory devise, but a contingent remainder, having a preceding freehold to support it; that it was not a limitation of a fee after a fee, but a limitation of only one indefeasible estate in fee; that the will presented a *contingency with a double aspect*, to be determined immediately on the death of B, at which time an indefeasible estate would vest, either in C, or in the next heir male of B, as the case might be. In this case, Gibson, J., thus states the general rules of law pertaining to the subject. Where, of two limitations, (in fee,) both are to take effect; the latter can do so only as an *executory devise*, for a remainder, originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but, where both are limited alternately on the same event, by the happening of which, one is to vest in exclusion of the other, there both are contingent remainders. Dunwoodie v. Reed, 8 Ser. & R. 485-452; Den v. Crawford, 8 Halst. 90.

§ 8. Where the language used may be construed to create either successive and alternative contingent estates in fee, or a contingent preceding estate less than a fee, and a vested remainder in fee, the latter construction will be adopted, as the more accordant with the general policy of the law. Thus there was a devise to A, the testator's daughter, for life; then to the children of her body begotten, and their heirs; *in default thereof*, to the testator's son B, his heirs and assigns. B died, living A, having devised his interest, and then A died without children. The question was, whether B took a vested remainder, which could be devised, or only a contingent remainder. Held, he took a vested remainder. The clause, *in default thereof*, was equally applicable to the failure of A's children and of their heirs. If there had been no limitation over, or a limitation to other parties, the devise would have made a contingent fee-simple to the children of A. But, the subsequent remainder being limited to a collateral heir of the children, they must take an estate tail, with a vested remainder to B. Had the devise in question applied to the failure of A's children only, and not that of their heirs, then there would have been two contingent fees simple, the one to take effect only on failure of, or as a substitute for, the other. But the law would not adopt this construction, except where the language absolutely required it.<sup>1</sup>

§ 9 a. Although, where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and, if too remote, this and all subsequent remainders are void; yet, if a fee be limited in contingency, and the estate given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder.<sup>2</sup>

§ 10. *Cross-remainders* are another qualification of expectant estates, and they may be raised expressly by deed, and by implication in a devise. Thus, if a devise be made of one lot to A, and another lot to B, in fee, and, if either dies without issue, the survivor to take, and, if both die without issue, to C in fee;

<sup>1</sup> *Ives v. Legge*, 8 T. R. 488 n. See *Blanchard v. Brooks*, 12 Pick. 68.

<sup>2</sup> *Evers v. Challis*, 2 Eng. L. & Equ. 215.

A and B have cross-remainders over by express terms, and, on the failure of either, the other, or his issue, takes, and the remainder to C is postponed. But if the devise had been to A and B, of lots to each, remainder over on the death of both of them, the cross-remainders to them would be implied. So, if different parcels of land are conveyed to several persons by deed, and by the limitation they are to have the parcels of each other when their respective interests shall determine, they take by cross-remainders. This subject will be more particularly considered hereafter.<sup>1(a)</sup>

§ 11. Where the preceding contingent remainder is limited, not in fee, generally, but to trustees and their heirs, until the happening of a certain event, the subsequent remainders may be not contingent but vested. Thus there was a devise to A for life, and, if she die without issue of her body living at her death, to trustees and their heirs, till B should be twenty-one years old. After which, devise to B for life, remainder to his sons in tail male. In default of such issue, or if B should die under twenty-one, and without issue, to C, &c., persons *in esse*. Held, the limitation to the trustees would take effect only upon A's dying without issue, and in this event would be not an absolute but a determinable fee; that B's estate was contingent only till he should come of age; and, in the meantime, the subsequent remainders were vested.<sup>2</sup>

§ 12. In case of concurrent remainders, or where a preceding contingent remainder is in fee; if, in the one case, one of such remainders, or, in the other, such preceding remainder, becomes vested, the other remainders thereby become void. Thus, where there is a devise to A for life, remainder to his issue male, in default thereof remainder over; upon the birth of such issue, the first remainder becomes vested, and the latter thereby void, even though the issue die before A himself.<sup>3</sup>

§ 12 a. Where there is a limitation of several successive remain-

<sup>1</sup> 4 Kent, 201. See *Packard v. Packard*, 16 Pick. 191.

<sup>2</sup> *Lethleullier v. Tracy*, 8 Atk. 774; Amb. 204.

<sup>3</sup> *Keene v. Dickson*, 8 T. R. 495.

(a) See *Deed; Devise; Cross-Remainder*.

ders, the first of which is made to depend upon a certain contingency, the important question arises, whether this contingency applies only to the first remainder or to all the succeeding ones also. Cases of this kind are divided into three classes. 1. Limitations after an estate which depends on a contingency that never happens.<sup>(a)</sup> 2. Limitations upon a conditional termination of an estate which never vests. 3. Limitations upon a conditional termination of an estate, which, though the estate vests, never happens.

§ 13. Remainders of the first class will fail, where the intention of the testator seems so to require, or where the court cannot find upon the whole will sufficient to gather a different intent, so as to warrant them in supplying omitted words.<sup>1</sup> Thus, there was a devise to A, the testator's son, and the heirs of his body; and, if A should die without issue, *and the testator's wife B should survive A*, that she should enjoy the premises for her life; after her decease to C for life; after her decease, (*A being dead without issue as aforesaid*), to D. B died in the life of A. Held, the remainder of D was defeated, being contingent upon A's dying without issue in the lifetime of B.<sup>2</sup> So a devise was made to trustees, in trust to pay a certain sum to A for life, and the rest of the rents to B her husband; and, after her death, the whole to him for life. *If she should happen to survive her husband*, then to stand seised of all the lands upon the trusts after

<sup>1</sup> Doug. 78-9.

<sup>2</sup> Davis v. Norton, 2 P. Wms. 890.

(a) In the case of *Lethienllier v. Tracy*, cited above, (sec. 11,) it was held, that neither the condition of A's dying without issue, nor the condition of B's coming of age, affected the remote subsequent limitations, which, accordingly, were vested remainders.

So there was a devise to the use of A for life, remainder to his first and other sons by any future wife in tail male, &c.; and, if A should marry any woman related to his then wife, all the above uses, so far as they related to the issue of A, to cease and be void; and, in such case, though A have issue, the trustees to stand seised to the use of C, &c. A died soon after the testator, not having again married, and without issue. Held,

the remainder to C took effect, not being defeated by the want of such second marriage. *Bradford v. Foley*, Doug. 58.

So a devise was made to trustees, to pay over the rents and profits to A and B, during the life of C. (A, B and C being sisters of the testator,) their heirs and assigns; and, after the decease of C's husband, in trust for A, B and C, each a third part, for life; remainders to their sons in tail male, &c., cross-remainders over. C died, living her husband. The question was, whether, by C's death, not only her own estate, but the subsequent remainders also, were defeated. Held, the latter were not defeated. *Horton v. Whitaker*, 1 T. R. 846.

*mentioned*, viz: to A for life, then to her son and the heirs of his body, remainder to the heirs of the body of the husband by her, remainder over. A died before B. Held, not only A's life estate, but all the subsequent remainders, were defeated.<sup>1</sup>

§ 14. The second class of cases, is where a remainder is limited upon the conditional determination of a preceding estate, which never takes effect. And here, whether the preceding estate is in fee or otherwise, it is said, that by whatever means it is out of the case, the subsequent limitation will take effect.<sup>2</sup> Thus there was a devise to trustees for years, remainder to the sons of A successively in tail male, provided they should take the testator's surname. If they or their heirs should refuse so to do, or die without issue, to the first son of B in tail male on the same condition. B had a son at the time of the devise. A died without having had a son. Held, whether the contingent limitation to persons not *in esse*, having only a term to support it, were void or valid; such limitation was not a condition precedent of the subsequent remainder, and that the son of B took a vested remainder.<sup>3</sup>

§ 15. The third case, is where the remainder is limited upon a contingent determination of a preceding estate, which actually takes effect, but does not terminate in the mode pointed out. In this case, the remainder shall not take effect, unless the general intent of the testator so require.<sup>4</sup>

§ 16. Words of limitation are often used, which, though seeming to import a contingent remainder, the law construes merely as fixing the time when a vested remainder shall become an estate in possession.(a) This construction is adopted, where an absolute property is given, and a particular interest in the meantime; as, *until the devisee shall come of age, then to him, &c.* And a remainder will always be construed as vested, where the words admit of it. Thus, where there was a devise to A

<sup>1</sup> Doe v. Shipphard, Doug. 75; Fearn, 236.

<sup>2</sup> Avelyn v. Ward, 1 Ves. 422.

<sup>3</sup> Scatterwood v. Edge, 1 Salk. 229; 1 Ves. 422.

<sup>4</sup> Fearn, 862.

(a) Sometimes called *adverbs of time*, as *when, then, after, from, &c.* Johnson v. Valentine, 4 Sandf. 86. See Hollifield v. Stell, 17 Geo. 280.

for eight years; remainder to executors till such time as B shall be of age; and *when* B shall be of age, that he shall enjoy the same in fee; held, this was a vested remainder in B; that the legal construction was, a devise to executors till B reached twenty-one years, remainder to B in fee; and the remainder was no more contingent, than in the common case of a lease for life or for years, remainder over; that, inasmuch as the term must certainly end, the adverb *when* created no contingency, but merely denoted the time when B should have possession.<sup>1</sup> So upon a devise to A, when and so soon as he shall be twenty-one years of age; if he die under age, the property to go into the residue; A takes a vested interest, subject to the condition. So a devise to A, till B reaches the age of twenty-one years; when B reaches that age, to him and his heirs; though B dies under age, gives him a vested remainder.<sup>2</sup> So a conveyance was made to the use of A for life, then to the first son of his body and his heirs male, and to four sons successively in tail; and *if it fortune* the said fourth son to die without issue male, then to remain to B. A died without issue male. Held, B's estate vested, the circumstance of A's having issue not being a condition precedent.<sup>3</sup> So there was a devise to A for life, then to B; and if my three daughters, or either of them, over-live A and B, and his heirs, then they to have it; and after them to C. B and two of the daughters died, living A. Held, this was not a contingent limitation, but only a designation of the time, when a vested remainder should become an estate in possession.<sup>4</sup> So upon a devise to the testator's wife for life, "to be for her own comfort, &c., while she remains my widow, without any disturbance, &c., from any of my children; and in case she alters her condition by marriage, then my said estate I will shall be divided as the law directs;"—the testator's children take a vested

<sup>1</sup> 4 Kent, 204; *Driver v. Frank*, 8 M. & S. 32; *Goodtitle v. Whitby*, 1 Burr. 228; *Matthew Manning's Case*, 8 Rep. 95 b; *Drake v. Pell*, 8 Edw. 253; *Ferson v. Dodge*, 23 Pick. 287. See *Rich v. Waters*, 22 Pick. 568; *Boraston's Case*, 8 Rep. 19; *Fearne*, 368; *Arnold v. Arnold*, 11 B. Mon. 81; *Hughes v. Hughes*, 12 Ib. 115; *Taylor v. Frobisher*, 10 Eng.

L. & Equ. 116; *Maxwell v. McClintock*, 10 Barr, 287; *Haggard v. Rout*, 6 B. Mon. 247; *Childs v. Russell*, 11 Met. 16; *Danforth v. Talbot*, 7 B. Mon. 628.

<sup>2</sup> *Mansfield v. Dugard*, 1 Abr. Eq. 195; *Phipps v. Akers*, 4 Mann. & G. 1107.

<sup>3</sup> *Holcroft's Case*, Moore, 486.

<sup>4</sup> *Webb v. Hearing*, Cro. Jac. 416.



remainder at his death.<sup>1</sup> So where there was a devise, to four children of the testator, of four several estates, to each one estate, and, when either of them shall die, the estates to be equally divided among them that are living; and the eldest son and heir died: held, the remainder to the other children, in the estate given for life to this son, was not contingent, but vested, and therefore was not void, in consequence of a merger of the son's life estate in the inheritance which descended to him.<sup>2</sup> So upon a devise to trustees, in trust, to apply the proceeds to the support and education of children during minority; and when and as they should come of age, to the use and behoof of them and their heirs; the children take an immediate gift, with a trust interest during minority.<sup>3</sup> So upon a devise to the wife of the testator, of the use and improvement of one-third part of his estate for life; "and I give and devise the same, at her decease, to my children" in fee; the children take a vested remainder.<sup>4</sup> So upon a devise to A for life, and after his death to three others, or the survivors or survivor of them, their heirs and assigns forever; these are vested, not contingent remainders, so that, if a remainder-man dies before the tenant for life, his heirs would inherit his interest.<sup>5</sup> So upon a devise to the wife of the testator for her life or widowhood; upon her death or marriage the property to be sold, and the proceeds divided among his children; his children who survive him take a vested remainder.<sup>6</sup> So in case of a devise to a wife for life, at her death the property to be equally divided among all the testator's surviving children, and the legal representatives of those deceased; the words of survivorship refer to the death of the testator, not of the tenant for life; and all the testator's children living at his death take vested remainders, to be enjoyed after the death of the tenant for life.<sup>7</sup> So upon a devise to a wife for life, then to be sold at her death, and the proceeds to

<sup>1</sup> *Bates v. Webb*, 8 Mass. 458.

<sup>2</sup> *Fortescue v. Abbott*, Pollexfen, 479; *T. Jones*, 79; 2 Ventr. 865.

<sup>3</sup> *Goodtitle v. Whitby*, 1 Burr. 228.

<sup>4</sup> *Nash v. Cutler*, 16 Pick. 491.

<sup>5</sup> *Moore v. Lyons*, 25 Wend. 119. See

*Doe v. Prigg*, 8 Barn. & C. 231; *King v. King*, 1 Watts & Serg. 205; *People v. Conklin*, 2 Hill, 67. But see also *Cripps v. Wolcott*, 4 Madd. 11.

<sup>6</sup> *M'Ginnis v. Foster*, 4 Geo. 877.

<sup>7</sup> *Vickers v. Stone*, *ib.* 461.

be distributed among children; if one of them dies before the tenant for life, his interest in the estate is vested, and liable for his debts.<sup>1</sup> So in case of a devise for life with intermediate remainders; then to "such person of the surname of H. as *shall be* the nearest male relation to A and his heirs;" the last remainder vests at the testator's death.<sup>2(a)</sup>

§ 17. Where there is a devise to trustees *and their heirs* during the minority of A, then to him in fee, or upon trust to convey to him; inasmuch as A takes a vested remainder, to vest

<sup>1</sup> Field v. Hallowell, 12 B. Mon. 517.

<sup>2</sup> Start v. Platel, 7 Scott, 422.

(a) Devise to the testator's three illegitimate sons, "if they should live to come of age." Held, whether the sons took a vested remainder, to become a vested estate afterwards, or only a contingent remainder; they had no estate in possession till they came of age, and, intermediately, the land descended to the heir at law. Jackson v. Winne, 7 Wend. 47.

Devise of certain specified lands to the use of the testator's wife for life, and of all the testator's lands to A in fee; but, if he shall not live to be of age, then in like manner to his surviving brother, C; but if C shall die before of age, then, &c., to his surviving brother, D; but if D should die, &c., then to the first surviving son of E. in fee; for default of such issue, remainder to the testator's own right heirs forever. If the wife shall die before A. or before his survivor is of age, to take possession, then E to have the use and benefit of the lands, till the testator's heir shall be of age to take possession. The wife and E both died before A came of age. Held, upon the death of the widow, the estate did not descend to the heirs at law. until A came of age, but immediately vested in him; that, as the devise to E of the use of the land after the widow's death, till A should come of age, failed by the death of E, it should be considered as out of the case; and that the object of this devise to E (who was the mother of A,) was not to benefit her, but to enable her to take the profits of the land during A's minority. Jackson v. Durland, 2 John. Cas. 814.

Devise substantially as follows: "all my debts to be paid from my personal estate, the remainder I give to my wife for the support of her and my minor children during her widowhood, and

the estate to remain undivided till my youngest child shall come of age. But if my wife should be still living and my widow, she shall have the whole income of my estate, keeping it in repair, &c.; but if she marry, she shall have £80 per annum from my estate for life. And it is my will, that all my children shall have an equal share of the whole of my estate that I now possess, or may possess at my death, at the time before mentioned for division; and should any of them die without heir lawfully begotten, their share shall be equally divided amongst the surviving children." Held, the estate devised to the children did not remain contingent till the death of the widow, or the coming of age of the youngest child; but immediately, upon the testator's death, they took a *vested remainder*, though not to take effect in possession till the happening of the last of the events referred to. Tatem v. Tatem, 1 Miles, 809.

A testator bequeathed one moiety of the residue of his property to the children of a deceased sister "and their heirs, to be equally divided amongst them, share and share alike, to them and their heirs forever;" and ordered the other moiety of the residue to remain in trust, the interest to be paid to another sister of the testator for life, and "the principal, upon her decease, to said children, share and share alike, to them and their respective heirs accordingly." Held, the children took vested remainders in the second moiety, and the share of one, who died before her to whom the interest was to be paid for life, was to be paid, on her decease, to such child's personal representative, and not to his child. Barton v. Bigelow, 4 Gray, 858.

in possession upon his coming of age, the trustees have been held, notwithstanding the words of inheritance, to take only an estate for so many years as the minority of A shall last. But this doctrine has been questioned, as an anomaly in the law; and held wholly inapplicable to limitations by deed.<sup>1</sup>

§ 18. Upon the above named principle, where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate to a person sustaining a given character, as *heir at law*, *heir male*, or *next of kin*, of the testator, or of another; the remainder will vest in the person or persons who fill that character *at the death of the testator*, and not remain contingent till the *termination of the prior estate*, unless there is a clear intention to the contrary.<sup>2</sup> But it is said, that the construction, by which a limitation, to take effect *in futuro*, is construed as a vested, and not a contingent remainder, cannot be adopted, unless there is an intermediate disposition of the estate, or the rents and profits, or a direction that it shall go over, upon the party's dying before the specified time. Otherwise, the limitation must take effect, if at all, as an executory devise.<sup>3(a)</sup>

§ 19. A remainder is sometimes contingent upon a *condition subsequent*, which operates to defeat it after being vested, instead of a condition precedent, the performance of which is necessary to its vesting. But it is said, a remainder cannot be thus divested, unless there are words in the will capable of producing this effect, and showing such intention. Of this nature is a limitation subject to a *power of appointment*. Thus if an estate be limited to A for life, remainder to such use as A shall appoint, and, in default of appointment, remainder to B; B's remainder is vested, but subject to be defeated by execution of the power.<sup>4</sup>

<sup>1</sup> Stanley v. Stanley, 13 Ves. 491; Doe v. Nicholls, 1 Barn. & Cr. 336; Cornish, 105-7; Doe v. Lea, 3 T. R. 41.

<sup>2</sup> Doe v. Spratt, 5 Barn. & Adol. 789.

<sup>3</sup> 4 Kent, 205.

<sup>4</sup> Driver v. Frank, 6 Price, 78-5; Packard v. Packard, 16 Pick. 191; 4 Kent, 204.

(a) In the case of Doe v. Lea, (3 T. R. 41,) a distinction was made, in reference to the point above considered, between the expressions "when and so soon as," and the word "if," which, in Browns-

words v. Edwards, (2 Ves. 248,) was held to create a condition precedent. But this distinction seems to have been disregarded in several subsequent decisions.

So upon a limitation to the use of A for life; after his death, of B in fee, if B should live to be of age; provided and on condition, that if B should die under age, remainder over: held, the remainder vested in B, subject to be divested by his dying under age.<sup>1</sup> So upon a devise to A for life, and, on his death, to and amongst his children, equally, at the age of twenty-one, and their heirs, but, if only one child shall live to be of age, to him and his heirs at the age of twenty-one; and, if A die without issue, or such issue die before twenty-one, devise over: held, A's children took a vested remainder.<sup>2</sup> So upon a devise of land to A for the purpose of building a school-house, provided it should be built in a certain place; and of the residue of the testator's property to B; A took possession, but, after B's death, forfeited by breach of condition. Held, B had a contingent interest, which passed to her heirs.<sup>3(a)</sup>

§ 20. Upon the same principle, a remainder once vested may be defeated only *in part* by the happening of a subsequent event. The general rule is stated to be, that, where there is a devise to *a class of persons*, to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others, as they are born afterwards.<sup>4(b)</sup> The same principle has been applied even in case of

<sup>1</sup> Edwards v. Hammond, 1 Bos. & Pul. 313.

<sup>2</sup> Doe v. Nowell, 1 M. & S. 827; Randall v. Doe, 5 Dow. 202.

<sup>3</sup> Clapp v. Stoughton, 10 Pick. 468.

See Austin v. Cambridgeport, &c., 21, 215.

<sup>4</sup> Johnson v. Valentine, 4 Sandf. 86. See Haskins v. Tate, 25 Penn. 249; Walters v. Crutcher, 15 B. Mon. 2.

(a) Devise of one-third to a son J., in fee, one other third to a son R., in fee, and the remaining third to a son W., and, "at the death of the said W., his share to be equally divided between J. and R., with this provision, in case the said W. should ever recover from the malady under which he now labors, then he is to hold all the property devised to him for his own benefit and disposal." W. was insane at the death of his father, and died without having recovered. During his life J. and R. made an amicable partition of the land between them, and each occupied his part. J. died, leaving a child, which died shortly afterwards. The other surviving brothers and sister brought ejectment, to recover

their proportion of the whole land, as heirs of the deceased child of J. Held,

1. The devise over to R. and J., after the death of W., was in form and substance a vested remainder.

2. The estate to arise, in case W. should become sane, was by way of *conditional limitation* on the fee previously granted.

3. The partition was valid, and the heirs of J.'s heir can only claim their share of the part allotted to J. Montgomery v. Petriken, 5 Cas. 118.

(b) Where there is a devise to A for life, remainder to his children; the children of A, living at the death of the testator, take vested remainders, subject to be disturbed by after-born children,

a deed. Thus A, in consideration of a sum of money and of natural love, conveyed to B, and C his wife, the daughter of A, and to the children and heirs of C, and their heirs, &c., *habendum* to B and C, and to children and heirs of C, for the proper use, &c., of B and C, for their joint lives and that of the survivor, and immediately from the decease of such survivor, to and for the use, &c., of the children and heirs of the body of C, in fee, as tenants in common, &c. C had three children at the execution of the deed; and subsequently several children and grandchildren were born. Held, a remainder vested in the three children, and, upon the birth of the others, opened and admitted them to their shares; and that the share of any child, who died living B

for whose benefit the estate will open, and let them in to take their proportional shares. *Fearne*, 394-6; *Doe v. Perryn*, 3 T. R. 484; *Dingley v. Dingley*, 5 Mass. 585; *Atkins v. Beane*, 14, 404; *Denny v. Allen*, 1 Pick. 147; *Right v. Creber*, 5 B. & C. 866; *Sisson v. Seabury*, 1 Sumn. 243; *Hannan v. Osborn*, 4 Paige, 886; *Nodine v. Greenfield*, 7 Paige, 544; *Turner v. Patterson*, 5 Dana, 295; *Haywood v. Moore*, 2 Humph. 584; *Baker v. Lorillard*, 4 Comst. 257; *Johnson v. Valentine*, 4 Sandf. 86; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 814; *Williamson v. Field*, 2 Sandf. Ch. 588; *Conklin v. Conklin*, 8, 64; *Minning v. Batdorff*, 5 Barr, 503.

Devise of all the remainder of my estate to my daughter A, and the children born of her body, including all my wife has the improvement of, during her life, after her decease. A had three children when the will was made, and a fourth was born afterwards, all of whom survived the testator, and two more were born after his death. Held, the children of A, living at the testator's death, took a vested remainder in that portion of the estate devised to A for life, which, upon the birth of the other children, opened and let in their shares. *Annable v. Patch*, 3 Pick. 860.

Devise to A for life, and immediately after her death, unto and among all and every such child or children, as she shall have lawfully begotten at the time of her death, in fee-simple, &c. Held, a vested remainder was hereby given to every child of A, subject to be in part divested by the birth of subsequent children; and that, upon the death of a child during

A's life, his interest descended to his heirs. The decision was founded, in part at least, upon the presumed intentions of the testator in favor of his grandchildren. *Spencer, J.*, dissented. *Doe v. Prevost*, 4 John. 61.

A devised to B for life, and after her death to C, to have the improvement to her and her heirs, during her natural life; and declared, that after C's death D, her son, should be sole heir of the estate. D died about a month after the testator, leaving a sister, E; and four years after his death two other sisters, F and G, were born. Held, D took a vested remainder in fee, to take effect upon the termination of two preceding life interests; that on D's death his title passed to E; and that, after the birth of F and G, they took as joint heirs with her under the devise. *Throop v. Williams*, 5 Conn. 98.

Devise to the testator's sons, for ten years, of the improvement and income of a farm. Then to his grandchildren, the sons and daughters of said sons, after the expiration of ten years, all the lands, &c., of which the improvement for ten years has been given to said sons, in fee. Held, this passed a vested remainder to those grandchildren living at the testator's death, subject to open and let in those born afterwards, whether before or after the termination of the particular estate; and that the share of a grandchild, living at the testator's decease, but who died during the particular estate, descended to his father as heir. *Ballard v. Ballard*, 18 Pick. 41.

Devise to the testator's son, A, for life, if unmarried; if married and having chil-

or C, vested in the issue of such child.<sup>1</sup> So, where an estate is limited by deed of uses to parents during their lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her and their heirs and assigns forever; there is a remainder in fee to the children, which ceases to be contingent upon the birth of the first, and opens to let in the after-born children. The general rule of law, founded on public policy, is, that limitations of this nature shall be construed to be vested, when and as soon as they may.<sup>2</sup>

§ 21. It follows, from the doctrine above laid down, that, where the particular estate terminates, before the time within

<sup>1</sup> *Wager v. Wager*, 1 S. & R. 374.

*Carver v. Jackson*, 4 Pet. 90-1-2.

dren, to him, his heirs, &c.; if he die unmarried, without children, equally among the children of the testator's sons, B, C and D. A the survives testator, and dies unmarried. B, C and D had children at the testator's death, and born afterwards, some of whom died unmarried, minors, during their father's lives, before A's death. Held, A took a life estate; the children living at the testator's death took, *per capita*, vested remainders, which opened, and let in after-born children; and the shares of the children of B, C and D, who died, living A, passed to their fathers. *Weston v. Foster*. 7 Met. 297.

Devise to A. and his wife B, and C, and their heirs forever, "to have and to hold to the said, &c., and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to D during his natural life, and from and after the death of D, in further trust, to convey the same in fee to the lawful issue of the said D, living at his death." Held, the first born child of D, at its birth, took a vested estate in remainder, which opened to let in his other children as they were successively born, and such vested remainder became a fee-simple absolute, in the children living, on the death of their father. *Williamson v. Berry*, 8 How. (U. S.) 495.

A devised as follows: "If I should have no child by my wife B, I do then give the use of all my personal estate not mentioned to my daughter C, during her

natural life, at her decease to be equally divided, share and share alike, amongst all her children, to them and their heirs; and if I should have no child by my wife, I do then give and bequeath the use of all my estate, both real and personal, to C during her life, and at her decease to be equally divided amongst her children, to them, &c.; if I should leave no children, and my daughter should die and leave no children, then, at the decease of my wife," over. Held, at the death of A, without other children, those of his daughter took a vested remainder, which opened to let in after-born children. *McGregor v. Toomer*, 2 Strobb. Eq. 51.

Devise to trustees, in trust to permit A to receive the rents for life; and, after her death, devise "to the heirs of the body of A, share and share alike," in fee. At testator's death, A had one child, and others were born afterwards. Held, by the "heirs of the body" was meant *children*, and that the first child took a vested remainder in fee, which, upon the birth of others, opened and let them in. *Right v. Creber*, 5 Barn. & Cress. 866.

Devise to A for life, remainder to the "second, third, fourth, and all and every other the sons of A, (*except the first or eldest son*,) successively in tail male," remainder over. At the testator's death, A had no children. Held, the remainder was contingent till A had two sons, both living, and then became vested, and not subject to be divested by subsequent changes in the family of A. *Driver v. Frank*, 6 Price, 41.

which the condition may happen that is to defeat the remainder, the remainder shall still become a vested estate, liable to be defeated by the happening of the condition. Thus upon a devise to A for life, after his death to B, if he live to be of age; if A dies, living B, B takes a vested estate, determinable on his dying under age.<sup>1</sup>

§ 22. As a remainder will not be construed to be contingent, where it can be construed as vested; so a vested remainder will not be divested, without a special provision, or a clear intention, to that effect.<sup>2</sup> It has been said, however, that the principle of favoring vested estates is an entirely *technical* rule.<sup>3</sup>

<sup>1</sup> Bromfield v. Crowder, 1 B. & P. N. R. 818-4; (Doe v. Moore, 15 E. 601.)

<sup>2</sup> Doe v. Perryn, 8 T. R. 494; Driver v. Frank, 8 M. & S. 25.

<sup>3</sup> 6 Price, 78.



## CHAPTER XLIII.

## REMAINDER. VOID CONDITIONS.

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|--|---|
| 2. Illegality.                           | 8. Exception—enlargement of prior estate. |
| 3. Remoteness of probability.            | 10. Devise—conditional limitation.        |
| 4. Abridgment, &c., of preceding estate. | 11. Limitation by way of use.             |
| 7. Or of preceding remainder.            |   |

§ 1. THERE are several circumstances, pertaining to the condition upon which a contingent remainder is limited, that will render such limitation void.

§ 2. The contingency must be *a lawful act*. The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law; for it is "*potentia remotissima et vana*," which, by intendment of law, "*nunquam venit in actum*," besides being against public policy.<sup>1</sup> Hence a limitation to a bastard is void. So a limitation to the children, legitimate or illegitimate, of A, by the grantor.<sup>2</sup>

§ 3. The contingency must be not a *remote*, but a *near* or *common* possibility. And the ordinary legal distinction between these two kinds of possibility is, that the latter is single and depends on only one uncertain event, while the former is double, depending on more than one, which are not independent, but the one requiring the previous existence of the other, and yet not necessarily arising out of it.<sup>3</sup> Thus, a limitation to the heirs of A, there being at the time no such person as A, is void, though A should be born and die during the particular estate; because there is first the contingency, whether there would be any such person; and second, whether he would

<sup>1</sup> Cholmley's Case, 2 Rep. 51 b.

<sup>2</sup> Co. Lit. 25 b; 184 a; 2 Rep. 51 a;

<sup>3</sup> Blodwell v. Edwards, Cro. Eliz. 509. Fearn, 878

die during the continuance of the prior estate.<sup>1</sup> So a limitation, during the vacation of a mayoralty, to A for life, remainder to the mayor and commonalty in fee, is good; but a limitation to a corporation not in existence at the time, though afterwards created, is void. So a limitation to the right heirs of the first born son of A, not naming them, is good; but a limitation to B, the first born son of A, is void, because there is first the contingency of A's having a son, and second, of his being named B, which is a possibility upon a possibility.<sup>2</sup>

§ 4. A remainder cannot be validly limited upon an event, which will operate to abridge, defeat, or determine the preceding estate; but must be so limited, as to take effect only upon the natural expiration of such estate. This rule is founded on the principle heretofore stated, that the benefit of a condition can be reserved only to the grantor or his heirs, who shall take advantage of any breach by entry. The effect of such entry, is to revest the estate, avoiding not only the particular estate, but also the remainder limited upon it.<sup>3</sup> Thus upon a conveyance to A for life, on condition that, if B pay the grantor a certain sum, then the land shall immediately remain to him; the remainder is void.<sup>4</sup> So upon a conveyance to A and B, remainder over, after the death of A, to C in fee; this remainder is void, because repugnant to the rights of B as survivor of A, by virtue of the first limitation.<sup>5</sup> So upon a conveyance to A, a widow, for life, remainder to B, in fee, on condition that A continues a widow; this remainder is void, because an entry, upon A's marrying, to defeat her estate, would defeat the remainder also. But a grant to A *during widowhood*, remainder to B upon A's marriage, makes a *limitation*, which will take effect by its own operation without entry, and therefore the remainder is good.<sup>6</sup>

§ 5. Where the words used may be construed to change a contingent remainder into a vested remainder, instead of converting a vested remainder into a vested estate, and thereby

<sup>1</sup> Cholmley's Case. 2 Rep. 51 b.

<sup>2</sup> Co. Lit. 264 a; 2 Rep. 51 a, b; Brent's Case, 2 Leon, 16. Fearne, 378.

<sup>3</sup> 1 Cruise, 276; 4 Kent, 249-268.

<sup>4</sup> Colthirst v. Bejushin, Plow. 29;

Brent's Case, 2 Leon, 16.

<sup>5</sup> Plow. 24.

<sup>6</sup> Hardy v. Seyer, Cro. Eliz. 414; Fearne, 368.

defeating a prior limitation; this construction will be given. Thus in case of limitations to A for life, remainder to B for life; if B die living A, the lands to remain to C; the last limitation was valid, having no effect to abridge A's estate.<sup>1</sup>

§ 6. It is to be observed also, that there is a distinction between conditions which operate to abridge or defeat a prior vested estate, and those which merely provide in what manner estates shall go over, which, *by virtue of the prior limitation* itself, are made dependent upon a condition. Thus, if land be limited to A for twenty-one years, *if B shall so long live*, and, in case of B's death during the term, to C in fee; this is a good remainder; for the condition does not abridge an *absolute* estate for years once vested, but a contingency is annexed to the estate for years itself.(a)

§ 7. A condition, the effect of which is to defeat or abridge

<sup>1</sup> Colthirst v. Bejushin, Plow. 28.

(a) It must be admitted, however, that the dividing line between conditions always allowed to be valid, and those which are said to be void, as abridging the prior estate, is extremely nice. The following observations of Mr. Douglas, in a note to the case of *Goodtitle v. Billington*, (Doug. 755,) throw some light upon the subject. He remarks, that a limitation does not cease to be a remainder, because it may vest in possession on an event, which, from *the terms* or from *the legal nature of the original limitation*, shall defeat the particular estate before its *natural or regular* expiration. Every remainder, limited after an estate for life, may vest in possession before the death of the tenant for life, which is the term of the natural expiration of the particular estate; namely, in consequence of any forfeiture which he may commit. Some have been inclined to consider conditional limitations after particular estates, as, for instance, after an estate for life, but limited to vest in possession on a contingency which may happen before the death of tenant for life, as not being remainders. Fearne, 9-10. Thus, if an estate is given to A for life, provided that when C returns from Rome, it shall thenceforth be to the use of B in fee, it is said, this limitation over is not confined to the remnant, expectant on

the particular estate before given to A, but may interfere with, and in part defeat and supersede that first estate, instead of awaiting its regular determination; and therefore it does not answer the definition of a remainder in Co. Lit. 148 a. But this seems too great a refinement. Every estate for life may, by the act of the tenant, be defeated and abridged, before its regular expiration, and thereby let in the remainder over in the manner above stated; and the only difference between such limitations and the others is, that in the others, the estate for life is not abridged by the act of the tenant for life, but by some extrinsic event, which happens also to be the contingency on which the limitation over depends. What difference more than what is merely verbal, can there be shown to be, between *an estate to A till B returns from Rome, then to remain over to C*; and *an estate to A, provided that, when C returns from Rome, it shall thenceforth be to B*. Under both forms of expression, A takes an estate for life, defeasible on the very same event. And Mr. Fearne himself adduces the former, as an example of contingent remainder. Nor can it make any difference, whether the prior estate is limited generally, or expressly for life; because, in the former case, a life estate is *implied*.

one vested remainder and substitute another for it, is void. Thus A conveys to B for life, remainder to C for life, provided that, if A should have a son who should reach a certain age, then C's estate should cease, and the land remain to such son. The latter remainder is void.<sup>1</sup>

§ 8. It has been said, that the rule above stated does not apply to the case where, although in terms the condition on which the remainder shall take effect will abridge the particular preceding estate, yet in effect it will merely operate to *enlarge* such estate; in other words, where the remainder-man and the particular tenant are one and the same person. In such case, no injury arises to the preceding tenant, and no entry on the part of the grantor or his heirs is necessary to defeat the preceding estate, at the same time defeating the remainder also. The operation is the same as if the remainder were limited to take effect upon the determination of the prior estate by its own limitation. Thus, if a conveyance be made to A and B, remainder in fee to the survivor, this remainder is valid.<sup>2(a)</sup>

§ 9. To render valid a condition, which operates by way of

<sup>1</sup> Cogan v. Cogan, Cro. Eliz. 860; Hall v. Tufts, 18 Pick. 455.

<sup>2</sup> Fearn, 896; 2 Cruise, 111.

(a) In illustration of this exception to the general rule, the case of Goodtitle v. Billington, (Doug. 758 and n.) is cited. This was a devise to the testator's wife, A, and his daughter B, for their lives, and the life of the survivor, in equal proportions—but if B marry and have lawful issue, then, after the death of A, to B in fee. But if B die unmarried and without lawful issue, to A in fee. A and B both survived the testator, and B survived A, but was never married. It was contended, that the limitation to B, in case she should marry and have issue, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her lifetime, as soon as the contingency on which it was limited should happen; and that it was therefore not a *contingent remainder*, but a *conditional limitation*; because, although the condition, on which a remainder is limited, may happen before the expiration of the particular estate, and a contingency be thereby changed into a vested remainder, as in the case of Luddington v.

Kime, and other like cases, yet a remainder cannot operate to abridge the duration of the prior estate, by *taking effect in possession* before the natural termination of such estate. But Buller, J., remarked, that, if B had married and had issue, her life estate would not have merged, because it was not limited to take effect till the death of the wife; and Lord Mansfield, that here the first limitation was to two persons and the survivor, so that a preceding freehold will be in the survivor, and the estate over is limited on a contingency, upon which a remainder may depend. It is to B and her heirs if she should marry and have issue, and it must have taken effect after the death of the survivor. Upon these grounds, the limitation was held valid as a contingent remainder. There is nothing in the case which indicates that it turned at all upon the consideration, that the remainder was limited to B, the tenant for life, herself; and the note of the reporter shows that he regarded this circumstance as wholly immaterial.

enlarging the prior estate, it is not necessary that the respective estates be of such nature as to cause a merger. Thus, the prior estate may be *in tail*. So, also, the remainder may be limited after other intervening remainders. But the law requires, in order to effect such enlargement: 1. A subsisting particular estate for its foundation, which is neither at will, revocable, nor contingent. 2. That the particular estate remain in the original grantee or his representatives unalienated, for the sake of privity. 3. That the remainder take effect immediately on performance of the condition, without any other act or proceeding whatever. 4. The two estates must be created by one deed, or by several delivered at one time.<sup>1</sup>

§ 10. By *devise*, a condition may be made to defeat or abridge the preceding particular estate, operating as a *limitation*, to vest the property in the remainder-man, without the necessity of any entry by the heirs of the devisor. Thus upon a devise to A for life, after her death to B in fee; provided, that, if the testator's wife should have a son, the land should remain to him in fee: held, on the birth of the son, the remainder vested in him.<sup>2</sup> This is termed a *conditional limitation*. And it will be effectual even against the heirs of the devisor, to whom the prior estate is limited.<sup>3</sup> It is said, a conditional limitation is where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens, upon which the estate is to fail.<sup>4</sup> Also that the expression and idea of a *conditional limitation* are adopted to avoid the necessity of an entry by the heir; and that, in strictness, all conditional limitations are either executory devises or contingent remainders.<sup>5</sup> More especially will this construction be given, where the estate which the condition operates to defeat is limited to the heir, who, therefore, if an entry were necessary, would have to enter upon himself; and where, consequently, the condition, as such, would be nugatory and void. Thus upon a

<sup>1</sup> Lord Stafford's Case, 8 Rep. 75.

<sup>2</sup> Dyer, 88 a, 127 a; Pells v. Brown, Cro. Jac. 592; Frye v. Porter, 1 Cha. Ca. 138; 1 Mod. 800.

<sup>3</sup> Fearne, 270, 407-9.

<sup>4</sup> 1 Steph. 278.

<sup>5</sup> Dong. 756, n. 1. See Proprs., &c v. Grant, 8 Gray, 142.

devise to A, the heir, and another devise to B; and, if A molest B, A shall lose his devise, and it shall go to B: if A enters upon the land devised to B, A's land thereby vests immediately in B.<sup>1</sup>

§ 11. A limitation in remainder, by way of *use*, may also be valid, as a *future or shifting use*, though it operate to abridge or defeat the prior estate.<sup>2</sup>

<sup>1</sup> 2 Mod. 7.

<sup>2</sup> 4 Kent, 249.

## CHAPTER XLIV.

## REMAINDER. BY WHAT ESTATE SUPPORTED.

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| <p>1. Contingent freehold remainder must be limited on a freehold; contingent remainder for years.</p> <p>3. Possession not necessary—a right of entry sufficient—to sustain a remainder.</p> | <p>7. Both estates must be created by one instrument.</p> <p>8. Estate of trustees sufficient to support remainder.</p> |
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§ 1. It has already been stated, (ch. 2,) that a freehold cannot be limited to commence *in futuro*. Hence it follows, that a freehold contingent remainder, in order to be valid, must be preceded by a vested freehold estate; in which case the whole interest conveyed passes out of the grantor immediately, in connection with the prior estate. But if this be less than freehold, a freehold interest cannot vest immediately anywhere, and the remainder is therefore void.<sup>1</sup>(a) Thus upon a devise to A for fifty years, if he live so long, remainder to the heirs male of his body; the latter limitation is a void remainder.<sup>2</sup>

§ 2. It has been seen, that, where the particular estate is limited to A for years, remainder to B after the death of A; if the term is so long as to render it impossible or highly improbable that A should survive its expiration, the remainder will be deemed to be vested and not contingent. On the other hand, where the term is so short that the life may probably outlast it,

<sup>1</sup> Fearn, 281.

<sup>2</sup> Goodright v. Cornish, 1 Salk. 226

(a) In New York, a contingent remainder may be limited on a term of years, provided the nature of the contingency is such, that the remainder must vest in interest, if ever, during the continuance,

or upon the termination, of not more than two lives in being at the time of the creation of such remainder. Butler v. Butler, 3 Barb. Ch. 304.



the remainder is contingent, and, being limited upon an estate less than freehold, is void.<sup>1</sup> The reason of the rule above stated is inapplicable, where a remainder is not freehold, but only for years. Hence, the rule itself is stated not to apply to such a case.<sup>2</sup> In an early decision,<sup>3</sup> however, it was held, that a contingent remainder for years could not be limited upon a prior estate for years, not upon the ground above referred to, but because a lease for years operates *by way of contract*, and therefore the particular estate and the remainder estate operate as two distinct estates, grounded upon several contracts; whereas, in case of a contingent freehold remainder limited upon a preceding estate for life, the particular estate and the remainder is but as one estate in law, and is created by the livery.

§ 3. Although a contingent freehold remainder requires a preceding freehold to support it, it is not necessary that the latter should remain actually vested in possession in the tenant. It is sufficient, if, being out of possession at the time when the remainder would vest, he still retains a right of entry. Otherwise, if he has a mere right of action; for this supposes that the title is uncertain, and depends upon the doubtful event of a suit, till the termination of which, another party has a title apparently good. Thus, where the tenant is disseised, as he may regain his estate by entry, the remainder is still good. But if the disseisor die, as the possession of his heirs can be defeated only by an action of the rightful owner, the remainder is destroyed. So, in England, where tenant in tail, with contingent remainders, makes a feoffment in fee, and dies; inasmuch as his issue are driven to an action to regain their estate, the remainders are defeated.<sup>4</sup>

§ 4. The right of entry, to support a contingent remainder, must be a *present* right. It must also precede the happening of the contingency. If it commence at the same time as the latter, this is not sufficient.<sup>5</sup>

§ 5. When once the right of entry is gone, the remainder is

<sup>1</sup> Fearne, 24-5.

<sup>2</sup> 2 Cruise, 288; Fearne, 285, 480.

<sup>3</sup> Corbet v. Stone, T. Raym. 150-1.

<sup>4</sup> Fearne, 286; Archer's Case, 1 Rep. 66 b.

<sup>5</sup> Fearne, 289.

gone forever; and a new title of entry will not restore it. Thus, if there be tenant for life, with contingent remainder over, and the tenant for life make a feoffment upon condition, and the contingency happen before the condition is broken, or before entry for breach; the remainder is wholly destroyed, though the tenant for life should afterwards enter for condition broken, and regain his former estate.<sup>1</sup>

§ 6. It would seem also, that, where the right of entry of the particular tenant is defeated by an *absolute* conveyance, the contingent remainder is destroyed, even though, *before* the contingency happens, the precedent estate is restored. Thus, in England, if A, a tenant in tail, with remainder to the right heirs of B, make a feoffment and die, and the issue of A recover the land by action before the death of B, so that, when the remainder would take effect by B's death, the prior estate is restored; still, it seems, the heirs of B cannot take.<sup>2</sup>

§ 7. A remainder must be created by the same instrument which creates the particular estate.<sup>3</sup> Thus, a woman being tenant for life, her husband devised the estate to the heirs of her body, if they reached fourteen years. Held, an executory devise, and not a contingent remainder.<sup>4</sup> So A was tenant for life by marriage settlement, remainder to his wife for life, remainder to his sons by that marriage in tail. A's father, the reversioner, by will reciting the settlement, devised the lands to A's sons conformably to it; and, if A should die without such issue, to A's sons by any other wife in tail male; and, if A should die *without issue*, to his grandchildren in fee. Held, even if the words *without issue* gave the heirs of the body of A an estate by implication, A would not take an estate tail; for nothing was devised to him, and the devise could not be tacked to his estate for life, so as to produce the effect of one entire limitation.<sup>5</sup> So A, being an owner in fee, and having previously limited a life estate to B, conveys to the use of himself for life, and after the

<sup>1</sup> 4 Kent, 254, 255.

<sup>2</sup> See Fearn, 464; 2 Cruise, 296.

<sup>3</sup> Fearn, 802.

<sup>4</sup> Snow v. Cutler, T. Raym. 162.

<sup>5</sup> Fearn, 801-2; Moore v. Parker, 4 Mod. 816; Doe v. Fonnereau, Doug. 486

death of B, and A her husband, to the use of C, son of A, for life. Held, inasmuch as these limitations were made by distinct deeds, C did not take a contingent remainder, as he otherwise would; but it was a conveyance to C of a subsisting remainder or reversion expectant upon B's death, and the mention of this event merely indicated the time when C should have possession, and did not make a contingency.<sup>1</sup>

§ 8. The legal estate of *trustees* is sufficient to support contingent remainders, without any preceding trust of freehold.<sup>2</sup>

<sup>1</sup> *Weale v. Lower, Pollexfen*, 66.

<sup>2</sup> *Fearne*, 308. See ch. 46.

## CHAPTER XLV.

## REMAINDER. AT WHAT TIME IT SHALL VEST.

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| <p>1. Remainder must vest during, or immediately upon termination of, the prior estate; subsequent revival of prior estate does not render valid the remainder; remainder void,</p> | <p>though a prior estate for years continues.</p> <p>2. Posthumous child.</p> <p>5. Vested remainder not affected by defeat of prior estate.</p> <p>6. Remainder may become void in part.</p> |
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§ 1. THE principle has been already alluded to, that a remainder, in order to take effect at all, must vest either during the continuance, or immediately upon the expiration, of the preceding estate. Thus, if a conveyance be made to A for life, and, upon A's death and one day after, remainder to B; the remainder is void. We have seen that this rule is founded in feudal principles, and in the inconveniences of an abeyance of the freehold. (Chap. 2.) As has been stated, a remainder will be good, if it is to vest immediately upon the termination of the preceding estate.<sup>1</sup> As in case of a limitation to A for the life of B, remainder to the heirs of the body of B.<sup>2</sup> Or a limitation to A and B for their joint lives, remainder to the heirs of him who shall first die.<sup>3</sup> But, if the preceding estate is terminated at the time when the contingency happens, though it be afterwards restored, the remainder cannot take effect.<sup>4</sup> And the termination of a preceding *freehold*, before the remainder can vest, defeats the remainder, though a preceding estate for years still continue. Thus a conveyance to A for years, remainder to B in tail, remainder to the heirs of A, gives a contingent

<sup>1</sup> Fearne, 310; 4 Kent, 248. See Cranehall's, &c., 89 Eng. L. & Equ. 445.

<sup>2</sup> Co. Lit. 298 a.

<sup>3</sup> Ib. 378 b.

<sup>4</sup> Fearne, 464.

remainder to A's heirs. Hence, if B die without issue before A, inasmuch as the preceding freehold estate terminates before the remainder can vest, the latter becomes void.<sup>1</sup> So a testator devises to his wife for life, remainder to A, his son, for ninety-nine years, if he should so long live; after the deaths of the wife and A, to the heirs of the body of A, with a power to A of appointing to all his children. The wife dies, living A. Held, the limitation to the children of A was thereby defeated.<sup>2</sup>

§ 2. In conformity with the principle above stated, it was formerly held, that, under the limitation of a remainder to the children of the particular tenant, a *posthumous child* could not take, not being in existence at the termination of the preceding estate. But a decision to this effect, made by the Court of Common Pleas and the Court of King's Bench, (Lord Somers dissenting,) in the case of a will, was reversed by the House of Lords, all the judges dissenting. Afterwards the statute, 14 Wm. III, c. 14, provided, that, where an estate is limited by any *settlement* to a child or children of any person, remainder over, (a) a posthumous child shall take.<sup>3</sup>

§ 3. It is the established principle of American law, that a posthumous child shall take both by descent and express limitation, equally with others.<sup>4</sup>(b)

<sup>1</sup> Jenk. 248; 2 Rolle's Abr. 418. See *Festing v. Allen*, 12 Mees. & W. 279.

<sup>2</sup> *Doe v. Morgan*, 8 T. R. 768.

<sup>3</sup> *Thellusson v. Woodford*, 4 Ves. 842;

*Reeve v. Long*, Salk. 227; *Burdet v. Hopegood*, 1 P. Wms. 486.

<sup>4</sup> 4 Kent, 248.

(a) But for a remainder, the children would take *by descent*. This, it seems, is the reason for limiting the provision to cases of remainder.

(b) It was early held in New York, (*Stedfast v. Nicoll*, 8 John. Cas. 18; acc. *Swift v. Duffield*, 5 S. & R. 38; *Marsellis v. Thalhimer*, 2 Paige, 85; *Dingley v. Dingley*, 5 Mass. 585; *Burke v. Wilder*, 1 M'Cord's Cha. 551; *Armistead v. Dangerfield*, 8 Mun. 20; Aik. Dig. 94,) that, although the statute of William is not in force in that State, having been expressly repealed, yet, independently of this act, the English law is settled in favor of the claim of a posthumous child. On principles of natural justice, such child has the same rights with others. The civil law never makes a distinction, and the

common law very rarely. Thus a posthumous child takes a share under the statute of distributions, and by descent. So the birth of such child, (with marriage,) revokes a will. Independent of the statute of William, the decision of the House of Lords, which was the determination of the highest tribunal of the English law, must be considered as prescribing the rule at *common law*; and, inasmuch as the old technical rule, which requires a remainder to vest at the very instant when the preceding estate terminates, was founded on feudal reasons not now in force, this furnishes an additional ground for adhering to the later doctrine. So in Pennsylvania, a testator devised lands to his son for life, with remainder to such child or children, born in lawful

§ 4. A posthumous child is entitled, under the statute, to the profits of the estate accruing since the father's death. The act provides, that he shall take as if born before the parent's death; and this distinguishes the case from that of an heir, who does not thus take. The same construction necessarily arises from the provision in the statute, that trustees, to preserve contingent remainders, shall not be necessary. The estate is held to vest in the person next entitled after the father's death, and upon the birth of a child to divest, *by relation*; as in the case of the enrolment of a deed, which *relates* to the making. Hence the child may either maintain ejectment, laying the demise from the father's death, which the defendant will be estopped to deny; or bring a bill in equity for an account, as against a trustee.<sup>1</sup>

§ 5. A vested remainder is not necessarily avoided by the defeating of the preceding estate. Thus A conveys to B for life; and afterwards, having disseised B, makes another conveyance to C for the life of B, remainder to D. B enters and avoids the estate of C. D's remainder is not thereby defeated. So, where the preceding estate is limited to an infant, and on coming of age he disaffirms it; a remainder limited after such estate is still good.<sup>2</sup>

§ 6. Where the preceding estate is limited to several persons, if a part of them die before the contingency happens, the remainder will be in part defeated. On the other hand, where the remainder is limited to persons not *in esse*, if some only are born during the particular estate, the remainder as to the rest will be void. Thus, in case of limitation for life to A, remainder to the heirs of B and C; if B dies before A, and C survives A, the heirs of B shall take; but not those of C. This principle, however, it seems, is not applicable to devises and uses.<sup>3</sup>

<sup>1</sup> Basset v. Basset, 8 Vin. Abr. 87; 3 Atk. 208.

<sup>2</sup> Co. Lit. 298 a; 4 Kent, 234-5.

<sup>3</sup> Gilb. Ten. 252; Fearn. 810; Ib. 812; Co. Lit. 9 a; Matthews v. Temple, Comb. 467; 2 Cruise, 802.

wedlock, as he should leave at his death. The son died, leaving one child, then born, and one *en ventre sa mere*, who was born after his decease. Held, that such

posthumous child was entitled to take under the will. Barker v. Pearce, 6 Casey, 178.

## CHAPTER XLVI.

## REMAINDER. REMAINDER BY WAY OF USE.

2. Since the statute of uses, a freehold trust necessary to support contingent remainders; preceding trust must continue till the contingency happens; resulting trusts sufficient

to support remainders; contingent uses arise out of seisin of trustees—discussions upon this subject—Chudleigh's case; &c.

4. Springing and shifting uses.

§ 1. REMAINDERS may be limited by way of *use*, and are indeed more often limited in this mode than in any other.

§ 2. With respect to remainders by way of use, a very material alteration in the law was effected by the statute of uses. Before this statute, if a freehold legal estate was vested in trustees, although the preceding or particular trust estate were less than freehold, the legal freehold of the trustees was sufficient to support contingent remainders. Thus a limitation would be good, to trustees and their heirs, to the use of A for years, remainder to the right heirs of B. But after the statute of uses, the effect of which is immediately to divest the estate of the trustees, such a limitation as to the heirs of B would be void. Hence where A conveys by lease and release to trustees and their heirs, to the use of himself for years, remainder to the use of trustees for years, remainder to his heirs male; the last remainder is void.<sup>1</sup> Upon the same principle, a freehold estate in trustees is insufficient to support a contingent remainder, where the particular estate in trust terminates before the contingency happens. Thus A, and B his wife, levy a fine of B's land to the use of the heirs of the body of A on B begotten, remain-

<sup>1</sup> Adams v. Savage, Salk. 679.



der to the use of A's right heirs. They had issue, which died; then B died, then A. Held, the limitation to A's heirs was void; that, inasmuch as the land belonged to B, no use resulted to A; and, though B might have a resulting freehold use, which would support the remainder to the issue, yet, as she died living A, such freehold would not support the remainder to A's heirs, since he could have no heirs during his life.<sup>1</sup> But where a freehold estate *results* to the party who makes a limitation to uses, it seems to be as effectual to support remainders, as if expressly limited to a third person.<sup>2</sup> On the other hand, it seems that a prior freehold limitation of a use is not sufficient to sustain a subsequent contingent use; upon the principle, that *a use cannot arise out of a use*. Thus, although, as has been seen, a limitation to A for life, remainder to the heirs of B, creates a valid contingent remainder, supported by A's life estate; yet, if the limitation were made to A in fee, to the use of B for life, remainder to the use of the heirs of C; such remainder would not be supported by B's life estate, but must rest upon the estate of the trustee.

§ 3. Upon the question, in what manner future contingent uses are supported and carried into effect by the estate of the trustees, Lord Hardwicke remarks,<sup>3</sup> that "the judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend." These reasonings, in the connection in which they were used, had a practical bearing; because they involved the question, as to the power of trustees to *destroy* contingent remainders—a subject which will be considered in the next chapter. But, supposing no act to have been done by the trustees to destroy the remainders, their validity, as having a sufficient preceding estate to support them, does not appear to have been questioned.(a)

<sup>1</sup> *Davies v. Speed*, Show. Parl. C. 104; Salk. 675 n.

<sup>2</sup> *Penkay v. Hurrell*, 2 Freem. 258; 2 Cruise. 808.

<sup>3</sup> *Garth v. Cotton*, Dickens, 188.

(a) Chancellor Kent gives substantially the following account of the controversy referred to. 4 Kent, 287-45.

(See *Garth v. Cotton*, Dickens, 188; *Hales v. Risley*, Pollexfen, 885.)

Before the statute of uses, the feoffees

§ 4. Remainders limited by way of use may be vested in favor of one person, and afterwards, on the birth of another person, or the happening of some other event, divested wholly or in part, and vested in new parties. This point has been already adverted to under the title of uses and trusts. (P. 409.) Some of the cases, which will be mentioned in illustration of the principle, are not strictly instances of *remainder*, but they are not distinguishable in reason from those which are.

§ 5. In the first place, where a remainder is limited by way of use to several persons, or to a class of persons, who become

to uses were seised of the legal estate; and, if disseised, no use could be executed, until by entry they had regained their seisin, for the statute only executed those uses which had a seisin to support them. After the statute of uses, it was difficult to ascertain by what estate contingent uses were to be supported. Some held, that the estate was vested in the first *cestui que use*, subject to the uses which should be executed out of his seisin; but this opinion was untenable, for a use could not arise out of a use. It was again held, the seisin to serve contingent uses was *in nubibus* or *in custodia legis*, or had no substantial residence anywhere. Others were of opinion, that so much of the inheritance as was limited to the contingent uses, remained actually vested in the feoffees until the uses arose. But the prevailing doctrine was, that there remained no actual estate, and only a possibility of seisin, or *scintilla juris*, in the feoffees, or releasees to uses, to serve the contingent uses as they arose. This doctrine was first started in Brent's case, (Dyer, 340 a; Brent's case, 2 Leon. 14,) in 16 Eliz. In Manning and Andrews' case, (Manning, &c., 1 Leon. 256,) the judges were equally unsettled in their notions respecting the operation of the statute on contingent uses. Some of them thought a sufficient seisin remained in the trustees to support the future uses; while others held, that no seisin remained in them, but that the statute drew the confidence out of them, and *reposed it upon the land*, which rendered the use to every person entitled in his due season. In a few years, Chudleigh's case (1 Co. 120; Dillam v. Frain, 1 And. 309 [the latter report said to be indisputably the best]; 4 Kent, 239, n.) arose, which is the leading case upon this subject. A minority

of the judges here held, that the notion of a *scintilla* remaining in the trustees was as imaginary as the Utopia of Sir Thomas More; that their original seisin was sufficient to serve the future as well as present uses; and that the future uses were *in the preservation of the law*, till they became vested. But a majority of the judges held, that the statute could not execute any uses that were not *in esse*; that not a mere *scintilla* remained in the feoffees, but a sufficient estate to serve the future uses, unless their possession was disturbed, and their right of entry lost. From these several cases the doctrine has been deduced, that future uses cannot be executed without a remaining right or estate in the feoffee. The estate in the land is supposed to be transferred to the *person* who has the estate in the use, and not *to the use*; and it is inferred, that no use can become a legal interest, until there shall be a person in whom the estate may vest.

But this view of the subject has been opposed by very distinguished writers upon real property—Mr. Fearne and Mr. Sugden. The latter takes the ground, that the doctrine of a *scintilla juris* was never judicially decided, but has been deduced from extra-judicial dicta; that the statute draws the whole estate in the land out of the feoffees, and the prior estates take effect as legal estates, and the contingent uses take effect, as they arise, by force of the original seisin of the feoffees. If there are any vested remainders, they take effect, subject to open and let in contingent estates, when the contingency occurs. Thus, in a conveyance in fee to A. to the use of B for life, remainder to his unborn sons in tail, remainder to A in fee; the statute immediately draws the whole estate out of A. vesting it in B and C respectively, which

capable of taking at different times, though it vests wholly in one, it will become divested in part, and let in the others to a proportional share. In this respect, however, uses seem not to differ from legal estates created by devise. Thus, upon a limitation to the use of A for life, remainder to the use of B, his wife, for life, remainder to all their issue female; upon the birth of a daughter, the remainder vests in her; but, upon the birth of a second daughter, the latter also shall take a share of the estate.<sup>1</sup> (See chap. 42.)

§ 6. Another class of future uses are those limited to arise *in futuro*, without any preceding estate to support them; or uses which change from one person to another by matter *ex post facto*, though the first use were limited in fee. These, of course, are not strictly remainders. Thus, in case of a limitation to the use of one, and of such wife as he shall afterwards marry; upon his marriage, the wife takes with the husband.<sup>2</sup> So, where A, in consideration of love and affection to B, his brother, and of £100 paid by him, granted, released and confirmed to B, then in possession as lessee for a year, in tail, after the death of A; held good as a covenant to stand seised, though void as a lease and release, and that the estate vested in B after A's death, as a springing use.<sup>3</sup>

§ 7. Where the conveyance to uses operates without any change of possession, the springing use arises out of the seisin of the covenantor; where there is a change of possession, out of that of the first grantee to uses.<sup>4</sup>

<sup>1</sup> Mathews v. Temple, Comb. 467; Sussex v. Temple, 1 Ld. Raym. 811; Doe v. Martin, 4 T. R. 39, acc.

<sup>2</sup> Mutton's Case, Dyer, 274 b; Woodliff v. Drury, Cro. Eliz. 439.

<sup>3</sup> Roe v. Tranmer, 2 Wills. 75.

<sup>4</sup> 2 Cruise, 311.

exhausts A's entire seisin. The estate to the sons of B is no estate, till they are born; and the statute did not intend to execute contingent uses, but the contingent estates are supported, by holding that the interests of B and C are vested only *sub modo*, with a liability to open. A retains no *scintilla*, but the contingent uses, when they arise, take effect, by *relation*, out of the original seisin.

Mr. Preston is of opinion, that limitations of contingent uses give contingent

interests, and that the estate may be executed *to the use*, though there is no person in whom it can vest. The statute passes the estate of the feoffees in the land to the estates and interests in the use, and apportiones the former estate accordingly. No *scintilla*, or the most remote possibility of seisin, remains with the trustees.

Mr. Cornish asserts, that the doctrine of *scintilla juris* rests on paramount authority.

§ 8. The class of uses already referred to are, as has been seen, called *springing* uses. A few cases will be mentioned of *shifting* or *secondary* uses; which are defined, as uses limited so as to change by matter *ex post facto*.<sup>1</sup> The distinction, however, between the different classes of future contingent uses, seems to be very nice, and not always accurately observed by writers of authority. Chancellor Kent says, springing uses arise on a future event, where no preceding estate is limited; while shifting or secondary uses take effect in derogation of some other estate.<sup>2(a)</sup>

§ 9. Where there is any preceding estate to support a future use, it will be construed as a contingent remainder, and not a springing or shifting use.<sup>3</sup>

§ 10. The remark already made (s. 6) as to the seisin, out of which a springing use arises, is equally applicable to shifting uses.<sup>4</sup> But such use cannot arise out of the seisin of the prior *cestui que use*. Thus in case of a conveyance to A to the use of B in fee; and, if C pay B a certain sum, B to stand seised to the use of C in fee; this is a void limitation as to C.<sup>5</sup>

<sup>1</sup> 2 Cruise, 811.

<sup>2</sup> 4 Kent, 296-7.

<sup>3</sup> 2 Cruise, 815.

<sup>4</sup> Ibid.

<sup>5</sup> Chudleigh's Case, 1 Rep. 187, a.

(a) A conveys to the use of B and his heirs, till C shall pay B £40, then to the use of C and his heirs. Upon payment of this sum, held, C should have the estate. The only doubt was, whether the right of entry belonged to C himself, or to the feoffee to uses. Bro. Abr. *Feoffment al Use*, pl. 80.

So A may convey to trustees and their heirs to their own use; but, unless they pay a certain sum in a certain time, to the use of A, with remainders over. Upon non-payment, the estate vests in A, and the remainders take effect. *Harwel v. Lucas*, Moo. 99; *Bracebridge's Case*, 1 Leo. 264.

So a conveyance may be made of two estates, S and T; of the former to the use of A in fee, and of the latter to the use of B in fee, until A should be evicted from S by B's wife; then T to the use of A, till his loss should be satisfied from the profits of T. *Kent v. Steward*, 2 Rolle's Abr. 792; Cro. Car. 158.

So, where A, tenant for life, and B, the reversiomer, covenant to levy a fine to the use of A in fee, unless B pay A 10s. at a certain time; if he should pay it, to the use of A for life, remainder to B in fee; A has a fee till payment of the money. *Spring v. Cæsar*, 1 Rolle's Abr. 418.

So A and B, sisters, in consideration of £4,000 paid to A, and of a marriage proposed between B and C, convey to trustees in fee, to the use of C for life, remainder to B for life, remainder to the children in tail, remainder to C in fee; but, if both B and C should die leaving no issue, and the heirs of B should, within twelve months from the death of the survivor of them, pay the heirs or assigns of C £4,000, the remainder in fee to C and his heirs to cease, and the premises to remain to the use of the heirs of B. Held, a good shifting use. *Lloyd v. Carew*, Show. Parl. Cas. 187.

## CHAPTER XLVII.

## REMAINDER. HOW DEFEATED.

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|---|---|
| 1. By destroying the particular estate.   | 5. Remainder by way of use, how destroyed; whether actual seisin necessary, &c. |
| 2. Whether by a mere change of estate.  |   |
| 8. Where the particular estate and a subsequent remainder unite, whether contingent remainders destroyed. Distinction of cases. | 9. American opinions and cases.   |

§ 1. INASMUCH as a remainder must take effect either before or immediately upon the determination of the preceding estate; it follows that any act, which destroys such estate before the contingency happens, will destroy the remainder also. Hence, in England, where a tenant in tail or tenant for life, with remainders over, makes a feoffment, or suffers a fine and recovery, or a recovery without fine or feoffment; as by these acts his estate is divested, the remainders also become void. The same effect follows from a surrender, to the owner of the reversion or a vested remainder, by tenant for life; or a conveyance to him of the reversion or a vested remainder, whereby his life estate is extinguished. But not from any such conveyance by tenant for life, as will pass only the estate which he has; such as a bargain and sale, or lease and release. It has already been stated (ch. 4,) as the general rule of American law, that no conveyance by a particular tenant will be effectual to pass more than his own estate. Hence, it seems, such conveyance will not in any case operate to defeat contingent remainders. But perhaps the English law as to the effect of a *surrender* remains unchanged.<sup>1</sup>

<sup>1</sup> Chudleigh's Case, 1 Rep. 185 b; Co. Lit. 252 a; Archer's Case, 1 Rep. 66; Lloyd v. Brooking, 1 Ventr. 188; Hales v. Risley, Pollexfen, 389; Thompson v. Leach, 2 Salk. 427; Fearne, 468, 323; Purefoy v. Rogers, 2 Saun. 380; Reeve v. Long, 4 Mod. 284; Blossie v. Clanmorris, 8 Bligh, 62; Doe v. Gatacre, 5 Bing. N. 609; 7 Scott, 807; Hole v. Escott, 2 Keen, 444.

§ 2. How far any mere *change* in the preceding estate will operate to defeat contingent remainders, seems to be an unsettled point. Mr. Fearne supposes that the change must be one of *quantity*, not merely of *quality*. Thus, where the preceding estate was limited to two persons, a release from one to the other was held not to destroy the remainders. But, on the other hand, where the particular estate descended to parceners, who made partition, it was held, that the remainders were defeated.<sup>1</sup>

§ 3. The alterations in the estate preceding a contingent remainder, above referred to, are those made by the act of the particular tenant himself. Such changes may also arise from the acts of third persons; and, upon this point, the following distinctions have been made.

§ 4. Where the same conveyance, which creates the particular estate and the contingent remainder, creates also the subsequent vested remainder; or where the reversion in fee *descends*, from a testator who limits such particular estate and contingent remainder, upon the particular tenant; there will be no merger, effectual to destroy the contingent remainder; but the two estates between which it is interposed will unite *sub modo*, and, when the contingency happens, will open or separate to let in the contingent remainder. Any other construction would manifestly defeat the intention of the party limiting the estates, both in regard to the particular estate, which would *mêrge*, and in regard to the contingent remainder, which would be destroyed, by the very act which created them.<sup>2</sup> Thus upon a limitation to A, and B his wife, for their lives, after their decease to their first issue male, &c., and for want of such issue, to the heirs male of the body of A; A and B take an estate tail, subject, however, to the condition, that upon the birth of issue male the estate shall open, and leave an estate for life in A and B, remainder to their issue in tail male, remainder to the heirs of the

<sup>1</sup> 2 Cruise, 819; Fearne, 337; 4 Leon. mines an estate at will held under one of them. Big. Dig. 480.  
<sup>2</sup> Fearne, 503.  
 237; Harrison v. Belsey, T. Ray. 418; Purefoy v. Rogers, 2 Saun. 386. Partition between tenants in common deter-

husband.<sup>1</sup> So, upon a devise to A, the testator's eldest son, for life; if he should die without issue living at his death, then to B in fee; but, if he should leave such issue, then to A's right heirs forever; held, although the reversion in fee descended upon A, he was still tenant for life, with contingent remainders which were not defeated. Nor could A's life estate merge in the remainder to his heirs, the latter being contingent.<sup>2</sup> But where the particular tenant, upon whose estate contingent remainders are limited, acquires a remainder or reversion in fee, not by a limitation or a descent concurrent in time with the creation of his prior estate, but by a subsequent descent, though acting through the party who limited the estates; as the same reason does not operate to prevent a merger, which has already been stated in relation to the former case, such merger will take place and the contingent remainders be destroyed. Thus A was tenant for life, remainder to B, his son, for life, remainder to B's first son in tail, remainder to the heirs of the body of A. A dies before B has a son, and the estate tail descends upon B. The remainder to B's son is destroyed.<sup>3</sup> So, in case of a conveyance to the use of A and his wife for life, remainder to the use of B, the son of A, for life, remainder to B's sons in tail, &c., remainder to A in fee; A and his wife die, living B. Held, B's life estate was merged in the fee which descended upon him, and the remainders destroyed.<sup>4</sup>

§ 5. With respect to contingent remainders limited *by way of use*, how far they are liable to be destroyed by acts affecting the estates upon which they depend, is a point that has already been somewhat considered. The celebrated controversy, noticed in the last chapter, as to the *scintilla juris*, Chudleigh's case, &c., derives all or most of its *practical* importance from its connection with the question, whether trustees have power to destroy contingent remainders. Upon this subject, the decided cases, as well as the statements and opinions of elementary

<sup>1</sup> Bowles' Case, 11 Rep. 79; Archer's Case, 1 Rep. 66; Hales v. Risley, Pollexfen, 889.

<sup>2</sup> Plunket v. Holmes, Raym. 28; 2 Cruise, 321; 2 Bos. & P. 297.

<sup>3</sup> Kent v. Harpool, 1 Vent. 306; T. Jones, 76.

<sup>4</sup> Hooker v. Hooker, Rep. Temp. Hardw. 13; (Duncomb v. Duncomb, 3 Lev. 437.)



writers, are exceedingly confused and contradictory; and there is great reason for the remark of Mr. Preston, that the doctrine requires to be settled by judicial decision.<sup>1</sup>

§ 6. With respect to contingent remainders by way of use, Mr. Cruise makes a distinction(*a*) between those which arise *without any change of possession*, that is, by a *covenant to stand seised to uses*, or *bargain and sale*; and those created by a *change of possession*, or by a *feoffment or conveyance to uses*.<sup>2</sup> In the former case, he says, *actual seisin* is necessary to give effect to the remainders, and not a mere *right of entry*, as in case of legal estates; because the use arises out of the estate of the covenantor, and this, according to the language of the statute, must be a *seisin*. Hence any act or transfer of the covenantor, by which his seisin is divested, defeats the subsequent contingent remainders.(*b*) Mr. Cruise proceeds to remark,<sup>3</sup> that, where a limitation to uses is made by some conveyance which operates by a *change of possession*, the doctrine established in Chudleigh's case would lead to the conclusion, that any act, which divests and turns to a right the particular, preceding estate, destroys the contingent uses, unless either the particular tenant or the feoffee to uses re-enters; for, otherwise, no possibility of entry or "*scintilla juris*" remains, to constitute the seisin, out of which uses must arise. The doctrine of that case is, that the

<sup>1</sup> Prest. on Est. 184.

<sup>2</sup> 2 Ib. 825.

<sup>3</sup> 2 Cruise, 824-5. See chap. 82.

(*a*) I have been unable to find any case where this distinction is expressly recognized.

(*b*) A covenants to stand seised to the use of himself for life, remainder to the use of B for life, remainder to the use of C for life, remainder to the use of the first son of C in tail male, with the reversion in fee to A. A grants the reversion to D, without consideration, and reciting the uses; and afterwards makes a feoffment of the land. After A's death, B enters, and dies seised, C having died previously. It was held, that the contingent remainder to the son of C was not defeated by the grant and feoffment of A; that D took the reversion charged with the uses, and the feoffment could not defeat D's right of entry; and that

the entry of B operated to re-vest D's estate, and restore a seisin which would support the contingent remainder. If A had made the feoffment before granting the reversion, as the law would not allow him to re-enter against his own deed, the entry of B would not enure to his benefit, and the contingent remainders would therefore be destroyed. *Wegg v. Villers*, 2 Rolle's Abr. 796; *Lloyd v. Brooking*, 1 Vent. 188.

These limitations and subsequent transfers were made by Lord Coke, for the purpose of enabling him to preserve or destroy the contingent remainder at his discretion, by producing the grant and destroying the feoffment, or the converse. But, it is said, he died before executing his plan.

grantee to uses is considered the *donor* of all the contingent estates when they vest. This principle, however, has been strongly contested by Lord Ch. J. Pollexfen,<sup>1</sup> upon the grounds, that it would place a dangerous power in the hands of those who are seised to uses, who are said to be generally "strangers and mean persons," and greatly endanger the security of titles; by enabling grantees to uses to deprive themselves, by their own unlawful acts, of a right of entry, and thus defeat all contingent estates limited by way of use. The same judge, and also Mr. Fearne,<sup>2</sup> urge the still stronger consideration, in opposition to this principle, that it is in direct contradiction to the words and uniform construction of the statute of uses; according to which, the grantee to uses is a mere instrument or *conduit pipe*, all his estate being immediately taken and transferred out of him, as if never vested. The *cestui que use* is seised, "to all intents, constructions and purposes in the law," as a grantee to uses would be before the statute; and one of the legal qualities of a legal estate is, that where a particular tenant, though deprived of his estate, has left in him *a right of entry*, this is sufficient to support subsequent contingent remainders. Hence, where such right remains in the *cestui*, no divesting of the estate from the trustees would seem sufficient to defeat such remainders.

§ 7. The doctrine that, where a limitation to uses operates by *a change of possession*, (although no peculiar effect seems to have been attributed to this circumstance,) contingent remainders may be defeated by the act of the trustees in transferring the estate, derives its great support from Chudleigh's case,<sup>3</sup> which has been already several times referred to. In this case, A enfeoffed several persons to the use of them and their heirs, during the life of B, remainder to the use of the first and other sons of B in tail. Before B had a son, the trustees conveyed to B in fee, without consideration, and with notice of the uses.(a)

<sup>1</sup> Hales v. Risley, Pollexfen, 888; Treat. of Eq. B. 2, ch. 6, sec. 1.

<sup>2</sup> Fearne, 800

<sup>3</sup> 1 Rep. 120; Dillon v. Fraine, Poph. 70.

(a) In another case, (Wood v. Reignold, Cro. Eliz. 784,) though recognizing the general doctrine, that contingent uses

may be defeated by the feoffee, upon the grounds, that the use ought to arise out of the estate which the covenantor had

B afterwards had a son. Held, the remainder to this son was destroyed by the feoffment of the trustees, which operated as a forfeiture of the particular estate.

§ 8. Many other cases are to be found in the books,<sup>1</sup> which settle substantially the same principle. These are generally cases of a *feoffment* made by the trustee or by the particular tenant, whereby the particular estate is defeated. The same principle is applied to *springing* or *shifting* uses, which are not strictly remainders, though hardly distinguishable from them. Thus a devise of the land, from which such uses are to arise, will defeat them; though, it seems, a mere devise of portions from it will not.(a)

§ 9. Chancellor Kent says,<sup>2</sup> in equity, the tenant for life of a trust cannot, even by a fine, destroy the contingent remainder dependent thereon; and it will only operate on the estate he can lawfully grant. A court of equity does not countenance the destruction of contingent remainders. So any conveyance of a thing *lying in grant* does not bar a contingent remainder; nor a

<sup>1</sup> *Biggot v. Smyth*, Cro. Car. 102; *Brent's Case*, Dyer, 840 a; *Brent's Case*, 2 Leon. 14.

<sup>2</sup> 4 Kent, 253-4

at the time of the covenant, and that the statute executes only vested uses or those *in esse*, leaving contingent uses as at common law; it is intimated that, according to the very reason of the rule last named, a party taking the land, without consideration or with notice, is chargeable with the contingent use when it arises.

(a) A levied a fine to the use of himself and his heirs, till a marriage had between B, his son, and C, then to the use of A for life, remainder to B in tail, &c. The marriage took place, A, however, having previously devised portions from the land to his daughters, and died. Held, a devise of the land itself would have defeated the future use; but it was doubted whether a mere devise of portions from it had this effect. 2 Cruise, 328.

Whether a mere lease for years or the grant of a rent from the land will wholly defeat the future use, seems to be a doubtful point, though the weight of authority is that it will not. But such

transfer has been held to bind the use when it arises, *pro tanto*. Even this point, however, was disputed by Fenner, J., in *Wood v. Reigold*, (Cro. Eliz. 854,) who said, "the same freehold remains, and the use is annexed to the lease, and therefore the lease shall not disturb nor bind it." So, in *Bould v. Winston*, (Cro. Jac. 168; Noy, 122,) where the party covenanting to stand seised remained seised of the reversion in fee, and afterwards made a long lease to defeat the contingent remainder; it was held, that the lease should take effect out of the reversion, and not in such way as to defeat the remainder. In another case, (*Barton's Case*, Moo. 743,) a lease was held wholly to defeat the contingent use.

The cases, in which a conveyance made by a feoffee or covenantor to contingent uses has been held to defeat such uses, are said to be very unsatisfactory, and to be contradicted by others of equal authority, one of which was decided by the House of Lords. (2 Cruise, 332; *Smith v. Warren*, Cro. Eliz. 688.)

conveyance deriving effect from the statute of uses; because neither of these passes anything more than the grantor has a legal title to. There are also some acts of a tenant for life, which, though amounting to a forfeiture, and authorizing an entry by a subsequent vested remainder-man, do not destroy the contingent remainder, unless such entry or other equivalent act be made or done. The same author also remarks,<sup>1</sup> that Chudleigh's case is a strong authority to prove that a feoffment without consideration, and even with notice in the feoffee of the trust, will destroy a contingent remainder; but that it is a doctrine flagrantly unjust, and repugnant to every settled principle in equity, as now understood.(a)

<sup>1</sup> 4 Kent, 252, n.

(a) Very few cases have occurred in the United States, in which the question, as to the power of the particular tenant to defeat contingent remainders, has arisen. In an early case in Pennsylvania, (*Dunwoodie v. Reed*, 8 S. & R. 447-8,) a tenant for life, with contingent remainders depending upon his estate, had suffered a common recovery; and the judges were divided in opinion as to the effect of this proceeding upon the remainders. Ch. J. Tilghman, who was of opinion that the remainders were destroyed, remarks as follows: The great Hamilton estate, near Philadelphia, was tied up, by the late Gov. Hamilton's will, to a number of life estates, with contingent remainders depending on them; but he omitted to appoint trustees for preserving the contingent remainders. Under the direction of very able counsel, common recoveries were suffered, for the purpose of destroying the contingent remainders, and many estates were sold for valuable and full considerations, on the faith of the common law, which had never been altered, either by act of assembly or judicial decision. The objection, that the law of forfeiture is founded on feudal principles, is of no weight. Those principles are so interwoven with every part of our system of jurisprudence, that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain may easily be removed, by acts of the

legislature. In that way, the future may be provided for, without injuring the past. But should this court undertake to shake a principle which has become a rule of property, the mischief would be incalculable. I doubt very much, whether it be not the policy of this country to facilitate the destruction of contingent remainders, (as well as of estates tail.) They tend to prevent the free enjoyment and alienation of land; whereas, the spirit of our constitution and laws has a direct contrary tendency. They tend to throw large estates into one hand; but the object of our laws is to divide them among many.

On the other hand, in the same case, (*Dunwoodie v. Reed*, 8 S. & R. 457.) Gibson, J., says, entailment and contingent remainders stand on different ground. Indefinite restriction on alienation is contrary to the genius of our laws; but restriction to a reasonable extent is tolerated. Land ought not to be transmissible like chattels. Convenience, and the state of society in this country, begin to require a more complex settlement and disposition of real property than has hitherto prevailed. This, it is said, may be effected, and these contingent interests secured, by interposing trustees to preserve contingent remainders. But this is a form of limitation rarely thought of, especially where the disposition of property is the last act of a man's life.

In the case of *Carver v. Jackson*, (4 Pet. 1.) it seems to have been taken for granted, that the confiscation of a preceding estate for life will defeat contin-

gent remainders depending upon it. And in South Carolina a feoffment, with livery of seizin, by tenant for life, bars contingent remainders. *Dehon v. Redfern*, Dudl. Eq 115. See *Brewer v. Hardy*, 22 Pick. 376.

In Virginia, it is said, the law on this subject has been essentially changed by statute, and the policy of the legislature has been, to place contingent remainders beyond the reach of accident to the particular estate. Trustees to preserve contingent remainders are no longer in much use. 1 Lom. 457, 468. In Massachusetts, no expectant estates shall be barred (except in case of entailments) by act

of the immediate owner, or destruction of his estate by disseisin, forfeiture, surrender or merger. R. S. 405. See Gen. Sts. Devise to A, for life, remainder to B and C to preserve contingent remainders, remainder to the issue of A in tail male. If A renounce or disclaim the life estate, B's and C's remainders take effect, and preserve the contingent remainder. *Webster v. Gilman*, 1 Story, 499.

In New Hampshire, a contingent remainder is not barred by a conveyance under the statute of uses, nor under the statute of the State, though it may be by fine or feoffment. *Dennett v. Dennett*, 40 N. H. 498.

## CHAPTER XLVIII.

## REMAINDER. TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

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|---|---|
| 1. Origin and history.                                      | 7. Chancery sometimes directs a conveyance in favor of mortgagees, creditors, &c. |
| 3. Trustees take <i>an estate</i> .                         | 8. But generally will not interfere.  |
| 4. May destroy the remainders; but it is a breach of trust. | 9. Trustees cannot safely defeat the remainders.                                  |
| 5. Exceptions—remote relations may be barred.               | 10. Power and duty in case of waste.  |
| 6. If remainder-men join; no breach of trust.               |   |

§ 1. FROM the rule, that the alienation or forfeiture of a preceding estate for life would defeat contingent remainders limited upon such estate, the practice arose, of limiting an intermediate estate to trustees, to take effect upon the termination of the life estate before the death of the tenant, and continue during his life. The invention is ascribed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who, during the civil wars, devoted themselves to the business of conveyancing. Such trustees are called trustees to preserve contingent remainders.<sup>1</sup>

§ 2. Lord Hardwicke remarks, that the practice in question arose from the decision of two great cases, reported by Lord Coke, viz: Chudleigh's case and Archers' case, though it was several years after those cases before that light was struck out; and it was not brought into general use till the time of the usurpation, when probably the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.<sup>2</sup>

§ 3. It was formerly questioned, whether trustees to preserve remainders, after a prior limitation for life, took any *estate* in

<sup>1</sup> 2 Cruise, 886-7.

<sup>2</sup> Garth v. Cotton, Dickens, 183.

the land, or merely a right of entry upon the forfeiture or surrender of the tenant for life; by reason that the limitation, being only during his life, could not commence or take effect after his death. But it was settled in *Cholmondeley's case*, and *Duncomb v. Duncomb*, that they take a vested remainder. And this is *a fortiori* the case, where the prior estate is only for years, because the first freehold is then in the trustees. It has also been argued, that the interposition of trustees to preserve, &c., was not intended to alter the legal rights of a preceding tenant for life, or of the ultimate remainder-man in fee. But the court held, that such interposition was designed to abridge the legal rights of both those parties; the right of the former to destroy the contingent use of the inheritance, while it remains contingent; and the right of the latter to destroy it, by accepting a surrender.<sup>1</sup>

§ 4. A trustee to preserve contingent remainders has the power to defeat them, by joining in a conveyance with the preceding tenant. Such trustee has been called *honorary*, as signifying a discretionary power in this respect. But this act is a plain breach of trust, and a grantee, without consideration or with notice, will take the land charged with the trust. It is said, that, should the court hold it to be no breach of trust, or pass it by with impunity, it would be making proclamation, that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve. In case of a conveyance for consideration or without notice, the trustee will be decreed to purchase other lands of equal value, and hold them upon the same trusts.(a) These principles were first solemnly settled in the great case of *Mansell v. Mansell*, which was decreed by Sir J. Jekyll, at the rolls, and

<sup>1</sup> *Garth v. Cotton*, Dickens, 183; 2 Co. 5 a; *Duncomb v. Duncomb*, 3 Lev. 437.

(a) Lord King said (2 P. Wms. 678) that, though these points had not been before judicially determined, yet it seemed to the court in common sense, reason and justice, to be capable of no other construction; Lord Harcourt, (1 P. Wms. 128,) that if, as was said, there was no precedent, he would make one; and (Tip-

ping v. Pigot, 1 Ab. Equ. 385,) that it would be dangerous for any trustees to make the experiment, and, if it should ever come in question, he thought the court would set aside such a conveyance. See remarks of Read, J., *Harris v. McElroy*, 45 Penn. 220; and of Gibson, C. J., *Lyle v. Richards*, 9 S. & R. 347.



afterwards by Lord King, assisted by Lord Raymond and Lord Ch. Baron Reynolds. Lord Raymond said, it was strange in natural reason to say, that, where a man hath created a trust to preserve his estate, the trustees may break that trust and give away the estate with impunity.<sup>1</sup>

§ 5. This rule, however, seems to have been established, chiefly for the protection of the immediate parties to a settlement or their issue; and not to have been extended to the relief of remote collateral heirs. The former are regarded in law as purchasers; the latter as mere voluntary claimants, not entitled to the aid of a court of equity. Thus a settlement was made in consideration of a marriage and a fortune, for the purpose of settling the lands in the name and blood of the husband. Limitation to trustees, in trust for the husband for ninety-nine years, if he should so long live, remainder to trustees during his life to support, &c., remainder to the sons of the marriage, remainder to the heirs of the body of the husband, remainder to his right heirs. After the marriage, the husband and wife, and trustees to support, joined in a fine and conveyance, with different limitations from those stated, providing a jointure, and giving the ultimate remainder to strangers. Husband and wife having died without issue, the heirs of the former brought a bill to set aside the latter conveyance. Held, they were not entitled to relief.<sup>2</sup>

§ 6. If the party to whom a remainder is limited join the trustees in their conveyance, this will be no breach of trust. And upon a similar principle, where such remainder is limited *to the heirs of the body* of A, and is therefore contingent, if the eldest son or heir apparent of A join the trustees in a conveyance, and afterwards die, chancery will not set aside the conveyance on application of a second son of A, during his father's life, because it is uncertain whether he will survive his father, and therefore come under the designation of *heir*.<sup>3</sup>

§ 7. A court of chancery, under some circumstances, will direct

<sup>1</sup> Woodhouse v. Hoskins, 8 Atk. 22; Pye v. Gorge. 1 P. Wms. 128; Mansell v. Mansell, 2 P. Wms. 678; For. 252; 2 Abr. Eq. 747.

<sup>2</sup> Tipping v. Pigot, 1 Ab. Eq. 885.  
<sup>3</sup> Else v. Osborn, 1 P. Wms. 887.

trustees for preserving contingent remainders to join in conveyances made for the purpose of barring such remainders. Thus, where a mortgage was made of the land, before the settlement by which the remainders are limited; and after such settlement the party who made it contracts for a sale of the equity of redemption; and the proposed purchaser files a bill against the settler and the trustees, praying that they may join in a conveyance to him, averring that there are no issue for whose benefit the trust was created, and that the mortgagee will foreclose unless the mortgage is redeemed, which the settler is unable to do; and the defendants by their answers submit to the direction of the court: the conveyance prayed for will be decreed, the trustees being indemnified, and the wife of the settler, one of the objects of the settlement, being privately examined to ascertain her consent.<sup>1</sup> So, also, chancery will decree that trustees join in a conveyance, where the first remainder has become vested, and it is for the interest of this remainder-man to make the conveyance, although subsequent remainders are limited. If there is a subsequent remainder-man *in esse*, it seems the trustees will be required to give security for his interest; if not, the fact that the parents, to whose future children subsequent remainders are limited, are still living, will not be regarded. The most common case in which such decree is made, is where the first remainder-man is about to contract an advantageous marriage, and a new settlement of the estate becomes necessary for this purpose, more especially if the effect will be to preserve the estate in the family. Thus A was tenant for ninety-nine years, if he should so long live; remainder to trustees and their heirs for his life to support contingent remainders; remainder to his first and other sons in tail male; remainder to trustees for years, to raise portions for daughters, if there were no issue male. A having a son, who was of age and about to marry, and also a daughter, and the mother being still alive, the father and son brought a bill in equity, to have the trustees join in making an estate, in order that a recovery might be had, for the

<sup>1</sup> Platt v. Sprigg, 2 Vern. 803.

purpose of making a marriage settlement. Decreed, that the trustees should join in the recovery, upon giving security for the daughter's portion.<sup>1</sup> So, also, it is said, that chancery will order trustees to join in defeating contingent remainders, upon the application of creditors, where such remainders were limited by voluntary settlement.<sup>2</sup>

§ 8. There are many cases, however, where the court of chancery has refused to order trustees for preserving contingent remainders to join in barring them. And it may refuse so to order, although, if the trustees actually joined, they would not be chargeable with a breach of trust; because, in settling this point, the reasons and motives only of the trustee would be taken into view.<sup>3(a)</sup>

<sup>1</sup> *Frewin v. Charlton*, 1 Abr. Eq. 386; (*Winnington v. Foley*, 1 P. Wms. 586.)

<sup>2</sup> *Fearne*, 881; 2 *Cruise*, 842-8.

<sup>3</sup> *Woodhouse v. Hoskins*, 8 Atk. 22.

(a) Lands were limited to husband and wife for life, remainder to a trustee to preserve, &c., remainder to their first and other sons in tail. Twelve years after the marriage, having had no children, the husband and wife brought a bill, praying that they might be enabled to sell the land for payment of the husband's debts. The trustee did not object, upon condition of being indemnified. Held, the court would still regard the possibility that children might be born, and the application was refused. *Davies v. Weld*, 1 Abr. Eq. 386.

Limitation to A for ninety-nine years, if he should so long live, remainder to trustees for his life to preserve, &c., remainder to his wife, remainder to the first and other sons in tail male. The wife having died, and there being two sons, B and C, A and B (who was of age) covenanted with D, to whom A had mortgaged the land, that they would suffer a recovery, and procure the trustees to join. The latter refused. Upon a bill by D against A, B and C, praying specific performance, and that the trustees might join; the bill was dismissed, because C did not consent, and the conveyance would operate, not to preserve the estate in the family, as in some other cases, but to pass it to strangers. *Townsend v. Lawton*, 2 P. Wms. 879.

A father devised to A, his eldest son, for ninety-nine years, if he should so long live, remainder to trustees during

A's life, to preserve, &c., remainder to A's first and other sons in tail male, remainder to B, a second son, for ninety-nine years, (as above,) remainders over. The will empowered his sons to revoke these uses, and appoint new uses, provided they limited them to their sons for ninety-nine years, and in strict settlement; with other powers and directions, tending to preserve the estate in his family. A died without issue, and B came into possession of the estate, and had an only son, C, who was of age. B borrowed money, for which B and C became bound; and afterwards B and C covenanted to convey the estate to the creditors, in trust to sell, pay their debts, and restore the surplus to B. The creditors bring a bill against B and C for specific performance, and against the heir of the surviving trustee to preserve, &c., praying that he might join in conveying. Held, the power of revocation in the will showed the testators's intent to make a strict settlement, and keep the estate in his family; that the inconveniences of having an estate for years instead of a freehold vested in B, as tending to a perpetuity, were balanced by the advantage of preventing an alienation by B, in which, if he had the freehold, he might compel the son, who was of course greatly under his control, to join; that the probable object of thus limiting the estate was to avoid the danger of the son's becoming bound for the father's

§ 9. It is said, that it would be a dangerous experiment for trustees in any case to destroy remainders, which they were appointed to preserve. Lord Eldon remarked,<sup>1</sup> that the act which they were decreed to do, should be such as they ought to do. The proposition, that trustees are never to join without direction of the court, is the result of great caution, but amounts to this, that the judges of the court of chancery are the trustees to preserve all the contingent remainders in the country, and no one could say what was to be done, till a decree had been obtained. But this principle cannot be sustained.

§ 10. Trustees to preserve a contingent remainder, limited after the death of the particular tenant, during his life, are tenants *pour autre vie*. Hence they cannot maintain an action for *waste*, which lies only for the owner in fee. But, on the other hand, as their office is to *preserve* the contingent estates, they are bound to preserve the inheritance as entire as possible; which inheritance consists of the land, timber and mines. Hence they may undoubtedly bring a bill in chancery, for an injunction to stay waste; and, if they consent to the felling and sale of timber, join with the tenant for years, and the ultimate remainder-man in fee, in an agreement therefor, by which the proceeds are to be equally divided between them, and expressly covenant to bring no bill for an injunction; they are clearly liable for a breach of trust, as for an alienation of part of the inheritance. The tenant for years and remainder-man in fee are also liable, having notice of the breach of trust and reaping the benefits of it. If it is a breach of trust, and the trustees convey the estate, a court of equity is not to sit still, and let others profit by the spoil.<sup>2</sup> And these parties are equally liable, whether the trustee commits any positive act, or is merely guilty

<sup>1</sup> *Pye v. George*, 2 P. Wms. 684; *Moody v. Walters*, 16 Ves. 288.

<sup>2</sup> Per Lord King, *Mansell v. Mansell* 1 P. Wms. 678; 2 Abr. Eq. 747.

debts; that the proposed conveyance was not designed to effect a marriage settlement, or pay the debts of C, or justified by any peculiar misfortune in the family; and that C, being only a remainder-man, with no vested freehold, was not to be

considered owner of the estate, with power over the rights of other remaindermen. *Woodhouse v. Hoskins*, 8 Atk 22; (*Barnard v. Large*, Amb. 774; *King v. Cotton*, 2 P. Wms. 674, n.)

of *laches* in not performing the trust, and bringing a bill for injunction. Upon these grounds, where waste has been committed by the particular tenant and the remainder-man in fee, and the timber sold, and after the death of the former the estate vests in his son, to preserve whose remainder trustees were appointed; the son may maintain a bill in equity against the remainder-man in fee for restitution of the amount which he received from the sale, although the waste was committed when the plaintiff had neither *jus in re* nor *jus ad rem*, before he was *in rerum natura*. If timber were blown down by accident, or cut by a stranger or by the tenant for life alone, it seems, the property of it would vest in the remainder-man in fee. This is a legal right, with which equity will not interfere. But wherever a legal right is acquired or exercised by fraud or collusion contrary to conscience, equity will enjoin it or decree compensation. Hence, in this case it will interfere, on account of the mutual agreement between the tenant for life and the remainder-man.<sup>1</sup>

<sup>1</sup> Garth v. Cotton, Dick. 188.

## CHAPTER XLIX.

REMAINDER. DOCTRINE OF ABEYANCE. CONDITION OF THE FEE,  
IN CASE OF CONTINGENT REMAINDERS.

1. Limitation to uses—use results; limitation by devise.      5. Limitation by common law conveyance.

§ 1. WHERE a remainder of inheritance is limited in contingency by way of use, the inheritance, in the meantime, if not otherwise disposed of, remains in the settler or grantor till the contingency happens.<sup>1</sup> (This point has been already considered to some extent, under the head of *Uses and Trusts*.) Thus a feoffment was made to the use of the feoffor for life; afterwards, of such tenants to whom he should demise any part of the land for years or for life; afterwards to the use of the performance of his will, and of the devisees of any estate in the land; after such performance, to the use of successive tenants in tail; and lastly, to the use of him and his heirs. Held, nothing vested till the death of the feoffor, because he had power to devise even in fee.<sup>2</sup> So in case of a feoffment in fee, to the use of A in tail, remainder in fee to the right heirs of B, who is living; the fee-simple is neither in abeyance nor in the feoffee, but the use in it results to the feoffor, and remains in him till the death of B.<sup>3</sup> So, where a contingent remainder is *devised*, the fee decends to the heir; and, even though a precedent estate for life is given to him, he takes such estate and the fee distinctly, in relation to the contingent remainder-man, so that when the contingency happens, the heir's estate opens to let in the remain-

<sup>1</sup> 2 Cruise, 385; Sir Edward Clere's Case, 6 Rep. 18 a.

<sup>2</sup> Leonard, &c.. 10 Rep. 78.

<sup>3</sup> Davis v. Speed, Carth. 262.

der.<sup>1</sup> So, where a contingent remainder in fee is devised to the heirs of the testator, preceded by other contingent remainders, one of which is in fee, the heirs take the inheritance by descent. Thus a testator devised to his wife for life, if she should have a son, and call it by his name; then he gave the inheritance to such son; and, if he died under twenty-one, then to his own heirs. The heir of the testator conveyed in fee to the testator's widow. Held, as the fee was not in abeyance, but descended to the heir, the contingent remainder to the son was hereby destroyed.<sup>2</sup>

§ 2. The doctrine above stated, however, has been denied in some cases. Thus Sir J. Jekyll remarked, that though, in case of a devise for life, remainder to the heirs of one still living, the remainder in fee is in abeyance, yet there is a *possibility* left in the heir. That this was plain even in case of a grant, where a possibility is left in the grantor, entitling him to enter for a forfeiture by the particular tenant, which terminates his estate as much as his death; and that it was absurd that a tenant for life should have power by an unlawful act, in destroying the contingent remainder, himself to acquire the fee. It was like the possibility that was upon a grant at common law to a man and the heirs of his body; for there, though the grantor had no reversion, he might enter upon failure of issue.<sup>3</sup>

§ 3. The decision of Sir J. Jekyll, in the case referred to, was reversed on appeal by Lord Parker. He remarked, that the only possible ground for treating the fee as in abeyance, or "*in gremio legis*," was the preservation of the contingent remainder; whereas the effect of this principle was, not to preserve, but to destroy it, by enabling the particular tenant to make a wrongful conveyance, which would defeat the remainder, if contingent.

§ 4. In another case, however, Lord Talbot seemed to recognize the principle that the fee is in abeyance, where a contingent remainder is limited by devise. The question having arisen,

<sup>1</sup> 2 Cruise, 886; Fearn, 525.

<sup>2</sup> Carter v. Barnardiston, 1 P. Wms. 511.

<sup>3</sup> Purefoy v. Rogers, 2 Saun. 880; Carter v. Barnardiston, 1 P. Wms. 511.



whether two persons, to whom an estate was devised, *and to the heirs of the survivor*, in trust to sell, could make a good title, the remainder in fee being contingent; it was proposed that the devisor's heir at law should join in the deed. But Lord Talbot remarked, that this would be of no avail, except as supplying a want of probate of the will, because *the fee was in abeyance*.<sup>1</sup> But Mr. Fearne attaches little weight to this incidental opinion, and thinks the contrary doctrine is now firmly established by a series of cases.<sup>2</sup>

§ 5. Where a contingent remainder in fee is limited neither by devise nor by way of use, but by *common law conveyance*, the opinion has prevailed, that, although the fee does not vest in any grantee, yet it passes out of the grantor, leaving him no estate whatever. It has been sometimes held, however, that, although the grantor retains no *estate*, yet there remains in him *a possibility of entry*, by which, upon a forfeiture by the particular tenant, he may regain his title. Mr. Fearne is of opinion, that nothing passes out of the grantor, except the particular estate, until the contingency happens. Thus, where a conveyance is made to A, remainder to the right heirs of B, and A dies before B; the remainder becoming void, the grantor's estate revests in him.<sup>3</sup> But Chancellor Kent says,<sup>4</sup> that though the good sense of the thing, and the weight of liberal doctrine, are strongly opposed to the ancient notion of an abeyance, the technical rule is, as at common law, that *livery of seisin* takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion, he has only *a potential ownership*, subsisting in contemplation of law, or *a possibility of reverter*. Mr. Preston<sup>5</sup> and Mr. Cornish<sup>6</sup> also are of opinion, that the common law rule is still in force, and the latter remarks, that it was never shaken or attacked, until Mr. Fearne brought against it the weight of his eloquence and talents.

<sup>1</sup> Vick v. Edwards, 3 P. Wms. 872.

<sup>2</sup> Fearne, 525.

<sup>3</sup> Co. Lit. 842 b.; 1 P. Wms. 515; Fearne, 526; 2 Rolle's Abr. 418; Vin. Abr. Remainder.

<sup>4</sup> 4 Kent, 259

<sup>5</sup> 1 Prest. on Est. 255; 2 Prest. on Abst. 103-6.

<sup>6</sup> Cornish, 117.

§ 6. Chancellor Kent expresses the opinion,<sup>1</sup> that, as conveyances in this country are almost universally *by way of use*, the question as to the abeyance of the fee will rarely occur; in other words, they are subject to the same rule, already stated as applicable in England to those conveyances, which are nominally or ostensibly made to uses; and that portion of the estate, limited as a contingent remainder, continues in the grantor till the contingency happens. But in New York, where by the Revised Statutes all conveyances are to be deemed *grants*, which is a common law mode of transfer, Chancellor Kent is of opinion that the doctrine of abeyance is in force. How far the latter remark is applicable in other States, and whether conveyances by deed, though designated by names which in England denote limitations to uses, such as bargain and sale, &c., are to be treated as such in effect; or whether, as is often expressed, they are to be regarded as a substitute for *feoffment*, and in most respects to have the same operation with the latter; are questions which may be considered hereafter.(a)

<sup>1</sup> 4 Kent, 257, and n.

(a) See *Deed, Feoffment*.

## CHAPTER L.

## REMAINDER. ALIENATION, ETC., OF CONTINGENT REMAINDERS.

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|--|---|
| 1. Vested remainders alienable, &c.; contingent remainders said to be descendible and devisable. | 3. Cannot be conveyed at law, but may be in equity, and may pass by <i>estoppel</i> . |
|  | 5. Transfer to creditors; general remarks.  |

§ 1. It has been already stated, that vested remainders are for the most part subject to the same rules of law as vested estates in possession. Like the latter, they are transmissible, either by act of law or by act of the remainder-man himself. Thus a vested remainder descends to heirs, may be conveyed or devised, and is in general liable to be taken by creditors. With regard to contingent remainders, the general principle laid down by elementary writers is, that all contingent estates of inheritance, *where the person to take is certain*, are transmissible by descent, and devisable.<sup>(a)</sup> So a contingent use descends to heirs. Thus, it is laid down in *Shelleys case*, that where A covenants with B, that, upon a certain contingency, he will stand seised of certain land to the use of the latter, who dies, and then

(a) To this point, so far as it relates to heirs, Mr. Cruise cites the following case: (See 4 Kent, 261; Fearn, 459; 2 Prest. on Abstr. 119; 2 Cruise, 296-8; Goodtitle v. Billington, Doug. 758; Lawrence v. Bayard, 7 Paige, 76; Varick v. Edwards, 1 Hoffm. 883; Jackson v. Waldron, 18 Wend. 178; Fortescue v. Satterthwaite, 1 Ired. 570; Turner v. Patterson, 5 Dana, 295; Shelby v. Shelby, 6 Dana, 60; Birst v. Dawes, 4 Strobb. Equ. 87.)

A made a feoffment to the use of himself for life; after the death of himself and his wife, to the use of B, his son, for life, then to the wife of B, and her issue

by him; remainder over; remainder to the heirs of B. B, having issue, a daughter, leased for a long term, made a fine to the lessee for the same term, and died in the lifetime of A. Held, though A took but a contingent remainder, yet this descended to his heir, so far that the latter, after the contingency happened, was bound by the fine. *Weale v. Lower*, Pollexfen, 54.

(This case directly decides, rather that a contingent remainder may be barred as against the heir, even if it does descend, than that such remainder is actually descendible.)

the contingency happens; although B had neither a right, title, use nor action, but only a possibility of an use, which could neither be released nor discharged, yet his interest descended to his heir.<sup>1</sup> But where the circumstances seem to make the existence of the contingent remainder-man a part of the contingency itself, upon which the remainder is to vest; his interest will not pass to his heirs.<sup>2</sup> Thus a conveyance was made by husband and wife of her lands, to the use of her for life, remainder to him for life, if they should have any issue that should so long live, remainder to all such children in fee, as tenants in common; if the wife should die without issue, or all such issue should die under twenty-one, then, as to one moiety, to the husband in fee. The husband died before the wife. Held, nothing passed to his heirs.<sup>3</sup> So the children of one who has died, and whose interest in a devise was contingent, to take effect upon the death of a co-devisee, cannot take anything upon the death of such co-devisee, occurring after the death of their ancestor.<sup>4</sup>

§ 2. The principle above stated, both in regard to the descent and devise of contingent remainders, is recognized in the case of *Roe v. Griffiths*,<sup>5</sup> where Lord Mansfield remarks, that in all contingent, springing and executory uses, where the person is to take is certain, *so that the same may be descendible*, they are also devisable. So, in the case of *Barnitz v. Casey*,<sup>6</sup> in the Supreme Court of the United States, it is said that a contingent remainder or executory devise descends to heirs, but with the qualification, that it shall vest in him who is heir to the first devisee when the contingency happens.<sup>(a)</sup> So, in *Driver v. Frank*,<sup>7</sup> although the point seems to be treated as if it were or had been doubtful, Ch. J. Gibbs says, "it cannot be disputed, that generally a contingent remainder is transmissible." So in a case where A devised in trust for his son B, and, if he should die without issue, under age, then that all his estate should go

<sup>1</sup> Wood's Case, 1 Rep. 99 a.

<sup>2</sup> Fearn, 864.

<sup>3</sup> Moorhouse v. Wainhouse, 1 Bl. R. 638.

<sup>4</sup> Deboe v. Lowen, 2 B. Mon. 616.

<sup>5</sup> 1 Black. R. 605.

<sup>6</sup> 7 Cranch, 469.

<sup>7</sup> 6 Price, 58.

(a) See *Reversion, Descent*.

to C, his heirs and assigns; and C afterwards devised all his estates in possession, remainder or reversion, and died, living B, who subsequently died under twenty-one, and without issue: Lord Chancellor Northington said, "I have never had any doubt, since I was twenty-five years old, that these contingent interests are devisable, notwithstanding some old authorities to the contrary."<sup>1</sup> So A covenanted with B, that his son should marry the daughter of B, and, if not, that A and his heirs would stand seised of certain land to the use of B and his heirs, until £100 should be paid. B died, and the marriage never took place. Held, the heir of B should have the land.<sup>2</sup> But, in a late case, a testator devised all the hereditaments to which he might be entitled at his death, and died, having a contingent interest in fee, by shifting use and a limitation in default of his brother's issue. Held, this interest did not pass.<sup>3</sup>

§ 3. In England, though a contingent remainder will not pass by a legal conveyance, yet it may pass by estoppel, (a) fine or recovery, so as to bind the heir, when the contingency happens, after the death of the original remainder-man. And such remainder is assignable in equity.<sup>4</sup> (b) Thus, in *Weale v. Lower*, (*supra*, sec. 3,) it being decided, that the remainder, whether vested or contingent, came to the heir of A *by descent*, not as a purchaser; it was further held, that, as the heir would have been bound by the lease *by estoppel*, upon the vesting of his estate, supposing it to have been contingent when the lease was made, so his heir was bound in like manner. So a devise was made to A for life, remainder to his first and other sons in tail. A, and B his eldest son, joined in suffering a recovery, and declaring uses of the estate. Afterwards B died, and C, a second son, undertook to create a charge upon the land, by a deed re-

<sup>1</sup> *Moor v. Hawkins*, 1 H. Bl. 33-4.

<sup>2</sup> *Rector of Cheddington's Case*, 1 Rep. 155 b.

<sup>3</sup> *Honywood v. Honwood*, 2 Y. & Coll. Cha. 471.

<sup>4</sup> 2 Cruise, 898; *Doe v. Martyn*, 8 Barn. & Cr. 516.

(a) A *feme covert*, not being bound by estoppel, cannot convey such remainder. *Den v. Demarest*, 1 N. J. 525.

(b) In Michigan, (Rev. St. 266,) any

contingent estate, which would pass by descent, is also subject to devise and conveyance.

citing his contingent and reversionary estate therein. A died, having devised to B a life estate in the land. Held, although, at the time of attempting to charge the land, C had no interest in it, yet his interest, subsequently acquired under the will, was bound by his deed, by estoppel.<sup>1</sup> So, upon a marriage settlement, a rent was created to the use and intent, that the heirs of the body of the wife and their heirs should receive such rent; and, subject thereto, the land was limited to the husband and his heirs. There were two sons of the marriage, who, living the father and mother, conveyed the rent by deed. The estate was the father's. Held, the sons had not, at the time of selling, an actual possibility; the rent might never arise, or, if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by the deed. A fine would have operated by estoppel.<sup>2</sup>

§ 4. In a late case,<sup>3</sup> it is said, by Bayley, J., that a fine by a contingent remainder-man passes nothing, but leaves the right as it found it; that it is, therefore, no bar when the contingency happens, in the mouth of a stranger, against a claim in the name of such remainder-man; that it operates by estoppel, and by estoppel only, and that parties or privies may avail themselves of that estoppel, but parties or privies only. But the same learned judge, in a still later case,<sup>4</sup> qualifies his former opinion by saying, that such fine, besides operating by estoppel, has an ulterior operation when the contingency happens; that the estate, which then becomes vested, feeds the estoppel, and the fine operates upon it as though it had been vested when the fine was levied. But where one to whom an estate was limited, by way of executory devise, having a vested right to a share of the same property, conveyed all her "right, title and claim to the land," with a covenant against all claims arising under her, before the contingency occurred, and the executory devise afterwards became vested; held, she was not estopped by her covenant from claiming the land conveyed by it.<sup>5</sup>

<sup>1</sup> *Bensley v. Burdon*, 2 Sim. & Stu. 519.

<sup>2</sup> *Whitfield v. Faussett*, 1 Ves. 891.  
(But see *Wright v. Wright*, 1 Ves. 411.)

<sup>3</sup> *Doe v. Martyn*, 8 Barn. & Cr. 527.

<sup>4</sup> *Doe v. Oliver*, 10 Ib. 187.

<sup>5</sup> *Hall v. Chaffee*, 14 N. H. 215.

§ 5. In England, a contingent remainder may be validly transferred to creditors. It may still be defeated by the particular tenant; but, if the original remainder-man afterwards regains an interest in the estate by the act of such tenant, the court of chancery will subject it to the claim of the creditors.<sup>1</sup>(a)

<sup>1</sup> Noel v. Bowley, 3 Sim. 103.

(a) The concurrent opinions of elementary writers, and the cases to which they refer, seem to settle the principle, that contingent remainders are both descendible and devisable. It will be perceived, however, that the establishment of this doctrine at once destroys a very important, perhaps the most important, distinction between vested and contingent remainders. There is but one other point of view than that of transmissibility, in which the question would be likely to be raised for judicial decision, whether a remainder was vested or contingent; and that is, the power of a preceding tenant to destroy the latter and not the former. Many of the numerous cases upon this subject have turned upon this latter question; but I think it will be found, on examination, that many others have turned upon the point, whether a remainder had or had not passed, or might or might not pass, to the representatives of the remainder-man after his death; and that this question has been treated, as involving, or involved in, the further inquiry, whether the remainder was vested or contingent. In other words, it has been *taken for granted*, that, if a remainder is transmissible, it is, of course, vested; if not transmissible, it is, of course, contingent. One of the cases already cited, viz. Barnitz v. Casey, (*supra*, s. 2,) although recognizing the doctrine, that a contingent remainder descends, yet, by stating in *what manner* it descends, seems to negative or greatly qualify the general proposition; for such remainder passes, not to the heir of the contingent remainder-man at his death, but to the person who is heir to him at the time the contingency happens.

(Thus a life estate is limited to A, with a contingent remainder to B and his heirs; B dies, living A, and leaves two nephews, C and D, his heirs at law. C dies, leaving children, and then A. D, upon A's death, takes the whole estate, and C's children nothing.)

This remark, of course, can have no

possible applicability to a vested estate or a vested remainder, which, upon the death of the owner in fee, must pass at once to his *then* heirs. So, in the leading case already cited, of Smith v. Parkhurst, Ch. J. Willes, in his elaborate opinion delivered to the House of Lords, urges as one of the most convincing reasons for regarding the remainder, limited to trustees *and their heirs*, as vested and not contingent; that, upon the latter construction, it could not descend to heirs, though they were expressly named.

(The *manner* of the Chief Justice's argument upon this point is confident, sarcastic, almost scornful. "*Will any one say that anything can descend to the heir, that did not vest in the ancestor? So that, if nothing vested in the trustees, the limitation to them and their heirs is nonsensical.*")

So, in the case of Doe v. Provoost, (*supra*, chap. 42,) the decision, that the remainder actually vested in the children of A. during her life, was founded in part at least upon the consideration, that otherwise it could not descend to grandchildren, and thus the testator's intentions in their favor would be defeated. The same ground of decision is recognized in the case of Wager v. Wager, (*supra*, ch. 42.) So in Jackson v. Durland, it is said, "B had a vested interest in possession on the death of the widow. B was the object of the testator's bequest; and he never meant that the remainder should be contingent until he came of age, so that, if he married in the meantime and died, *his children could not inherit.*" And in Doe v. Perryn (3 T. R. 494-5,) Buller, J., assigns as the strong reason for construing a remainder to be vested, if possible, that otherwise, where it is limited to children, it would not pass after their death to grandchildren. The same ground is recognized in Boraston's Case, and in several others, which it is needless to enumerate.

(*Being a vested remainder*, it descended by force of the statute to his father, as



his heir, and he is now entitled to that share. *Ballard v. Ballard*, 18 Pick. 44.)

I trust that those cited will excuse me from the charge of presumption, when I express my surprise, that the *transmissibility* of contingent remainders by descent (to say nothing of devises) has been stated by so many distinguished writers, as a well settled and clear point. Nor does it seem to me, that the conflict of authorities is fully reconciled, by the qualification ordinarily annexed to the statement of this rule, viz, that such remainders descend "*where the person to take is certain.*" It would seem a self-evident proposition, that, where the person to take is *uncertain*, a remainder cannot descend. Thus, where a conveyance is made to A for life, remainder to the right heirs of B, this is a contingent remainder by reason of *the uncertainty of the person*. In other words, *there is no person*, answering to the description of "*heirs of B.*" "*Nemo est hæres viventis.*" Unless, therefore, a kind of personalty is given to *nemo*, it is idle to say that such remainder cannot descend, since the law recognizes no one who can

stand in the capacity of ancestor. Still, some of the cases may perhaps be explained by the circumstance, that, although the remainder was contingent, yet the person who should take was ascertained; or, in the language of Wilde, J., in the case of *Clapp v. Stoughton*, 10 Pick. 468, (*supra*, chap. 42.) that there was "*a vested right subject to a contingency*, which was transmissible to heirs, and became vested in possession in them on the forfeiture of the estate" by the prior tenants. This seems to be substantially a repetition of Chief Justice Willes' doctrine already referred to, of a distinction between contingent remainders which do vest, and contingent remainders which do not vest.

In Maine, (Rev. St. 872,) any contingent remainder, which would pass by descent, may also be conveyed or devised. In Massachusetts, by a recent decision, it has been settled that contingent interests are assignable. *Winalow v. Goodwin*, 7 Met. 368.

In New Jersey, they are made subject to conveyance and descent, but not to execution. N. J. Sts. 1851, 282.

## CHAPTER LI.

## REMAINDERS IN NEW YORK.

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|---|--|
| 1. Expectancies. Remainders vested and contingent.  | 18. Remainder not barred by destruction of prior estate. |
| 6. Fee upon a fee.                                  | 14. Not void for improbability.                          |
| 7. Remainder after estate tail.                     | 15. Remainder to heirs.                                  |
| 8-18. Remainder after estate for life or for years. | 16. Contingency may abridge prior estate.                |
|   | 17. Limited application of the statute.                  |

§ 1. In New York, *expectancies* are divided into *future estates*, or those which are to commence at a future day, and *reversions*. A future estate may be limited, either without any precedent estate, or after the termination of such estate. In the latter case, it may be called a *remainder*.<sup>1</sup>

§ 2. A remainder is defined to be "an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate created at the same time."<sup>2</sup>

§ 3. A *vested* remainder, is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. Or it is where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to possession, upon the ceasing or failure of all precedent estates, provided the estate limited in remainder continues; or, where a remainder cannot be defeated by third persons, or contingent events, or failure of the condition precedent, if the remainder-man lives and the estate limited to him continues, till all the precedent estates are determined.

<sup>1</sup> 1 N. Y. Rev. St. 723.

<sup>2</sup> *Ib.*

§ 4. A remainder is *contingent*, whilst the person to whom, or the event upon which, it is limited to take effect, remains uncertain. Or it is, where there are other uncertainties, besides the remainder-man's living and the continuance of his estate, though he be living and ascertained at the time. But a remainder is not contingent, where it is limited to a whole class in being, though accompanied with a power of appointment to a part of such class; until such appointment is made, it vests in the whole.<sup>1</sup>

§ 5. A remainder is contingent, where, before it can take effect, trustees are to make an appointment with reference to moral character, at the time of vesting in possession.<sup>2</sup>

§ 6. A contingent remainder in fee may be limited on a prior remainder in fee, to take effect in case the first remainder-man dies under age, or upon any other contingency by which his estate may terminate before he comes of age. So, a fee may be limited upon a fee, upon a contingency, which must happen, if at all, within the period of two lives in being at the creation of the estate.<sup>3</sup>

§ 7. Remainders may be validly limited upon every estate which, under the English law, would be adjudged an estate tail. These take effect as conditional limitations upon a fee, and vest in possession on the death of the prior tenant, leaving no issue.<sup>4</sup>

§ 8. No remainder, except a fee, can be created upon an estate for the life of any other person or persons, than the grantee or devisee of such estate; nor can a remainder be created upon such estate in a term for years, unless it be for the whole residue of such term; nor can a remainder be made to depend upon more than two successive lives in being; and, if more lives be added, the remainder takes effect upon the death of the first two persons named.<sup>5</sup>

§ 9. A contingent remainder cannot be created on a term for years, unless the nature of the contingency is such, that the

<sup>1</sup> 1 N. Y. Rev. Stat. 723; *Hawley v. James*, 5 Paige, 818.

<sup>2</sup> *Ib.*

<sup>3</sup> 1 Rev. St. 723-4.

<sup>4</sup> *Ib.* 722.

<sup>5</sup> *Ib.* 724.

remainder must vest in interest during not more than two lives in being at the creation of the remainder, or upon the termination thereof.<sup>1</sup>

§ 10. No estate for life can be limited as a remainder on an estate for years, except to a person in being at the creation of such estate.<sup>2</sup>

§ 11. A freehold estate, as well as a chattel real, (to which these regulations equally apply,) may be created to commence *in futuro*; and a life estate may be created in a term of years, and a remainder limited thereon; and a freehold or other remainder, either contingent or vested, may be limited upon an estate for years.<sup>3</sup>

§ 12. When a remainder on a life estate or a term for years is not limited on a contingency defeating or avoiding the prior estate, it shall be construed as intended to take effect only on the death of the first taker, or the natural expiration of the term.<sup>4</sup>

§ 13. No expectant estate shall be defeated or barred by any alienation or other act of the prior tenant, or by any destruction of the prior estate by disseisin, forfeiture, surrender, merger or otherwise, unless in some mode authorized by the party who created the estate.<sup>5</sup>

§ 14. No future estate, otherwise valid, shall be void, on the ground of the probability or improbability of the contingency on which it is limited to take effect.<sup>6</sup>

§ 15. Where a remainder is limited to the heir or heirs of the body of a person to whom a life estate is given, the persons who, on the termination of the life estate, are the heirs of the tenant for life, take as purchasers.<sup>7</sup>

§ 16. A remainder may be limited upon a contingency, which operates to abridge or defeat the prior estate; and such remainder shall be construed as a conditional limitation.<sup>8</sup>

§ 17. The provisions above-named do not affect vested rights,

<sup>1</sup> 1 Rev. St. 724.

<sup>2</sup> *Ib.*

<sup>3</sup> *Ib.*

<sup>4</sup> *Ib.* 725.

<sup>5</sup> *Ib.*

<sup>6</sup> *Ib.* 724.

<sup>7</sup> *Ib.*

<sup>8</sup> *Ib.* 725.

or the construction of deeds or instruments, which took effect prior to January 1, 1830.<sup>1</sup>

§ 18. Upon a devise to A for fifty years, as an absolute term, remainder to B for life if he should marry C, remainder to the children of such marriage; the remainder to B is contingent, but cannot vest after his death, and fails by that event if it happen within the term. The ultimate remainder must vest, if ever, within the period of one life in being at the testator's death. The first child would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children.<sup>2</sup>

§ 18 a. New York and Wisconsin are almost alone in detailed legislation upon remainders. In Mississippi and Michigan, acts provide that no remainder shall be affected by an alienation, or union with the inheritance, of the particular estate.<sup>3</sup> In Maine, by any conveyance, disseisin, &c.<sup>4</sup> In Indiana, a remainder may be validly limited upon a contingency, which may shorten the preceding particular estate. It cannot be limited for more than a life or lives in being; except on the contingency of the first remainder-man's dying under age.<sup>5</sup> In Wisconsin, successive life estates shall not be limited except to lives in being.<sup>6</sup> A remainder, limited on the life of a person not the grantee, &c., must be in fee. A remainder, limited upon an estate for the life of a third person, shall be for the residue of the term. A remainder upon more than two lives, not the grantees, &c., shall take effect on the death of two. A contingent remainder in a term of years shall not be limited for more than two lives. An estate shall not be limited as a remainder, on a term of years, except to one in being at the time. A contingency of death, "without heirs," "issue," &c., shall be understood as referring to heirs, &c., living at the death of the ancestor. Chattels real are included in the above provisions. A freehold may be created to begin *in futuro*. There may be

<sup>1</sup> 1 N. Y. Rev. St. 750.

<sup>2</sup> *Marsellis v. Thalkimer*, 2 Paige, 85; *Hawley v. James*, 4 Kent, 251, n.

<sup>3</sup> *Missi. Rev. C.* 458; *Mich. R. S.* 258.

<sup>4</sup> *Me. Rev. Sts.* 872. See *Mass. Rev. St.* 405; *Gen. Sts.*

<sup>5</sup> *Ind. Rev. Sts.* 201.

<sup>6</sup> *Wis. Rev. Sts.*, chap. 56.

alternative future estates. Posthumous children shall take in case of a limitation to heirs, to take effect in future. No expectant estate shall be defeated by a conveyance. A remainder shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is to vest. Expectant estates are alienable, and subject to inheritance. Expectant estates may commence *in futuro*, without the support of a particular estate.

## CHAPTER LII.

### REVERSION.

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| 1. Definition and principle of the estate.           | 7. Subject to same rules with estates in possession.   |
| 2. An incorporeal hereditament.                      | 8. Actions by reversioner for injuries to the land.  |
| 3. After conditional fee, &c.; after base fee.       | 13. Rights of reversioner in case of adverse possession.   |
| 4. After estate for years.                           | 15 & n. Reversion, how far liable for debts; transfer of reversion—when set aside; miscellaneous provisions. |
| 5. May belong to a particular tenant, who underlets. |  |
| 6. Created by act of law.                            |  |

§ 1. A REVERSION is either the residue of an estate left in a grantor, to commence in possession after the termination of some particular estate which he has conveyed; or the residue of an estate which descends to heirs, subject to some particular devise, or some temporary interest created by act of law. Thus, if the owner in fee grants an estate for life, the reversion of the fee is, without any special reservation, vested in him by act of law. So, if an owner in fee devises an estate to one for life, or if the owner's widow is endowed from his land, his heirs are owners of the reversion. (a) The estate is founded upon the principle, that, where the owner of land creates a limited or particular estate therein, he (or his heirs, as the case may be), retain all the interest in the land, which he has not expressly parted with. Thus, if one convey to A, remainder to B, with any number of remainders over, less than a fee; he retains the fee himself, as a reversion. And so his heirs, if he devises in the same way.

(a) See *Hitchman v. Walton*, 4 Mees. & W. 409. By the English law, the two incidents to a reversion are *fealty* and *rent*. The former is unknown in the United States. The latter, though incident to the reversion, is not inseparably incident, but may be excepted by the reversioner from a transfer of his estate.



§ 2. A reversion is said to be an *incorporeal* hereditament, and therefore, in England, may be conveyed by grant, without livery of seisin. The more usual method of transfer is a lease and release, or bargain and sale.<sup>1</sup>

§ 3. At common law, where a man conveyed a *conditional fee*, no reversion or actual estate remained in him, but the grantee took the entire estate, leaving only a *possibility of reverter* in the grantor, upon failure of the condition. But it is now settled, though once doubted, that an *estate tail* is a *particular* estate, carved out of the fee-simple, and leaves a reversion in the grantor.<sup>2</sup> But no reversion remains upon a *base* or *qualified fee*; because no valid remainder can be limited upon such estate.

§ 4. It is said, that, where the owner in fee makes a lease for years, he has no reversion till the lessee enters, upon the ground that before entry the lessee does not complete his estate. But when an estate for years is created by any conveyance deriving effect from the statute of uses, as the lessee immediately has the legal possession, a reversion immediately vests in the lessor. This subject has been already considered under the title of *Estate for Years*.<sup>3</sup> See p. 239.

§ 5. Where one having a limited or particular interest in land conveys to another a smaller interest than his own, he thereby acquires a reversion to himself. Thus, where tenant in tail leases for life, or a tenant for ninety-nine years, for this period, less one day, he becomes a reversioner. So, in England, where land is taken by the legal process of *elegit*, &c., to be held by the creditor till his debt is satisfied, the debtor has a reversion.<sup>4</sup>

§ 6. A reversion is never created by deed or writing, or by *act of party*, but always arises from construction of law. And where an estate is expressly limited, though under the name of *remainder*, in the same way in which it would pass by law as a *reversion*; it will be construed as the latter, not the former interest. Thus, if one conveys for life or in tail, remainder to

<sup>1</sup> 4 Kent, 854 and n.

<sup>2</sup> Willion v. Berkley; Plow. 248; Lit. secs. 18, 19.

<sup>3</sup> Co. Lit. 46 b; 2 Cruise, 800.

<sup>4</sup> Co. Lit. 22 b.

*his own right heirs*; he still retains the reversion in fee. So, if one conveys in fee, to the use of himself for life, then to the use of A in tail, then to the use of his own right heirs, a reversion in fee remains in him by way of resulting use.<sup>1</sup>

§ 7. A reversion, like a vested remainder, though not to take effect in possession *in præsenti*, but only *in futuro*, is still an immediate fixed right of future enjoyment; and subject to most of the rights and liabilities incident to estates in possession. Hence, many of the following remarks may be regarded as alike applicable to reversions and to vested remainders.

§ 8. A reversioner may maintain an action for any injury done to the inheritance. And, for an encroachment under a claim of right, a reversioner may have his action, although the immediate injury is merely nominal. When the encroachment is established, the defence that it did no material injury is inadmissible, except in mitigation of damages.<sup>2</sup> Thus, where an action was brought by a reversioner for obstructing his lights, Lord Mansfield held, that the tenant might sue, and the reversioner also, as the injury would affect the price of the estate, if the latter should be disposed to sell it.<sup>3</sup> So one having a reversionary interest in real property may maintain an action against one who wrongfully removes fixtures therefrom. Thus A, being the owner of a factory and the machinery in it, gave bond to B, to convey them to him on payment of certain notes given by B for the price; B to have possession of the property until he failed to pay the notes at maturity. Possession was delivered accordingly. Before maturity of the first note, a creditor of B attached the machinery, and the officer removed it, having notice of A's title, and afterwards sold it upon execution. A brings an action against the officer, declaring both in trover and in case. Held, although, if B had himself removed and sold the machinery, this might have been regarded as so putting an end to the contract, and revesting the possession in A, as to justify an action of trover against the purchaser; yet the attachment made by the creditors of B, being *in invitum*, might not have the same effect; but that the

<sup>1</sup> Co. Lit. 22 b; *Rochell v. Tompkins*,  
1 Strobh Equ. 114.

<sup>2</sup> *Schnable v. Koehler*, 4 Casey, 181.  
<sup>3</sup> *Jesser v. Gifford*, 4 Burr. 2141.

action of trespass on the case was clearly sustainable.<sup>1(a)</sup> So the owner of land held by a tenancy at will may bring an action on the case for the obstruction of a way appurtenant to the land, if damage is thereby caused to him, though neither the reversion is affected, nor the rent reduced.<sup>2</sup> So a reversioner may maintain an action for breaking and entering a house, removing a blind and breaking glass.<sup>3</sup> So, that the land to which a way was appurtenant was in the possession of a tenant at the time it was obstructed, does not prevent the owner from maintaining an action on the case for the injury.<sup>4</sup> But a reversioner cannot maintain an action for obstruction of a way, unless permanently injurious, or involving a denial of his right.<sup>5</sup> And a lessor at will cannot maintain an action against a stranger for entering upon the land, demanding rent from, and making a lease to the tenant, if the reversion sustains no actual damage therefrom.<sup>6</sup> And, in general, for acts which affect injuriously merely the *possession* of the land, a reversioner can maintain no action. The landlord and tenant do not stand in the relation of *principal and agent*.<sup>7</sup>

§ 9. There must be some tangible injury to the reversion. Hence the declaration, in an action brought by a reversioner, must either expressly allege the act to have been done to the injury of his reversion, or must state an injury of such permanent nature as to be necessarily prejudicial to the reversion.(b)

<sup>1</sup> Ayer v. Bartlett, 9 Pick. 156.

<sup>2</sup> Cushing v. Adams, 18 Pick. 110.

<sup>3</sup> Cushing v. Kenfield, 5 Allen, 807.

<sup>4</sup> Okeson v. Patterson, 5 Casey, 22.

<sup>5</sup> Hopwood v. Schofield, 2 Carr. & K. 84.

<sup>6</sup> French v. Fuller, 28 Pick. 104.

<sup>7</sup> Stark v. Miller, 8 Mis. 470.

(a) In this case the amount of damages recovered was three times the sum for which the property was sold by the officer. Held, the verdict should not be set aside for excessive damages.

(b) Upon the same principle, a declaration *against* the owner of land, for a nuisance to the premises of his neighbor, by means of neglected drains, must allege, either that the defendant was the occupier of the drains, or that the nuisance is a continuing one. Russell v. Shenton, 2 G. & Dav. 578.

The tenant of one part of a building, not guilty of negligence or malfeasance,

is not liable to a tenant of another part for damages resulting from the defective construction of the demised premises, or from the insufficiency of a fixture therein, by which the flow of Croton water is regulated. Eakin v. Brown, 1 Smith, 821.

If injury result from the negligence of the owner, either in constructing or upholding the freehold, he is liable, and cannot, by letting, divest himself of such liability, although he is not in general responsible for the negligence of the tenant in the use. If the injury result from the negligence of the tenant, he is liable.

§ 10. Where, as was the case in New York, a statute gives to a reversioner or remainder-man "an action of *waste* or *trespass*, notwithstanding any intervening estate for life or years;" this does not authorize a plaintiff to bring either of these actions at his election, but merely to bring that form of action which is appropriate to the particular case that occurs—that is, waste against the tenant himself, and trespass against a stranger.<sup>1</sup>(a)

<sup>1</sup> *Livingston v. Haywood*, 11 John. 429.

Thus both landlord and tenant may be responsible for the same injury. *Ib.*

As between different tenants, under a common landlord, the question of liability for injuries arising from the condition of the premises is always one of negligence in the use. The negligence may consist in either the careless use of well constructed apparatus, or in the use of apparatus which the tenant has reason to know is in a condition unfit for use. *Ib.*

Such tenants are not under contract with each other, express or implied; but their reciprocal obligations rest upon the duty which every man owes, to employ care, that, in the exercise of his own rights, those of his neighbor be not injured. *Ib.*

The plaintiff declared as reversioner of a yard and part of a wall occupied by his tenant, and that the defendant placed on that part of the wall quantities of bricks and mortar, and thereby increased its height, and placed pieces of timber on the wall over-hanging the yard, by which the plaintiff during all the time lost the use of that part of the wall, and also by means of the timber, &c., over-hanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and that part of the wall were injured; without alleging an injury to the reversion. Judgment was arrested, after verdict. *Jackson v. Pesked*, 1 M. & S. 234. See *Baxter v. Taylor*, 4 B. & Ad. 72; *Tucker v. Newman*, 11 Ad. & Ell. 40.

Where land subject to a nuisance is leased by the owner, and the nuisance kept up subsequently, the reversioner cannot maintain a bill in equity, without joining the lessee as plaintiff. *Ingraham v. Dunnell*, 5 Met. 118. In Massachusetts, a reversioner cannot maintain such bill, unless the injury is irreparable, or the remedy at law insufficient. *Ib.*

Where the plaintiff demised a cottage,

without exception of mines; held, he might maintain an action on the case against a third person for an injury to the cottage by an excavation of coal, though it did not clearly appear whether this was caused by excavation under the cottage, or under the adjoining house, occupied by the plaintiff himself. *Raine v. Alderson*, 4 Bing. N. 702.

(a) With regard to the form of action to be brought by a reversioner, it would seem that *trespass* cannot be maintained, except in the single case, where the actual tenant of the land is a tenant at will or at sufferance. See *Reynolds v. Williams*, 1 Texas, 811; *Tilghman v. Cruson*, 4 Harring. 341; *Knetzer v. Wyson*, 5 Gratt. 9. It has indeed been suggested in Massachusetts, (11 Mass. 526,) that even in case of a lease for years, for any act which is principally injurious to the lessor, such as cutting down the trees or overturning the buildings, this form of action might lie; but the prevailing doctrine is as above stated. Even if the occupant of the land is a tenant at will, some authorities hold, that the reversioner can maintain only an action on the case. *The King v. Watson*, 5 E. 485-7; *Campbell v. Arnold*, 1 John. 511; *Tobey v. Webster*, 8, 468; *Biddeford v. Onslow*, 8 Lev. 209; 8 Woode. 198. But very ancient cases and opinions favor the action of trespass, and the same rule has been adopted in Massachusetts. 2 Rolle's Abr. 551; Yr. Bk. 19 H. 6, 45; *Starr v. Jackson*, 11 Mass. 519; *Hingham v. Sprague*, 15 Pick. 102. So, in Connecticut, where the owner of a building leases at will the rooms therein, though they constitute the chief parts of the building, he is not thereby put out of possession, so as to preclude him from suing in trespass for the destruction of the building, or such an injury to it as to render it untenable. *Curtiss v. Hoyt*, 19 Conn. 154. By the

But in general a reversioner may bring an action on the case *in nature of waste* against a stranger, for ploughing up his ground and carrying away the turf thus obtained. Unlike a bare wrongful entry on land, or mere outrage on the possession of the tenant, for which he might be compensated in the action of trespass, these are permanent injuries, and entitle the reversioner to damages. And these damages he is not bound to recover from the tenant; but may have his action against the wrong-doer himself.<sup>1</sup>

§ 11. Questions sometimes arise in regard to the right of action of a lessor against third persons, as affected by the terms of the lease, and the interest thereby acquired by the lessee in the property injured. Upon this subject it is held, that where, by virtue of special provisions in a lease, the lessee has the right to do certain acts in relation to the land, which would otherwise be a ground of action against him by the lessor, it seems the lessor can maintain no action against a stranger for doing such acts, or at most can recover only nominal damages. Thus A demised land to B for years at annual rent, with liberty to dig half an acre of brick earth annually. B covenanted that he would not dig more; or, if he did, that he would pay a certain increased rent, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth, and the lessee brought trespass, and recovered full damages against him. Held, he was entitled to retain the whole damages. Chief Justice Mansfield remarked, that the terms of the lease gave the lessee the same right as the lessor, and a right to dig and sell the brick earth. The lease amounted to an absolute sale of the whole brick earth,

<sup>1</sup> *Randall v. Cleveland*, 6 Conn. 828.

operation of the Rev. Sts. of Massachusetts, however, which require three months' notice to terminate an estate at will, it seems *case* and not *trespass* is now the proper form of action. *French v. Fuller*, 23 Pick. 104. See *Lunt v. Brown*, 13 Maine, 236; *Rowland v. Rowland*, 8 Ohio, 40; *Anderson v. Nesmith*, 7 N. H. 167. A tenant at will may himself maintain trespass against one who cuts trees on the land. *Howard v.*

*Sedgeley*, 2 Shepl. 489. So, a tenant for life may have a proceeding for damages done to her estate by the construction of a railroad, without joining the remainder-man. *Railroad v. Boyer*, 1 Harris, 497. By the New York Revised Statutes, (2, 839,) a reversioner or remainder-man may maintain the action of waste or trespass for any injury to the inheritance, notwithstanding an intervening estate for life or for years.

though the tenant was not to pay for the whole, unless he used it. The lessor could take none of it. For all that he took, the lessee might recover full damages. And the lessor could not, it seems, have an action of waste against the lessee, but might sue him upon the covenant, as if the brick earth had been expressly *sold*, it having been taken with the lessee's knowledge. He proceeds to remark, "it is not necessary to prejudge the question, whether the lessor can sue in this case. But I have great difficulty in finding out how the lessor can be injured. If he has any right, it must be for mere nominal damages." Heath, J., remarked that the lessor could not recover damages for the removal of the soil, for that is sold to another; but only for any damage possibly done to the inheritance, if such there be, in the manner of excavation. Chambre, J., dissented, on the ground that the right of the lessee was executory merely; that he acquired no freehold in the soil, till he himself elected to become a purchaser of it; and, till such election, he had a mere possessory right, his interest being the difference between the value of the earth taken by the defendant, and the price that the lessee must have paid for it if he had taken it himself, and all the remaining interest being in the reversioner, who might bring an action on the case against the wrong doer.<sup>1</sup>

§ 12. Where a third person does acts which are in their nature permanently injurious to the estate, as, for instance, by cutting down trees, but by the license of the lessee; he is not a *stranger*, within the meaning of the New York statute, which gives to a reversioner, &c., an action of trespass for an injury to his estate done by strangers. The mere want of privity of contract between the wrong-doer and the lessor does not constitute the former a stranger; because this construction would authorize an action against every servant or laborer, in the employment of a tenant, who should do an act injurious to the lessor. The general rule is, that, in a case of this kind, both the lessor and lessee may bring their respective actions; but in this instance the latter could not sue, having expressly authorized the act. The lessee

<sup>1</sup> *Attersoll v. Stevens*, 1 Taunt. 182.

would be answerable in an action of waste. Every act, that would be a trespass in a stranger, is not necessarily waste in the tenant. If the servant of the tenant were liable in trespass to the lessor, he might sometimes be made liable for acts which the lessee might do with impunity. He must therefore be allowed to make the same defence, which the lessee could make to an action of waste. The difficulty, which would inevitably result from treating such person as a stranger, could not be avoided, without confounding the actions of trespass and waste.<sup>1</sup>(a) But it has been held in New Hampshire, that an action on the case for waste lies in favor of a reversioner against a third person, who has cut timber upon the land by virtue of a sale to him by the lessee; the title of the trees, when cut, in all cases remaining in the reversioner; and the tenant being empowered to cut and use them for specific purposes only, but not to sell them.<sup>2</sup>

§ 13. A remainder-man or reversioner, not having any right to immediate possession of the land, cannot lose his title by means of a disseisin, or adverse possession, by a stranger. He either cannot, or, if he can, is not bound to, enter during the particular estate, to defeat the wrongful title. It is said, neither a descent cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of the particular estate; and the *laches* of a tenant for life will not affect the party entitled. An entry, to avoid the statute, must be an entry *for the purpose of taking possession*; and such an entry cannot be made during the existence of the life estate.<sup>3</sup> Thus, it is said, where there is a right to *curtesy* in land descended, no

<sup>1</sup> Livingston v. Mott, 2 Wend. 605.

<sup>2</sup> Elliot v. Smith, 2 N. H. 480.

<sup>3</sup> Per Kent, J., Jackson v. Schoonmaker, 4 John. 402.

(a) A lessee having mortgaged his interest and become bankrupt, the assignee removed certain fixtures. Held, the mortgagee might maintain an action against him, although the lease contained a covenant to deliver up all fixtures to

the landlord; that the mortgagor, while in possession, stood as a *tenant*, leaving the reversion in the mortgagee; and that he was entitled to recover the full value of the fixtures. Hitchman v. Walton. 4 Mees. & W. 409.



right of entry descends to, or can vest in, the heir, during the continuance of that estate.<sup>1</sup> And the statute does not run against reversioners, &c., during the continuance of the particular estate, even though the latter did not exist at the time the disseisin took place; provided it was immediately preceded by disabilities, such as *infancy*, &c., which prevented a legal entry. (The subject of *disabilities* will be considered hereafter.)<sup>2(a)</sup>

§ 14. In Massachusetts, although, as in New York, a reversioner, &c., is not *bound* to enter during the continuance of the particular estate; the language of the court implies that he *may* enter. Thus, in a case of alleged forfeiture by the particular tenant, Judge Wilde remarks,—“as to the objection of the forfeiture, it is sufficient to remark, that the demandants do not claim a right of entry arising from forfeiture. If a forfeiture were incurred, they were not bound to enter; and if the right to enter for that cause is now barred by the statute of limitations, this does not affect the right of entry, arising afterwards, on the death of tenant for life. If there be two rights of entry, one may be lost without impairing the other.”<sup>3</sup> The same principle is adopted by statute in Maine.<sup>4</sup> In Wisconsin,<sup>5</sup> a reversioner may defend a suit brought against the particular tenant. If he make default or give up, and judgment be rendered against him; at the termination of the particular estate, the reversioner may recover. A recovery by agreement against a tenant for life is void against the reversioner, unless he appeared.<sup>6</sup>

§ 15. In England, a reversion, expectant upon an estate for

<sup>1</sup> Jackson v. Sellick, 8 John. 289.

<sup>2</sup> Jackson v. Johnson, 5 Cow. 74.

<sup>3</sup> Stevens v. Winship, 1 Pick. 827;  
Miller v. Ewing, 6 Cush. 84.

<sup>4</sup> Maine Rev. St. 621.

<sup>5</sup> Rev. Sts. 584.

<sup>6</sup> Ib.

(a) See Vol. II—*Disabilities; Disseisin*.

A tenant of lands of the Society for the Propagation of the Gospel, holding under a perpetual lease granted by a town, under the (Vt.) act of 1794, directing the appropriation of lands heretofore granted by England to the society, holds adversely to the society. Propagation, &c. v. Sharon, 2 Wms. 603.

Under Stat. 1819, allowing limitations to run against the society, and St. 1832,

repealing the exception “beyond seas,” adverse possession may run against the society. Ib.

A tenant for life was disseised, and the disseisor, and those claiming under him by two successive descents, visibly occupied the land for forty years. Held, upon the death of the tenant for life, the reversioner might still assert his title to the land. Wallingford v. Earl, 15 Mass. 471.

years, is present assets for payment of debts. Thus, it is now settled, though there are old precedents to the contrary, that an heir holding such reversion cannot plead the estate for years in delay of execution, upon a suit against him on his ancestor's bond, but must confess assets. The grounds of this doctrine are, that an estate for years, at common law, was an interest not recognized by the law; and that, although an execution may issue upon the judgment against the heir, yet the lessee may defend against an ejectment by the title of his lease.<sup>1</sup>

§ 16. A reversion, expectant upon an estate for life, is *quasi assets*. The heir of such reversioner may plead specially the intervening estate, but the plaintiff may take judgment of it *quando acciderit*, or a judgment to recover the debt and damages, to be levied when the reversion shall *fall in*; and a special writ shall issue accordingly.<sup>2(a)</sup>

<sup>1</sup> 2 Cruise, 802; Smith v. Angel, 1 Salk. 854; 2 Ld. Ray. 788; 7 Mod. 40; Osbaston v. Stanhope, 2 Mod. 50; Villers

v. Handley, 2 Wils. 49; Murrell v. Roberts, 11 Ired. 424.

<sup>2</sup> Ib.; Dyer, 878 b; Barton v. Smith, 18 Pet. 464.

(a) In most of the cases upon this subject, the bonds, of which payment was claimed, were entered into by the person who had been once seised in fee in possession, who had afterwards created the limitations of the estate, and had also died last seised of the fee; so that the heir, in claiming the reversion on the determination of the particular limitations, was obliged to derive title from the original debtor. But it has been also held, in some cases, that such reversion is liable to the bond debts of an intermediate tenant for life, who becomes entitled to the reversion. It is said, the obligor had actual seisin of the reversion by his seisin as tenant for life. He might have sold it, and therefore might charge or incumber it; though, strictly speaking, his bond was no charge upon the reversion, but only upon the heir, in respect of such reversion descending. And this reversion was properly, the instant it vested in the heir, assets by descent in his hands, though, before, only dormant potential assets. Smith v. Parker, 2 Black. 1230.

The doctrine above stated, however, has been questioned; and it has been contended that, as one who claims a reversion by descent, must make himself heir to the donor, and not take as heir to

any of the intermediate heirs, because they never had actual seisin; such reversion in his hands is assets of the donor, but not of the intermediate heirs. Tweddale v. Coventry, 1 Bro. 240; 2 Saun. 8, n.; Doe v. Hutton, 8 B. & P. 651; 4 Vin. Abr. 451; 1 Ves. 174.

The question, how far a reversion in the hands of heirs is regarded as an actual estate, with respect to its liability for debts as well as in other respects, will be considered hereafter under the title of *Descent* (ch. 77, sec. 4). A single case only, and a few general observations upon the subject, will be here given.

A devise was made to one for life, afterwards the estate to be distributed as if no devise had been made. A, one of the heirs of the testator, dies during the continuance of the life estate. The question arose, whether A's heir, after the life estate was determined, inherited to his father or to his grandfather, the testator, and whether A's debts were upon his death to be paid from this reversion, now become possession. Held, at common law, A had a share of the reversion, and might aliene it, or, by an obligation binding *his heirs*, might render the estate assets in their hands. So, if judgment should be rendered against him before

§ 17. A reversion expectant on *an estate tail* is said not to be assets during the continuance of the latter, being deemed of no value, by reason of the power of the tenant to bar the entailment by a common recovery. But such reversion is assets, when it falls into possession; and liable to the judgments recovered against all who were ever entitled to it. Also, to all conveyances, charges and leases made by such persons, and all the covenants contained in them.<sup>1</sup>(a)

<sup>1</sup> 2 Cruise, 803; Gifford v. Barker, 4 Vin. 451; Symonds v. Cudmore, 4 Mod.

1; Shelburne v. Bliddulph, 6 Bro. Parl. 856.

his death, execution might issue against the estate after his death. But still, none of these things having taken place, on the determination of the life estate, A's son takes as heir of the testator, and not as heir of A. Therefore, by the common law rule, the reversion would not be liable for A's debts; but by Statute 1783, c. 86, and following acts, reversions are made liable in Massachusetts for debts, under the general denomination of *real estate*. Hence the administrator of A might take the estate as assets. *Whitney v. Whitney*, 14 Mass. 88. See *Rich v. Waters*, 22 Pick. 568.

A very important, perhaps the leading American case, upon this subject, is that of *Cook v. Hammond* (4 Mas. 467) in the United States Circuit Court. In the course of his learned and able opinion, Judge Story makes the following general remarks. *Ib.* 484.

Where the estate descended is a present estate in fee, no person can inherit who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof; that is, as the old law states it, *seisina facit stipitem*. But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and, consequently, there cannot be any mesne actual seisin, which of itself shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as to reversions and remainders expectant upon estates in freehold is, that, unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor,

who was seised in fee and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. But, while the estate is thus in expectancy, the mesne heir, in whom the remainder vests, may do acts which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus, he may, by a grant or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for his debt during his life, and this in the same manner intercepts the descents. But if no such acts be done, the rule above stated prevails, and the heir of the donor shall take the estate, though he be not heir of the reversioners, &c. Thus, in case of an estate in dower or by the curtesy, after the death of the last owner in fee, the heir takes only a reversion. But, it is a misnomer to call it a case of *suspended descent*; for the reversion descends and vests absolutely in the heir; he may sell it, incumber it, devise it, and it is subject to execution as part of his property during his life.

(a) Statute 8 Wm. & Mary, ch. 14, rendered a devise of lands fraudulent and void as against creditors of the deviser. Before this act, there was no method, either at law or in equity, to subject lands devised to payment of debts. The reason was, that the ancestor by his specialty bound only the heir, and not even him, unless he was named, and never beyond the extent of the assets which came to him. It has been held under this statute, that, where the heir of an estate tail, and of the reversion in fee expectant upon it, devises the estate and then dies without issue, whereby the

devisee acquires a fee-simple in possession, the estate is liable in the hands of the latter for debts of the ancestor of the devisor, who made the settlement in tail. The heir is regarded, not merely as a representative of the debtor, but as himself a debtor within the words of the the statute. *Kynaston v. Clark*, 2 Atk. 204.

In Massachusetts, a reversion expectant upon an estate tail is a vested interest, devisable, and which will pass under a general residuary clause. *Steel v. Cook*, 1 Met. 281.

If limited by way of executory devise, upon the contingency of issue by a future marriage of one of the tenants in tail, the residuary devisee of the reversion may grant it to a third person, subject to the executory devise. *Ib.*

In regard to *contracts and conveyances* made by those holding expectant interests, the law, regarding them as from the nature of their estates peculiarly liable to imposition, has established peculiar rules for their protection. *An heir* has, in strictness, neither a reversion nor remainder, (except in case of a contingent remainder, limited expressly to the heirs of one living; and to this the rules in question are not applicable, because a contingent remainder cannot be conveyed.)

(As to the distinction between *contingent interests*, such an executory devises, &c., which are assignable, and mere *possibilities*, such as the expectancy of an heir, or the prospect of a legacy, which are not; see *Fortescue v. Satterthwaite*, 1 Ired. 566.)

He has a mere *expectancy*, wholly subject to the disposition of his ancestor. But, inasmuch as all expectant interests, with respect to the principle now to be considered, stand upon substantially the same foundation; it seems not inappropriate to present a general view of the subject under the present title.

The general principles of law upon this subject are thus stated by Parsons, Ch. J., in the case of *Boynton v. Hubbard*, 7 Mass. 119-22. (See *Wheeler v. Smith*, 9 How. 55; *Hallett v. Collins*, 10, 174.) When an heir gives a bond, on receiving a sum of money, to pay a larger sum, exceeding legal interest, upon the death of his ancestor, if the heir shall be then living; if there is only a reasonable indemnity for the hazard, it may be enforced at law. But, if his necessities are taken advantage of, he is relieved as against an unconscionable bargain, on payment of

principal and interest. So, when one having a reversion or remainder contracts to sell it, on becoming possession, for money paid at the time of the bargain, a similar rule is adopted. Here there may be a computation of the risk, as involved in the continuance of the preceding estate; and the bargain, like that before mentioned, may be relieved against if unconscionable. If the reversion or remainder be actually conveyed, equity alone can give relief, unless there were absolute fraud. But a contract, made by an heir, to convey on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud upon the ancestor, productive of public mischief, and moreover in the nature of a *wager*, without furnishing any means of computing the risks, &c., as to the amount of property and the value of the inheritance, and is, therefore, void both in law and equity.

It has been since held, however, in the same State, that such a contract is valid, if made with the ancestor's consent, for a valuable consideration, and without imposition upon the heir. *Fitch v. Fitch* 8 Pick. 480.

Judge Story remarks, that relief has been constantly granted in equity, in what are called *catching bargains*, with heirs, (1 Story on Eq. 827-88; *Chesterfield v. Janssen*, 2 Ves. 157. See *Newton v. Hunt*, 5 Sim. 511). and, in modern times, reversioners and expectants, in the life of their parents or other ancestors, or during the continuance of prior, particular estates. Many, and indeed most of the cases have been compounded of all or every species of fraud; there being sometimes proof of *actual* fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness. Generally, there has been deceit upon third persons; the father or other ancestor has been kept in the dark, and thereby misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand. The doctrine is founded, in part, upon the policy of maintaining parental *quasi* or parental authority, and preventing the waste of family estates; as well as of guarding distress and improvidence against calculating rapacity. Equity treats parties in this situation almost like *infants*, incapable of contracting; and,

although formerly undue advantage must be shown to have been taken, it now requires the purchaser to *make good the bargain*, that is, not merely to show the absence of fraud, but payment of a full consideration. The court will relieve, upon the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. Years do not seem to make much difference in the case of expectant heirs; since the aim of the rule is principally to prevent imposition upon ancestors. And the same rule applies, it seems, to reversioners and remainder-men, if necessitous, distressed and embarrassed.

The policy of this rule has been questioned, and it has been thought to have the effect of throwing necessitous owners of expectancies into the hands of those who are likely to take advantage of their situation; for no one can securely deal with them. It has also been doubted, whether the rule is strictly applicable, unless a reversioner also combines the character of heir. But the weight of authority seems to negative any such restriction or limitation.

(In South Carolina, it is remarked by Desaussure, Chancellor: "There is a distinction made between the cases of young heirs selling expectancies, and of others, which I am not disposed to support. It is said, that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in Chancery, have gradually applied the great principles of equity on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains, at an enormous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not." *Butler v. Haskell*, 4 Desau. 687-8. In New York, it is held, that the expectancy of an heir is not a subject of legal transfer. *Tooley v. Dibble*, 2 Hill, 641.)

The rule above referred to, being founded in part at least, in the case of heirs, upon the ground of imposition practiced on the ancestor, is inapplicable, as has been seen, where the transaction was known and not objected to by him; and, *a fortiori*, if he expressly sanctions or adopts it, or the heir is of mature age. It seems there is the same exception to the rule, where the party is a reversioner, &c.; and the

bargain is known and not objected to by the prior tenant. *King v. Hamlet*, 2 My. & K. 478-4.

Another reason of the rule creates another exception to it; namely, where the party is not dealing under the pressure of necessity. But, it seems, the rule is applicable, if either of the reasons on which it is founded exist; and it is not necessary that both should concur. *Ib.*; *Portmore v. Taylor*, 4 Sim. 182.

If the heir is dealing substantially for his expectations, although for a present obligation also, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, equity will interpose; as where the heir received an annuity worth about one-sixth of the value of the reversion, though an interest in possession, amounting to £99 a year, was included in the sale. *Earl, &c. v. Taylor*, 4 Sim. 209-10. See *Potts v. Curtis*, Younge, 548.

The rule in question, perhaps, is not applicable, where there is a fair though secret agreement among heirs themselves to share equally, and thus to cut off all attempts to overreach each other, and to prevent all exertions of undue influence. 1 Story, 834.

In relation to the contracts of heirs, &c., respecting their future estates, as they are not *void*, but only *voidable*; in general, any confirmation of them, after the party comes in possession, and the former unfair inducement has ceased, will render them valid. But it will be otherwise, if the former pressure or necessity still continues, or if the party acts under the belief that the original contract is binding upon him. It has been held in some cases, that, if the contract is *illegal* or *usurious*, it is absolutely void, and not susceptible of confirmation. 1 Story, 838-9, & n.

If the heir or other expectant, after being restored to his legal capacity, becomes opposed to the other party, and does any act, by which the rights or property of the latter are injuriously affected; upon the principle, which forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers resulting therefrom; the heir, &c., will not be allowed to rescind the bargain. So, if he dispose of the consideration received for his reversionary interest, in such way that it can never be restored to the other party in its original condition; he will not be allowed to rescind, unless he can show, that this disposition was made under a

continuance of the original pressure. *Ib.*; *King v. Hamlet*, 2 My. & K. 456.

A reversion was purchased from A by B, at a gross discount from its value. C, having notice, ten years afterwards bought of B for a full price, A joining and confirming the sale. Held, A was still entitled to a decree for reconveyance to him, upon re-payment of the original price. *Addis v. Campbell*, 4 Beav. 401.

The following miscellaneous statutory provisions pertain to the title of *Reversion*:

In Maryland, the Chancellor may, after notice, order a sale of lands in the State belonging to any minor who resides out of the United States, or of any remainder or reversion dependent thereon, for payment of his debts. A subsequent act provides for the sale of any reversion belonging to a minor, dependent upon a life estate, and that, upon the assent of the tenant for life, the annual interest or a suitable part thereof shall be paid him for his life. 2 Md. L. 129; 5 *Ib.*, chap. 154, sec. 18.

In Maryland, it was formerly the practice to assess taxes upon land held by an estate for life, equally, half and half, upon the particular tenant and the reversioner in fee. But a statute provides that the whole shall be assessed upon the former as if he owned the fee. Md. L. 1798, ch. 96.

In New Jersey, Michigan, Mississippi and New York, it is provided, that a reversioner, &c., may be admitted to

defend a suit brought against the tenant for life at any time before judgment; and that the former shall not be prejudiced by any default, surrender or giving up of the land by the latter. 1 N. J. R. C. 846; Mich. L. 228; Missi. Rev. C. 449; 2 N. Y. Rev. St. 889.

In New York, a process is provided, by which reversioners and remaindermen may annually call for the production or appearance of tenants for life, upon whose estates their expectancies depend, and whose residence is unknown or concealed. 2 N. Y. Rev. St. 848.

In Massachusetts, where a tenant for life recovers the land by action, and pays to the defendant the value of improvements made upon it by the latter, such tenant for life or his representatives, at the termination of his estate, may recover the value of the improvements, as they then exist, from the reversioner or remainder-man, and shall have a lien therefor upon the land, as if it were mortgaged for payment of such amount. The reversioner, &c., may also have a bill in equity to redeem, as in case of mortgage, if the amount is not agreed by the parties. He will not be limited to three years, but he shall recover no balance from the defendant, though the rents and profits have exceeded the sum due for the improvements. The reversioner, &c., shall be considered as dis-seised at the termination of the prior estate, and the statute of limitation shall run against him accordingly. Mass. Rev. St. 615. See Gen. Sta.



## CHAPTER LIII.

## JOINT TENANCY.

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|--|---|
| 1. Number and connection of the owners of real estate. | 12. Unity of time.  |
| 2. Joint tenancy, how created.                         | 13. Unity of possession.                                  |
| 4. Joint tenancy, in a remainder.                      | 14. Survivorship; exceptions to the rule of survivorship. |
| 6. Joint tenancy, for lives, and several inheritances. | 20. Who may be joint tenants.                             |
| 9. Unities necessary to joint tenancy.                 | 25. Not subject to charges made by one.                   |
| 10. Unity of interest.                                 | 26. Except by lease.                                      |
| 11. Unity of title.                                    | 32. Severance of joint tenancy.                           |

§ 1. WITH respect to the number and connection of the owners of real estate, it may be held, according to the English law, in four ways, viz: in severalty, joint tenancy, co-parceny and common. Upon the first of these kinds of tenancy, of course, it is unnecessary to make any remarks.(a)

§ 2. Where lands are granted or devised to two or more persons, to hold to them and their heirs, for their lives, or for another's life; they all take a joint estate, and are called joint tenants.<sup>1</sup>

§ 3. Joint tenancy can be created only by acts of parties, and never by acts of law.<sup>2</sup>

§ 4. Joint tenancy may exist in *a remainder*. Thus, if a conveyance be made to two persons, and the heirs of their two bodies, remainder to them two and their heirs; they are joint

<sup>1</sup> Lit. 277. (That joint tenancy is founded upon the feudal idea of making no division of the services due to the lord; see Williams R. P. 109, n.; 2 Flint. R. P. 324.)

<sup>2</sup> 2 Cruise, 431.

(a) In Ohio, it is said, that the three last named estates are reduced to one estate. Walk. 291.

Chancellor Kent says, that two or more persons may have an interest in connec-

tion in *the title* to the same land, as joint tenants or co-parceners, or in *the possession* of the same as tenants in common. 4 Kent, 357.-



tenants of the remainder in fee.<sup>1</sup> And, in case of a conveyance to two persons, and the heirs of one of them, they are joint tenants for life, and one of them has the fee. If this one die, the other shall hold the whole by survivorship for life. So, two persons may be joint tenants for life, and one of them have an estate tail. It seems, in each of these cases, the inheritance vests by way of remainder.<sup>2</sup>

§ 5. Lord Coke says, that, when land is given to two persons, and the heirs of one of them, he in remainder cannot grant away his fee-simple. Mr. Hargrave's construction of this passage is, that, although in some respects the life estate and the remainder are vested in one person, as distinct interests, yet they are so far consolidated that the latter cannot be transferred separately, and as a remainder.<sup>3</sup>

§ 6. Two men may have joint estates for their lives, and yet several inheritances, in the same land. Thus, if a conveyance is made to A and B, being both males or both females, and the heirs of their bodies, and both of them have issue; during their joint lives they hold as joint tenants; upon A's death, B will take the whole for his life; and, upon B's death, the respective issue of A and B will hold as tenants in common. It is said however, that, in case of a devise in this form, it is not the intention of the testator that the surviving tenant should turn out the issue of the other.<sup>4</sup> So a devise to A and B and their issue, and in default of such issue to C, gives A and B a joint estate for life and several inheritances.<sup>5</sup>

§ 7. A limitation to a man and woman and their issue, it seems, will not create several inheritances, because it will be presumed to contemplate their intermarriage together, and the birth of joint issue. But a limitation to two men and one woman, and the heirs of their three bodies begotten, will create several inheritances; because the chance of the woman's marrying both men, though possible, is a possibility upon a possibility. The

<sup>1</sup> Co. Lit. 183 b.

<sup>2</sup> Lit. 285. See *Wiggin v. Wiggin*, 48 N. H. 561.

<sup>3</sup> Co. Lit. 184 b. and n. 2.

<sup>4</sup> Lit. 288; *Cook v. Cook*, 2 Vern. 545; *Wilkinson v. Spearman*, 2 P. Wms. 530; Printed Cas. H. of L. 1705.

<sup>5</sup> *Ib.*

same principle applies to a gift made to one man and two women; and also to parties whose relationship precludes the possibility of their legally marrying each other.

§ 8. Lord Coke says, in all these cases there is no division between the estates for life and the several inheritances. The tenants for life cannot convey away the inheritance after their decease, because it is divided only in supposition and consideration of law; and to some purposes the inheritance is said to be *executed*.<sup>1</sup>

§ 9. Joint tenancy requires the following points of *unity*, viz: of *interest*, *title*, *time* and *possession*.

§ 10. With respect to *unity of interest*, it is said, that one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one. This principle, however, seems to be only partially true, and the instances and illustrations, adduced in the books, show a discrepancy for which it is difficult to discover any satisfactory reason. Thus a conveyance to two persons, to the one in fee and the other in tail, or to the one for life and the other for years, does not create a joint tenancy. So a reversion upon a freehold, or a right of action or of entry, cannot stand in jointure with a freehold and inheritance in possession. But, on the other hand, it has been seen, (sec. 6,) that a limitation to A and B, and the heirs of A, makes A and B joint tenants for life. So a right of action and a right of entry may stand in jointure.<sup>2</sup>

§ 11. *Unity of title* requires that the estate of joint tenants be created by the same limitation or lawful act of party, or by the same disseisin or lawful act. Persons joining in a disseisin are held to be joint tenants. Hence, if one of them die seised, after peaceable possession for five years, no descent is cast, and the disseisee still retains his right of entry.<sup>3</sup> Although some of the persons to whom an estate is limited take by common law, and others by way of use, they may still be joint tenants. Thus, where a fine was levied to A and B, to the use of A and

<sup>1</sup> *Ib.*; Co. Lit. 184 a.

<sup>2</sup> Co. Lit. 182 b.

<sup>3</sup> *Putney v. Dresser*, 2 Met. 583.

B, and also to C; held a joint tenancy, though A and B were in by the fine, and C by the statute of uses.<sup>1</sup>

§ 12. With respect to *unity of time*, the general principle is stated to be, that it is necessary to a joint tenancy that the estate become vested in all the tenants at the same instant. Thus, if a conveyance is made to A for life, remainder to the heirs of B and C; upon the death of B, a moiety of the remainder vests in his heirs, and, upon the death of C, the other moiety in C's heirs; and therefore these respective heirs are not joint tenants.<sup>2</sup> This principle, however, does not apply to uses and executory devises. It has also been held inapplicable to husband and wife. Thus, if a man convey to the use of himself and of any future wife; upon his marriage, the husband and wife become joint tenants, although their estates vest at different times. (This, however, is a case of *use*, and may be sustained upon that ground alone.) So where limitations take effect at different times, still, *if the root is joint*, as in case of limitations to successive children of one parent; there may be a joint tenancy. And, in one case, it is stated, generally, that a joint claim *by the same conveyance* makes joint tenants, and not *the time of vesting*. And in another, that, if the parties claim by *one title*, though taking at different times, this is a joint tenancy.<sup>3</sup> So in case of a devise to a woman and her children on her body begotten or to be begotten by A, in fee; the woman and her children are joint tenants, though the estate vest in them at different times.<sup>4(a)</sup>

§ 13. With respect to *unity of possession*, joint tenants are

<sup>1</sup> 2 Cruise, 438; Co. Lit. 188 a.

<sup>2</sup> Watts v. Lee, Noy, 124.

<sup>3</sup> Co. Lit. 188 a; 4 Kent, 858; Gilb. Uses, 71; Blamford v. Blamford, 8 Bulstr. 101; Aylor v. Chep. Cro. Jac. 259; Earl,

&c. v. Temple, 1 Ld. Raym. 810; 2 Prest. on Abstr. 67; Matthews v. Temple, Comb. 467.

<sup>4</sup> Oates v. Jackson, 2 Stra. 1172.

(a) Mr. Hargrave was of opinion, that these exceptions to the general principle are limited to conveyances by way of use and to devises. And some decided cases seem to favor this opinion. But Lord Thurlow appears to have rejected the distinction between limitations to uses and others. Co. Lit. 188 a, n. 18; Samme's case, 18 Co. 54; Stratton v. Best, 2 Bro. 238.

In a late case of *personal property*, the old doctrine upon this subject was adhered to. Bequest to A for life, and after her death to her children, when they become of age. A had two children, who lived to be of age. Held, they took as tenants in common, because the property vested in them at different times. Woodgate v. Unwin, 4 Sim. 129.

said to be seised *per my et per tout*. Each of them has the entire possession of every part, and of the whole. Each has an undivided moiety of the whole, not the whole of an undivided moiety. Hence the possession and seisin of one is that of the other also.

§ 14. The principal incident to an estate in joint tenancy, is the right of *survivorship*; by which, upon the death of one joint tenant, whether the estate is a fee, or a joint term for years, or a trust, his interest passes, not to his heirs or other representatives, but to the surviving co-tenant or co-tenants. And though one of two lessees for years dies before entry, the survivor shall take his interest.<sup>1</sup> In some cases, however, joint tenancy may exist without the mutual right of survivorship. Thus, in the case of a lease to A and B during the life of A; upon the death of B, A takes the whole, but upon the death of A, B takes nothing.<sup>2</sup>

§ 15. Although, as has been seen, *trusts* are subject to survivorship, yet the general principle is, that the right of survivorship is looked upon as odious *in equity*, being often attended with hardship and injustice. Hence, upon the death of one joint owner, his estate has been held to pass to his heirs.<sup>3(a)</sup>

§ 16. If one of two *mortgagees*, who have jointly advanced the mortgage money, dies; his representatives shall have a share of the money when paid. This principle, however, seems to be limited to cases, where they advance unequal portions of the whole sum. If each advances a moiety, which appears by the deed, this is regarded as a joint purchase of the chance of survivorship. When the proportions are unequal, the mortgagees are regarded in law either as *partners*,—in which case, though the survivor take the whole legal estate, he becomes a trustee for the other; or as actual tenants in common, with no right of

<sup>1</sup> Lit. 280-1; Co. Lit. 46 b; Brompton v. Alkis, 2 Vern. 556; Cray v. Willis, 2 P. Wms. 530; Rex v. Williams, Bunb. 342.

<sup>2</sup> Co. Lit. 181 b.

<sup>3</sup> Bunb. 442; Gould v. Kemp, 2 My. & K. 809.

(a) It is remarked by a late English writer, that joint-tenancy, in England, is now chiefly used for the purpose of trusts—trustees being uniformly made joint tenants. Williams, R. P. 311.

survivorship.<sup>1</sup> Upon the same principle, where one of two joint purchasers of land lays out money in repairs and improvements, and dies; the expense is a lien upon the land in favor of his representatives.<sup>2</sup>

§ 17. The doctrine above stated has been broadly laid down by Sir Joseph Jekyll in this form; that the payment of money creates a trust for the parties who advance it, and an undertaking upon the hazard of profit or loss is in the nature of *merchandizing*, when the *jus accrescendi* is never allowed. In this extent, the principle is by no means limited to conveyances in mortgage, or to liens arising from the laying out of money upon the land, or to unequal advances of money by the respective parties. Thus, where several persons agreed to drain certain overflowed lands, and a deed was made to them of the lands in consideration of a certain sum of money, and they proceeded to lay out money in prosecution of the undertaking; it was held, that the parties were tenants in common.<sup>3</sup>

§ 18. Though the circumstance, that the consideration for a conveyance is advanced unequally by the several grantees, seems to have been regarded as important in determining the nature of their tenancy; yet the general rule is, that a deed given to several persons, and not designating their respective proportions, will pass to each an equal share of the land. The amount of consideration paid by each of them cannot be shown by parol evidence; and, if one dissent to the conveyance, his share does not pass to the other grantees, but reverts in the grantor.<sup>4</sup> The equitable principle, that, where a purchase of land is made by two persons, with a view to expending large sums of money in the improvement of it, they shall be regarded as tenants in common, has been recognized in Pennsylvania. But the inequality of the sums paid by the respective parties seems to have been considered as an unimportant circumstance; and it is intimated that the principle is inapplicable, unless the case is

<sup>1</sup> Petty v. Styward, 1 Ab. Eq. 201;  
Rigden v. Vallier, 2 Ves. 258.

<sup>2</sup> Aveling v. Knipe, 19 Ves. 441.

<sup>3</sup> Lake v. Craddock, 8 P. Wms. 158.

<sup>4</sup> Treadwell v. Bulkley, 4 Day, 395.

clearly shown to be of a mercantile nature, and connected with a partnership in business.<sup>1</sup>(a)

<sup>1</sup> *Duncan v. Forrer*, 6 Bin. 198.

(a) Under the insolvent law of Massachusetts, if a surviving partner become an insolvent debtor, real estate purchased in the names, with the funds, and for the business of the partners, belongs to the assignee, who may, by a bill in equity, compel the administrator, widow and heirs of the deceased partner, to convey to the plaintiff such deceased partner's moiety of the land, for the benefit of partnership creditors. *Burnside v. Merrick*, 4 Met. 537. See *Tappan v. Bailey*, Ib. 529. In Ohio, in case of a partnership in the business of building, &c., the widow of a deceased owner cannot claim dower as against partnership creditors. *Sumner v. Hampson*, 8 Ohio, 828.

So, in Vermont, it is held that real estate, belonging to partnership funds, should follow the same law of distribution in Chancery, which is applied to personal property. *Rice v. Barnard*, 20 Verm. 479. The same rule is adopted in Tennessee. *Boyers v. Elliott*, 7 Humph. 204.

So, in New York, real estate, purchased with partnership funds, for the use of the firm, although the legal title is in a member or members of the firm, is in equity the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the co-partners as between themselves. *Smith v. Tarlton*, 2 Barb. Ch. 336; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366. And the same rule applies to leasehold estate. *Day v. Perkins*, 2 Sandf. Ch. 359.

But real property purchased with partnership funds for partnership purposes, and which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate. *Buckley v. Buckley*, 11 Barb. 43.

Upon the death of one, his legal title passes to his heirs. *Buchan v. Sumner*, 2 Barb. Ch. 163. And the surplus remaining, after settlement of the partnership affairs, is treated as real estate. Ib.

To constitute real estate partnership property, it must be purchased with partnership funds, and have been used

for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561.

Where land is purchased in the name of one partner, and not used for partnership purposes, the other partner has no interest therein as survivor of the grantee, and no interest passes to his assignee in bankruptcy. Ib. Though such land was paid for with the partnership funds, it could be reached only by the creditors of the partner not named in the deed, who were such at the time of the conveyance. Ib.

Where real estate was originally purchased by one of two partners, and paid for out of his individual funds, and the only interest of the partnership is on account of improvements made with its funds; the actual interest of such partner, at least his individual interest, is liable to be sold on execution. But, it seems, the partnership creditors have a claim, in equity, to have the whole value of the improvements applied to their debts, in preference to the separate creditors of the individual partner; the equitable interest in such improvements, chargeable with the debts of the partnership, will pass under an assignment made by the co-partners for the benefit of the partnership creditors; and upon such equitable interest, a judgment, obtained by a separate creditor against the partner who purchased, will not, as against the partnership creditors, be a lien. *Averill v. Loucks*, 6 Barb. 19.

Where real estate is purchased by one of two partners, and paid for out of his individual funds, and improvements are made thereon, with the partnership funds, between the time of the giving of a judgment by one of the partners as a security for future responsibilities, and the incurring of such responsibilities by the judgment creditor; the equitable interest of the other partner, to be reimbursed his share of the funds, applied to such improvements, is prior to the lien of the judgment. *Averill v. Loucks*, 6 Barb. 19.

Where a lease, taken by a partner, demises the premises to him individually, it does not belong to the partnership; and parol evidence, that it was executed for their benefit, is inadmissible. *Otis v. Sill*, 8 Barb. 102.



§ 19. While the case of joint mortgagees has been held in England an exception to the rule of survivorship; in this country, where, as will be seen hereafter, joint tenancy is for the most part abolished, it is held, for peculiar reasons, still to subsist between parties of this description. (See ch. 54, s. 10.)

§ 20. Bodies politic or corporate cannot be joint tenants with each other, nor with individuals; because they take in their political capacity, and are seised in several rights, by several titles and capacities. But the mere designation of a grantee by his

A and B. partners as nursery-men, owned land in common, which was planted with young trees, and, there not being land enough for their business, A agreed to the planting of partnership trees on his own land. This piece A mortgaged; the mortgage was foreclosed, and the land purchased by C, at which sale B gave public notice that the trees belonged to the firm, and that he owned one-half of them. B filed a bill to close up the partnership, and also prayed for a decree against C, declaring that half the trees belonged to him. Held, the trees were the property of the firm, and liable for the partnership debts, and for any balance due B on a final adjustment of the partnership accounts; that neither the mortgagee nor the purchaser was entitled to protection as a *bona fide* purchaser without notice; and that B could enforce his rights against them, to the same extent that he could have done against A. *King v. Wilcomb*, 7 Barb. 268. See *Warren v. Davies*, 1b. 820.

In Maryland, it has been held, that, in the absence of any express agreement between partners, giving to their real estate the character of personalty, the widow of a deceased partner may claim an allowance from the proceeds of partnership lands sold, in lieu of dower, if the partnership was solvent at the time of its dissolution. *Goodburn v. Stevens*, 5 Gill 1; 1 Md. Ch. 420.

But where real estate had been used by a partnership for many years in the manufacture of iron, and, upon the death of one partner, his heirs came into the partnership, and there was no proof of any articles of partnership; held, the whole partnership estate, whether consisting of real or personal property, was in equity a consolidated fund, to be appropriated primarily and exclusively to partnership debts. *Goodburn v. Stevens*, 5 Gill, 1.

In Pennsylvania, where a lease is made of certain coal mines to two persons as tenants in common, and they afterwards associate themselves as partners, for the purpose of mining, shipping and selling coal from the demised premises, for the whole period of the lease; the leasehold is thereby converted into partnership assets, and becomes the property of the firm. *Patterson v. Silliman*, 4 Cas. 804.

If such lease provides that any transfer or assignment of the lease, or permitting it to be seized in execution, should work a forfeiture, and enable the lessors to re-enter, without prejudicing their right to claim damages; such forfeiture is not incurred by a sale of the leasehold estate under a decree of Chancery as the property of the firm. *Id.*

An intention to bring real estate into partnership must be manifested by deed or writing placed on record; and parol evidence is inadmissible, that real estate, conveyed to two persons as tenants in common, was purchased and paid for by them as partners, and was partnership property. *Ridgway's, &c.*, 8 Harris, 177.

In Tennessee, where an entry was made on the books of a firm by one of the partners, charging them with a tract of land valued at a given price, as debtor to him, with the understanding that it should become partnership property; held, the land became partnership property, and subject to the prior lien of partnership, over individual debts. *Boyers v. Elliott*, 7 Humph. 204.

In Louisiana, where an immovable is purchased by a commercial partnership, the partners become joint owners, and none of them can alienate it without the consent of the rest. *Weld v. Peters*, 1 La. An. 432.

Where immovable property belonging to a partnership is sold by one of the partners, for a consideration which en-



corporate character will not prevent his holding as joint tenant. Thus, if a conveyance is made to A, bishop of B, and C, to have and to hold to them and *their heirs*, they are joint tenants. So the rule does not apply to the conveyance of a chattel real, because this cannot pass in succession. Hence, in case of a lease for years to a bishop and a natural person, they are joint tenants.<sup>1</sup>

§ 21. An alien and a citizen may be joint tenants; but the interest of the former is subject to escheat.<sup>2</sup>

§ 22. Husband and wife, being considered in law as one person, cannot take by moieties, as joint tenants, each an undivided moiety of the whole; but upon a conveyance to them each has the *entirety*, they are seised *per tout* and not *per my*, and the husband can neither forfeit nor aliene the estate so as to bind the wife after his death. Neither can sever the jointure, but the whole goes to the survivor. It will be seen hereafter that this rule is changed in some of the States.(a) Upon this principle,

<sup>1</sup> Co. Lit. 190, a.

<sup>2</sup> Co. Lit. 180 b, n. 2.

ures to the benefit of the partnership, and the other partner, though informed of the sale, makes no objection to it; he will be considered as having ratified it. *Ib.*

Where several persons buy a tract of land, in the name of one, for the purpose of dividing it into lots and squares, and selling at a profit to be shared among them, the notes and assets, as well as the unsold lots, are subject to the action of partition; and a suit by one of the partners against the other, to compel him to account for sales made by him, will not be barred by the prescription of ten years. *Aiken v. Ogilvie*, 12 La. An. 858.

In Kentucky, where land was purchased by a firm, but not used in their business, and afterwards sold under execution against one partner; and it did not appear that the purchaser had notice that it was partnership property; held, not liable for partnership debts. *Buck v. Winn*, 11 B. Mon. 820.

In Alabama, an agreement was made between three brothers, which recited, that they had agreed to be equal sharers and partners in the product of their labor and that of those under their care, and to bear equally the expense of carrying on a farm, stock, purchasing land, negroes and other property, whether jointly or individually. The articles then provided for the con-

tinuance of the partnership, extended it to all business in which either of them might engage, and stipulated that, if either of them died before a final adjustment and division of the property, owned by them jointly or individually, the survivor or survivors should *heir* or inherit all the property, after paying all debts against all or either. Held, lands bought on joint account, or in the name of the brothers individually, enured to the benefit of the partnership; that, if one of them purchased lands in his own name, and sold them, taking a note to himself for the purchase-money, such note vested in the partnership, at least in equity; and that, upon the death of the payee, the surviving partners might file a bill in their own names for the enforcement of the lien. *Houston v. Stanton*, 11 Ala. 412.

In Mississippi, a lease was made to several persons in their individual names. The interest of one was sold on execution. Held, the purchaser might maintain an action for partition against the others, in the absence of proof that he had express or implied notice of the equitable lien growing out of partnership. *Cowden v. Cairns*, 28 Miss. 471.

(a) The doctrine above stated was held in a very early case, where a husband, to whom with his wife an estate had been

where a conveyance is made to husband and wife and a third person, the two first take one moiety, and the last the other.<sup>1</sup>

§ 23. The widow of a joint tenant is not entitled to dower. The survivor comes in by a paramount title, which he may allege in pleading as derived directly from the grantor, without naming his companion.<sup>2</sup>

§ 24. It was formerly held, that, where lands were given to two women and the heirs of their two bodies, the husband of one of them deceased should be tenant by the curtesy, the inheritance

<sup>1</sup> Lit. 291; Co. Lit. 187 a; *Harding v. Springer*, 2 Shepl. 407.

<sup>2</sup> Lit. 45; Co. Lit. 87 b.

conveyed, was attainted and executed for high treason in the murder of King Edward II. The heir of the wife, after her death, claimed the land, by petition to Edward III. against a stranger to whom the king had granted a patent therefor; and upon *scire facias* had judgment in his favor. Co. Lit. 187 a.

It has been held in Connecticut, that, where husband and wife bring an action to recover a debt due her before marriage, and land is set off to them on execution in satisfaction of the judgment, they become joint tenants of such land, as they were joint tenants of the judgment. *Hommick v. Bronson*, 5 Day, 290.

The husband may bring a suit for the land alone. *Jackson v. Leek*, 19 Wend. 389. And the effect is the same, whether the land be limited to the two during their joint lives, with remainder to the survivor during his or her life, or to the two and their representatives during the life of the survivor. *Torrey v. Torrey*, 4 Kern. 430.

A and his wife conveyed lands to their son, the defendant, who, in consideration of such conveyance, demised the same premises to A and his wife during their natural lives, and the life of the longest liver of them, free of rent. Afterwards the defendant went into possession of the lands, under a verbal agreement with A and his wife, to support them, and to receive the profits of the lands over what should be necessary for such support. A died during the continuance of this agreement. In a suit between his widow (the plaintiff) and the defendant for possession of the lands; held, that the plaintiff was entitled to recover. 4 Kern. 430.

A grant to husband and wife, expressly

to hold as tenants in common, has been held to make them such. Co. Lit. 187 b.; 1 Steph. 815 n. But a conveyance to A, and B and C, his wife, and their heirs, as tenants in common, not joint tenants, gives to A one moiety, B and C the other. *Johnson v. Hart*, 6 W. & S. 819.

Conveyance to a husband for the joint benefit of himself and his wife, but with no words limiting a trust for her separate use, though expressly excluding him from power to sell. Held, the land might be taken by creditors of the husband for his life. *Stoebler v. Knoce*, 5 Watts, 181.

Where a wife in her own right, and another person, whose interest was purchased by the husband in his own right, held the equitable title to a tract of land, by warrant, survey and possession, and a patent issued for the whole tract to the husband and wife; held, though under the patent the husband and wife each took, at law, the entirety of the tract, with the chance of excluding by survivorship the heirs of the other, yet the wife's equitable estate in an undivided moiety was not defeated, but descended to her children at her death, subject to her husband's life estate as tenant by the curtesy; that it was not competent for the husband, by any act of his, to divest the equitable estate of his wife, and vest it in himself, either absolutely or contingently; that he held the legal title to the undivided moiety of his wife in trust for her heirs; and that, he having sold the land to *bona fide* purchasers without notice, equity would compensate the heirs of the wife out of the estate of the husband. *Norman v. Cunningham*, 5 Gratt. 63.

being executed. Lord Coke says, that Littleton has cleared up this doubt, by showing that the inheritance is not executed, and therefore that there is no curtesy.<sup>1</sup>

§ 25. One joint tenant, as has been already intimated, cannot charge or encumber the estate to bind the other who survives him; as, for instance, by a rent-charge or recognizance. So, if one joint tenant suffers a judgment to be entered up against him, and dies before execution of it, no execution can be had. Though an execution sued in his life binds the survivor; and all charges bind the party himself who makes them, during his life; or, if he survive the other, absolutely.<sup>2(a)</sup>

§ 26. An exception to this rule, however, is a *lease*. A joint tenant may bind his fellow by a lease for years, even though limited to commence only after his own death. Even in such case, it is said to be an immediate disposition of the land.<sup>3</sup> But, where one of two joint tenants for life leased for years his own moiety, to commence from the death of the other, and the other moiety by the same instrument to commence from his own death, and died; held, the whole was void, because he had no power to lease his companion's share, and the lease of his own, over which he had power, was not to commence till the other's death.<sup>4</sup>

§ 27. Although a joint tenant cannot charge or incumber the estate, so as to affect the right of survivorship, yet he may convey his whole interest; and in this way, as will be presently seen, *sever* the tenancy.

<sup>1</sup> Co. Lit. 80 a, 183 a; 2 Cruise, 885.

<sup>2</sup> Co. Lit. 184 a, 185 a; Lit. 286; Ld. Abergaveny's case, 6 Rep. 78.

<sup>3</sup> Co. Lit. 185 a; Clerk v. Clerk, 2

Vern. 828; Gould v. Kemp, 2 My. & K.

810.

<sup>4</sup> Whitlock v. Huntwell, 2 Rolle's Abr. 89; (*infra*, sec. 86.)

(a) In Connecticut, a joint tenant may charge his share with his private debts. Remington v. Cady, 10 Conn. 44. The common law rule, that no title to *dower* attaches on a joint seisin, on account of the mere possibility that the estate may be defeated by survivorship, does not prevail in North Carolina, South Carolina, Indiana and Kentucky, or probably any other States, where the *jus accrescendi* is abolished. Lit. sec. 45; Ind. L. 183, p. 290; Reed v. Kennedy, 2 Strobb. 67; Weir v. Tate, 4 Ired. 264; 8 Blackf.

18, n.; Davis v. Logan, 9 Dana, 186; 4 Kent, 87, n.; Mayburry v. Brien, 15 Pet. 21. See Meniffee v. Meniffee, 8 Eng. 9; *supra*, ch. 11.

In Maine, where A and B jointly and equally erected houses in a block, afterwards made a parol partition, and each occupied, sold and received the price of his own portion; held, there was not sufficient proof of sole seisin to give a title to dower. Hamblin v. Bank, &c., 1 Appl. 66.

§ 28. It is said, that, in consequence of the intimate union of interest and possession between joint tenants, they are obliged to join in many acts, such as *fealty*, in England. But, on the other hand, there are many cases, where the act of one is regarded in law as that of the whole. Thus the entry of one, and the seisin thereby acquired, enure to the benefit of all. So, in case of a joint lease by them, a surrender to one is a surrender to both. So, if one commit waste, the others forfeit the land, though he alone is liable to treble damages.<sup>1</sup>

§ 29. The possession of one joint tenant being in law that of the other also, one cannot disseise another but by actual ouster. Thus, in England, a fine levied by one of the whole land is no disseisin.<sup>2</sup>

§ 30. Joint tenants, having one entire and connected right, must in general join and be joined, in all actions respecting the estate.<sup>3</sup>(a)

§ 31. Some other incidents of joint tenancy, common to this estate and to tenancy in common, will be considered hereafter.

§ 32. It is said, that a joint tenancy may be *severed*, by the destruction of any of its constituent unities, except that of time, which, as it relates solely to the commencement of the estate, cannot be affected by any subsequent transaction.<sup>4</sup>

§ 33. A joint tenancy is destroyed by destruction of *the unity of interest*, which may take place either by act of parties or act of law.<sup>5</sup>

§ 34. It has been seen, that there may be joint tenants for life, remainder to the heirs of one of them; or, in other words, that

<sup>1</sup> Co. Lit. 67 b; Ib. 49 b; Ford v. Grey, 6 Mod. 44; 2 Cruise, 387; 2 Inst. 302.

<sup>2</sup> Fisher v. Wigg, 1 Salk. 892; Reading v. Royston, 2. 428.

<sup>3</sup> 4 Kent, 859.

<sup>4</sup> 2 Cruise, 388.

<sup>5</sup> Ib.

(a) In Mississippi it is expressly provided, that, in real and mixed actions, a defendant may plead in abatement, that another person holds the land jointly with himself. Missi. Rev. C. 116. So in Virginia. 1 Vir. Rev. C. 237. In Rhode Island, a suit for the land may be brought by all the tenants, or any two of them, or one alone. R. I. L. 208. In Connecticut, it has always been the

practice for one joint tenant to sue alone. 1 Swift. 102. In Mississippi, one joint tenant may alone maintain a merely possessory action for the joint premises, the possession of one being in law the possession of all. Rabe v. Fyler, 10 S. & M. 440.

So, one may maintain forcible entry and detainer, to recover possession, the title not being involved. Ib.

one joint tenant may have a life estate and the other a fee. The whole interest being created at one time, the fee-simple cannot merge the jointure which had no previous existence. But it is otherwise, where one of several joint tenants for life takes a conveyance of the fee, after the creation of the original joint estate; the jointure is severed by a merger of the life estate in the fee-simple. It is said, that, if such tenant for life might purchase the reversion in fee, and still retain his life estate, he would have power to convey the reversion by itself. which, it has been seen, the law does not allow, where the two estates are joined by the *original limitation*.<sup>1(a)</sup> So where there are joint tenants for life, and a new conveyance in tail is made to them; the joint tenancy is severed.<sup>2</sup> So a descent of the fee to one of two joint tenants for life severs the joint tenancy. Thus, where one devised to his two youngest sons for life, and afterwards the reversion came to one of them by descent from the eldest son; held, a severance of the jointure.<sup>3</sup> It would seem, from analogy to the distinction already stated, that, if the devise were made for life to the *eldest* son and other, as the reversion and life estate must come to the former by the same event, the death of the testator, the joint tenancy for life would still exist.

§ 35. Another mode of severance is by destroying *the unity of title*. Thus, if one joint tenant conveys his interest to a third person, inasmuch as this person claims title by conveyance from the joint tenant, and the remaining joint tenant claims title by the original conveyance, the jointure is severed.<sup>4</sup> And such conveyance destroys the unity of *possession* as well as of *title*. The remaining joint tenant and the grantee have several freeholds.

§ 36. A lease for life by one joint tenant operates as a severance. And the severance applies to the reversion, as well as the particular estate. A lease for years operates as a severance *pro tanto*. So an under-lease by one of two joint tenants for years.<sup>5</sup>

<sup>1</sup> Co. Lit. 182 b; Wisecot's Case, 2 Rep. 80.

<sup>2</sup> Co. Lit. 182 b.

<sup>3</sup> Robert, &c., 2 And. 202.

<sup>4</sup> Lit. 292.

<sup>5</sup> Lit. 802; Co. Lit. 192 a. (*Supra*, sec. 26.)

(a) This distinction is analogous to that above mentioned, in regard to the destruction of contingent remainders. See p. 784.

§ 37. It has been held, in equity, that a joint tenancy in a trust term may be severed by a mortgage made by one of the tenants. This, however, is contrary to the general principle, that no *charge* upon the estate shall interfere with the right of survivorship.<sup>1</sup> And a conveyance, which is in law invalid, will not operate to sever a joint tenancy, even in equity; as, for instance, a conveyance made to the wife of the tenant, though immediately before his death, and for the purpose of providing for her.<sup>2</sup>

§ 38. Whether mere articles of agreement may in equity operate as a severance of joint tenancy, seems to be a doubtful point, though the prevailing opinion is that they may.<sup>3(a)</sup> But, when made by an infant, they do not have this effect. Being in their nature avoidable by the party, it is in the discretion of the court of equity either to give or refuse its assistance. It may model such a contract at pleasure. And, in the view of equity, a surviving joint tenant is not considered as a mere volunteer, but as claiming by title paramount, like the issue under an entailment. If the other tenant had died first, the infant might have avoided his act, and claimed by survivorship. Hence, to set up this act as a severance, would be manifestly unequal and unjust. Upon these grounds, articles of agreement, by which a female infant, upon her marriage, covenanted with her proposed husband and trustees to settle her lands, held in joint tenancy, upon the husband, were held not to be valid in equity against the claim of the surviving joint tenant.<sup>4</sup>

§ 39. A joint tenancy cannot be severed by *devise*.<sup>(b)</sup> A devise takes effect only by the death of the testator, which also vests the title by survivorship in the remaining tenant; and, the two claims being concurrent in time, the law gives priority to the latter.<sup>5</sup>

<sup>1</sup> York v. Stone, 1 Abr. Eq. 298; 1 Salk. 158.

<sup>2</sup> Moyse v. Giles, Prec. in Cha. 124.

<sup>3</sup> Musgrave v. Dashwood, 2 Vern. 68; Hinton v. Hinton, 2 Ves. 684; Rigden v. Vallier, 2 Ves. jr. 257.

<sup>4</sup> May v. Hook, Co. Lit. 246 a. n. 1; Durnford v. Lane, 1 Bro. 112.

<sup>5</sup> Lit. 287; Co. Lit. 185 b; Swift v. Roberts, 1 Bl. Rep. 476.

(a) A and B being interested in a fund as joint tenants, A, by letter to B, engages to secure to his family, in any way B may desire by his will, a moiety of the fund. Held, a severance of the

joint tenancy. Gould v. Kemp, 2 Mylne & K. 804.

(b) An ancient statute in South Carolina, not now in force, provided otherwise.

§ 40. If a joint tenant makes a will, and then becomes solely seised by survivorship, the will does not operate upon the title so acquired, without republication.<sup>1</sup>

§ 41. A severance may be effected by the alienation of one joint tenant to another. It is said that this should be done in the form of a *release*, because both are actually seised of the estate before.<sup>2</sup>

§ 42. If there are three joint tenants, and one of them releases to one of his companions, the latter holds one-third of the land in common, and he and the other tenant hold two-thirds as joint tenants. But if one release to all the others, they hold in law under the original conveyance, and not under the release; and therefore remain joint tenants as before.<sup>3</sup>

§ 43. By accepting a release from his companions, a joint tenant recognizes the validity of any previous charge upon the estate made by the releasor, which he might have avoided under the title by survivorship. Thus, if one joint tenant grant a rent-charge from the land, and afterwards release to the other and die; although, as between the two joint tenants themselves, the releasee holds not by the release but by the original joint conveyance, yet, as to the grantee of the rent, he claims under the release, and therefore his title is subordinate to the rent.<sup>4</sup>

§ 44. Joint tenants may make a severance by voluntary partition. But such partition must be by deed.<sup>5</sup>

§ 45. At common law, one joint tenant could not compel another to make partition. But by statutes 31 Hen. VIII, ch. 1, and 32 Hen. VIII, ch. 32, joint tenants are enabled to make partition of their estates by means of compulsory legal process, called a writ of partition. And, by Stat. 8 and 9 Wm. III, ch. 31, this process is much simplified. The methods of obtaining partition in the United States, which are substantially the same in relation to joint tenants and tenants in common, will be particularly considered hereafter.

<sup>1</sup> 4 Kent, 360; Swift v. Roberts, 3 Burr. 1488; Ambler, 617.

<sup>2</sup> 2 Cruise, 842.

<sup>3</sup> Lit. 804; 2 Cruise, 842.

<sup>4</sup> Co. Lit. 185 a; Abergaveny's Case, 6 Rep. 78 b.

<sup>5</sup> 2 Cruise, 848.



## CHAPTER LIV.

## TENANCY IN COMMON

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|---|--|
| 1. Three forms of joint ownership in England.   | 22. Estate in common subject to the same rules with a several estate.  |
| 2. Co-parcenary; obsolete in the United States.   | 24. But a tenant cannot convey by metes and bounds.  |
| 5. Tenancy in common, what.   | 28. General rights and remedies of tenants in common, &c.; receipt of rents, &c., by one; assumpsit, &c.   |
| 6. Joint tenancy favored in England, but discountenanced in the United States; statutory provisions changing it into tenancy in common. | 29. Trespass, waste, &c.   |
| 7. Exceptions—husband and wife.   | 31. Whether the possession of one is <i>adverse</i> to the other; disseisin; limitation: purchase by one; whether it enures to the use of the other. |
| 10. Joint mortgagees.   | 45. Form of action by tenants in common for the land.  |
| 13. Trustees and executors.   |  |
| 14. Statutes apply to vested estates.   |  |
| 18. Legislative grants.   |  |

§ 1. By the English law, as has been stated (ch. 53), there are three modes in which several persons may own real estate together, viz: *joint tenancy*, *co-parcenary*, and *tenancy in common*. The first of these has been already considered.

§ 2. The second mode of joint ownership—*co-parcenary*—always arises from *descent*. (a) At common law, it took place when a man died seised of an inheritance, and left no male

(a) Devise by A to trustees, upon trust to sell as soon as conveniently might be, except an advowson, and certain hereditaments in the same parish, the sale of which should be postponed until after the death of A's eldest son W., who was then incumbent. The proceeds were to be held in trust for his children, as tenants in common. Held, the right of presentation previous to the sale passed by the will, and did not descend. Also, if the children could not agree whom to nominate for presentation by the trustees, the question was to be decided by

lot, and, being tenants in common, they were not entitled to present *successive* according to seniority, as in the case of co-parceners. *Johnstone v. Baber*, 39 Eng. L. & Eq. 189.

It is said, one may be a parcener with himself; as where one-half of an estate descends to him from the father, and one-half from the mother, in which case, upon his death without lineal heirs, the former descends to his father's, the latter to his mother's, heirs. 1 Washb. R. P. 429.

issue, but two or more daughters, or other male or female representatives. Co-parceners have distinct estates, with a right to the possession in common, and each may alienate her share. So one may release to another, with the same effect as in case of joint tenancy.<sup>1</sup>

§ 3. Co-parceners, like joint tenants, have a unity of title, interest and possession. They are also said to be seised *per my et per tout*. But still there is no survivorship between them, and either may devise her estate.<sup>2</sup> They continue to hold by *descent*, even after the co-parcenary is dissolved by partition.<sup>3</sup>

§ 4. The common law learning of partition, in respect to parceners, is called, by Lord Coke, a *cunning learning*, and is said to be replete with subtle distinctions and antiquated erudition. But, in the United States, as land descends to all the children equally, whether male or female, the common law definition of co-parcenary has become inapplicable; and the English doctrines in relation to it are also of little importance, because the ownership of joint heirs is in some of the States expressly declared to be, and in all of them is in effect, a tenancy in common.<sup>(a)</sup> It is said, the technical distinction between co-parcenary and estates in common may be considered as essentially extinguished in the United States.<sup>4</sup> The only peculiar incident of the former is, that partition may be made among parceners by the probate courts, to which the settlement of the estates of deceased persons appertains.<sup>5</sup>

§ 5. *Tenancy in common*, by the English law, is where two or more persons hold lands and tenements by *several titles*, not by a *joint title*, and occupy them in common. The only unity required between such tenants is that of possession.<sup>6</sup> It has already been seen (ch. 53,) that a tenancy, which would other-

<sup>1</sup> 4 Kent, 864.

<sup>2</sup> *Ib.*

<sup>3</sup> *Doe v. Dixon*, 5 Ad. & Ell. 834.

<sup>4</sup> 4 Kent, 864.

<sup>5</sup> 1 Swift, 104. See *Drury v. Drury*, 1

Rep. in Chy. 26; *O'Bennon v. Roberts*, 2 Dana, 54; N. H. Rev. St. 242.

<sup>6</sup> *Spencer v. Austin*, 88 Verm. 258. See *Wiggin v. Wiggin*, 48 N. H. 561.

(a) It is recognized *by name* in some of the States. Prince, 541; Ky. Rev. L. 560. In Maryland, the children of parents who die intestate, seised in fee

of lands, &c., take as co-parceners, and are so treated by the act of 1820, c. 191, sec. 5. *Hoffar v. Dement*, 5 Gill. 132.

wise be a joint tenancy, for the want of unity in interest, title or time, is held a tenancy in common.

§ 6. The common law favored title by joint tenancy, by reason of the right of survivorship. Its policy was averse to the division of tenures, because this tended to multiply the feudal services, and weaken the efficacy of that connection. But it has been said, that the reason of that policy had ceased with the abolition of tenures, and that even the courts of law were no longer inclined to favor joint tenancy; and it has been seen, (ch. 53,) that survivorship is discountenanced by a court of equity. In the United States, where feudal tenures are unknown, upon the ground that tenancies in common are more beneficial to the commonwealth and consonant to the genius of republics,<sup>1</sup> the old English doctrine upon this subject has been, not partially qualified or subjected to occasional exceptions, but actually reversed in nearly all the States. In England, where several persons own land together, they are joint tenants, unless there is some special reason for a different ownership; but in the United States, in the absence of such reason, they are tenants in common. Chancellor Kent remarks,<sup>2</sup> that in this country the title by joint tenancy is very much reduced in extent, and the incident of survivorship still more extensively destroyed. (a) Inasmuch as survivorship is the only important, *practical* incident, which distinguishes joint tenancy from tenancy in common, it is a question of no great consequence, whether one or the other of these forms is adopted in changing the old law. (b)

<sup>1</sup> Shaw v. Hearsey, 5 Mass. 522.

<sup>2</sup> 4 Kent, 861.

(a) In the Plymouth Colony, in 1648, it was enacted by the general court, that survivorship should not apply to joint tenants. 4 Kent, 862, n.

(b) It seems, a limitation may be such as to constitute tenants in common, with benefit of survivorship. Doe v. Abey, 1 M. & S. 428.

In Indiana, joint tenancies are changed into tenancies in common. In South Carolina, the death of one joint tenant operates as a severance, and his estate passes to his heirs, as in case of a tenancy in common. So in Ohio.

(In South Carolina, it is said, survivorship is not abolished, but joint tenants may devise their estates. 4 Kent, 861 n.)

In Maryland and New Jersey, an estate in joint tenancy can be created only by an express declaration that the land is to be owned in this way.

(In Delaware, persons occupying vacant land in mixed possession, prior to the act of 1848, become tenants in common under that act. Tubbs v. Lynch, 4 Harring. 521.)

In New York, Delaware, Michigan, Arkansas, Illinois, Wisconsin, California, Pennsylvania and Missouri, an exception

§ 7. From the recapitulation of the statutory provisions in the Several States, it appears that, in some of them, joint tenancy has been unqualifiedly abolished, while in others it is still retained in certain enumerated cases, for which it is peculiarly adapted; as in case of husband and wife, of executors and trustees, and of mortgagees. Massachusetts, Vermont, Wisconsin and Michigan are the only States in which conveyances to husband

is made from the same provision in regard to executors and trustees. In Massachusetts, Vermont and Pennsylvania, trustees alone. In some of these States, the phraseology is, that a joint tenancy shall not arise, unless it is declared that the parties are to hold as joint tenants, "and not as tenants in common;" but probably no particular significance is to be attached to this last expression.

In Tennessee, Georgia, Texas, Florida, Pennsylvania, Mississippi, Illinois and Alabama, survivorship between joint tenants is expressly abolished by statute. In Connecticut, the doctrine was exploded in an early decision, and the law has never been since contradicted.

In Vermont, Massachusetts, Maine, New Hampshire and Rhode Island, there must be express words, or an intention to that effect, to create a joint tenancy; and, in Vermont, the statute is declared applicable to estates previously created, as well as those which might arise subsequently. The same provision is made in Wisconsin, Minnesota, California, Iowa, Oregon and Kansas.

(In Massachusetts, it shall "manifestly appear from the tenor of the instrument." Substantially the same language in Maine and New Hampshire. In Rhode Island, words "clearly and manifestly showing otherwise.")

In Massachusetts, Maine, Wisconsin, Indiana, Michigan, Mississippi and Minnesota, another exception from the general provision is made in relation to mortgages; and, in Wisconsin, Massachusetts, Michigan, and Vermont, conveyances to husband and wife. While in Rhode Island, on the contrary, conveyances to husband and wife are expressly declared not to be an exception.

(In Ohio, a conveyance to husband and wife jointly, their heirs and assigns and the survivor of them, his or her separate heirs, &c., gives them a joint estate while she lives, and upon her death vests the fee in him. *Lewis v. Baldwin*, 11 Ohio, 252. In Maine, in case of a mortgage to

A and B, if A dies, B is entitled to the mortgage and notes. If A has collected a part of the money, and dies insolvent, B may collect the balance, and retain enough for his own indemnity, as an equal owner. 1 Appl. 430.)

In North Carolina, there is no survivorship between joint tenants, except in the case of partners in business, and here only for the purpose of settling the joint concern. After such settlement, the survivor pays over the balance due, to the representatives of the deceased partner. Ind. Revised Laws, 290; 1 Brev. Dig. 435; *Phelps v. Jepson*, 1 Root, 48, (A. D. 1769); 1 Swift, 104; 1 N. Y. Rev. St. 727; Md. L. 1822, 98; 1 N. J. L. 556; Del. St. 1829, 167; Rev. Sts. 286; Mass. Rev. St. 406; Illin. Rev. L. 130, 474; Misso. St. 119; Aik. Dig. 129; 1 Smith's St. 136-7; Verm. L. 177; R. I. L. 208-9; Purd. 417; 4 Kent, 861; Mich. Rev. St. 258; Ark. Rev. St. 189; Me. Rev. St. 372; Verm. Rev. St. 310; *Kinsley v. Abbott*, 1 Appl. 430; Wisc. Rev. Sts. ch. 56, sec. 44; Ind. Rev. Sts. 201; 1 N. C. Rev. St. 258; Minn. Comp. Sts. c. 82, s. 44; Wood, Cal. Dig. 104; Iowa, Rev. c. 95, s. 2214; Oreg. L. 1855, 519; Kans. Comp. 2, 1862, c. 41, s. 8; Cobb, Geo. Dig. 1851, 293-545; Oldh. & W. Tex. Dig. 245; Thomp. Flori. 191; *Sergeant v. Steinberger*, 2 Ohio, 305.

In Virginia and Kentucky, (1 Vir. Rev. C. 81; 2 Ky. Rev. L. 876-7,) it is provided, that, of whatever kind the estate may be, it shall not pass to survivors, but shall descend, may be devised, and shall be subject to debts, charges, curtesy and dower, and be considered to every other intent and purpose in the same manner as if it had been a tenancy in common.

But it has been held in Kentucky that a conveyance to trustees, in pursuance of a previous statute, and for the benefit of a literary seminary, vests the title in them, and their successors, though not named. *Churchill v. Grundy*, 5 Dana. 99.

and wife are expressly excepted from the general provision of the statute. Rhode Island is the only one in which they are expressly included. But the prevailing rule of American law is, that the case of husband and wife is, *by implication*, not included in the general provisions upon this subject. The reasons for making this exception, equally applicable, it seems, in all the States, are thus stated by the court in Virginia.<sup>1</sup>

§ 8. Though a jointure might be destroyed by various acts, yet, at the common law, there was no mode by which a partition might be compelled. To remedy this inconvenience, the Statutes of 31 and 32 Henry VIII were passed. These speak of *all* joint tenants; but they have never been supposed to reach the case of husband and wife. All the books agree, not only that husband and wife cannot enforce partition, but that they cannot make it even by mutual consent. It is a *sole*, and not a *joint* tenancy. They have no moieties. Each holds the entirety. Notwithstanding any act of the husband, the wife, upon his death, takes the whole; not by *survivorship*, which implies an accession of something not owned before, but by virtue of the original limitation; and, as if the land had been given to them during the lives of both, and, after the death of either, to the survivor alone. The expressions, *jointure*, *joint tenancy*, &c., are indeed often applied to the ownership of husband and wife; but only because these words approach nearer to a description of the estate than any others which could be used without circumlocution. This doctrine is said to have been settled for ages.<sup>2</sup> The law stood thus when the Virginia act was passed, being substantially a copy of the English statutes; and this act must be supposed to have recognized the established principle in relation to husband and wife. Hence, when it provides, that upon the death of *joint tenants*, their share shall not *accrue* to the survivors; the case of husband and wife is not included in this clause, both because they are not joint tenants, and because between them there is nothing which can *accrue* from one to the

<sup>1</sup> Thornton v. Thornton, 8 Rand. 183. Warrington, 2 Hare, 54; Moore v. Moore, See Rain's Outl. 170; Warrington v. 12 B. Mon. 651.

<sup>2</sup> 5 T. R. 652.

other. Nor does the clause, "whether they be such as might have been compelled to make partition or not," vary this construction; because this clause is satisfied by the case of joint tenancy in personal property, or between a man and woman who afterwards intermarry, of which there could be no partition by law; and this application is favored by the mention of executors, &c. So the clause, "of whatever kind the estate holden be," means merely to describe the *quantity* of the estate, as in fee, for life &c.; not the *quality*, which had already been sufficiently expressed by the words *joint tenants*. The words, "if partition be not made" in the parties' lifetime, &c., imply that the case is one where partition *might be made*, which is not the case between husband and wife; not on account of this particular relation, but because each owns the whole estate. The statute intended to prevent the right of the deceased, which might have been disposed of in his life, from accruing to the survivor, and to devolve it upon the representative of the former; not to give a new right to his representatives, which he never had. But a purchaser from the husband would not hold as against the wife. A purchaser from a mere joint tenant would hold against the survivor; and, therefore, there was no necessity to provide for his protection. But if the act applies to husband and wife, the heirs, &c., of the former are provided for, while a purchaser from him is not. This construction would vest in husband and wife new rights, and take away a vested right from the other; and such construction ought not to be given, when another may be, which will only tend to preserve existing rights by repealing a rule of law, which, if unrepealed, might give such rights, in one event, to another.(a)

§ 9. It has been said, that husband and wife holding lands by a conveyance to them must both join in a conveyance; that they are both necessary to make one grantor; and the deed of either

(a) The same principle has been recognized in Kentucky, Massachusetts, Maryland and New York, upon substantially the same grounds. *Ross v. Garri-* son, 1 Dana, 85; *Rogers v. Grider*, Ib. 248; *Shaw v. Hearsey*, 5 Mass. 521; *Craft v. Wilcox*, 1 Gill, 504; *Jackson v. Stevens*, 16 John. 115-6.

without the other is merely void.<sup>1</sup> It is to be observed, however, in qualification of this remark, that the husband, of course, has the same right in the wife's interest, *as husband*, which he has in any other estate belonging to her; and may therefore convey or mortgage it for his own life, (there being children.) But the land cannot be taken upon an execution against him.<sup>2</sup>

§ 10. It has been seen, that the Revised Statutes in Massachusetts except from the general provision in relation to joint tenancy the case of a mortgage made to two or more persons. The former statute upon this subject made no such exception; but yet it was held to exist by implication. Parsons, Ch. J., remarks, "as upon the death of either mortgagee, the remedy to recover the debt would survive, we are of opinion that it was *the intent of the parties*, that the mortgage should comport with that remedy, and for this purpose that the mortgaged estate should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt, which would be clearly repugnant to the intention of the parties."<sup>3</sup> In another case, Jackson, J., assigns as an additional reason, that either of the mortgagees, by releasing the debt, would release the mortgage, and destroy their joint title and estate in the land.<sup>4</sup> But, *after foreclosure*, that which was originally a joint tenancy becomes a tenancy in common. The land is then no longer a pledge, but the title is vested absolutely in the mortgagee. The foreclosure operates as a new purchase. The mortgage is no longer an incident to the debt; nor is it connected with it any more than if the partners had received payment of the debt and laid out the money in the purchase of the land. The entry for condition broken gives them a new and different estate.<sup>5</sup> But it has been doubted whether the same principle could be applied where one of two joint mortgagees dies and the survivor forecloses; for that would be to turn the estate from a trust into a use by the mere act of foreclosure.<sup>6</sup>

<sup>1</sup> Doe v. Howland, 8 Cow. 288.

<sup>2</sup> Barber v. Harris, 15 Wend. 615;  
Jackson v. McConnell, 19 Wend. 175.

<sup>3</sup> Appleton v. Boyd, 7 Mass. 181.

<sup>4</sup> Goodwin v. Richardson, 11 Mass. 472.

<sup>5</sup> Ib. 469.

<sup>6</sup> 8 Mass. 386.



§ 11. In the Circuit Court of the United States, it has been denied that a mortgage given to several persons constitutes them joint tenants. This decision was made under a statute of Rhode Island, which was similar in its terms to that of Massachusetts. Judge Story remarks,<sup>1</sup> "the doctrine (held by Chief Justice Parsons) that a conveyance in mortgage to two persons, as tenants in common, becomes by the death of either no security, except for a moiety, cannot, in my judgment, be maintained in point of law. No authority is cited for it, and it seems to me irreconcilable with established principles. It cannot be deduced from the fact, that the debt vests by survivorship in one party, while the estate would pass to another. For, at the common law, upon the death of the mortgagee, the estate in the land vests in the heir, while the debt vests in the administrator. Upon the like argument, it ought to follow in such case, that by the death of the mortgagee the whole security in the land should be gone; and yet it is well established, that the heir takes the land by descent, subject to redemption, and that the debt belongs to the administrator. So if a mortgage were made to two persons expressly as tenants in common, as security for a joint debt, by the common law they would hold in common; and, upon the death of either, his share would descend to his heir as as tenant in common, and the survivor would hold the other moiety as tenant in common, at the same time that the debt would vest solely in him by survivorship for the purposes of the remedy. So if a sole mortgagee dies, the land descends to his heirs as parceners, while the debt belongs to the administrator. Hence it follows that the estate is still a security for the debt, into whose ever hands it passes." Judge Story proceeds to remark upon the fact, so strikingly opposed to the doctrine which he controverts, and which we have already noticed (ch. 53), that even in England the implication in case of a mortgage to several persons is in favor of a tenancy in common instead of a joint tenancy; thereby constituting an excep-

<sup>1</sup> *Randall v. Phillips*, 8 Mas. 884.

tion to the general rule, directly the reverse of that established by the court in Massachusetts.

§ 12. In the case of *Randall v. Phillips*,<sup>1</sup> already referred to, Judge Story remarks, that, in the eye of a court of equity, it would make no difference, whether the legal estate survived to the surviving mortgagee or not, because he would hold in trust for the representative of the deceased. There seems no reason to doubt that this would be the case at law as well as in equity. There is no pretence that the survivor could retain *the whole debt*. And the very reason for holding to a survivorship in such case is, that the mortgage *follows the debt*.

§ 13. With regard to trustees and executors, although for peculiar reasons they are excepted, in many of the States, from the general statutory provisions; yet, in the absence of any express exception, it has been held, that none will be implied; that survivorship is abolished, as well in regard to trust estates as others.<sup>2(a)</sup>

§ 14. The American statutes, changing joint tenancy into tenancy in common, are almost universally made applicable by their terms to estates previously created, as well as those to be created subsequently. The objection has been raised, that in this particular such statutes are unconstitutional, as affecting rights and interests already vested; but it has always been overruled. It is said, by the Court in Massachusetts, the principle is correct, that the legislature cannot impair the title to estates without the consent of the proprietors, unless for public objects, when an adequate consideration shall be provided. But there can be no objection to the operation of any legislative act retrospectively, which shall enlarge, or otherwise make more valuable the title to any estate; for the consent of the holder may always be presumed to such acts. The new tenure is more beneficial than the old one to all the tenants; inasmuch as a certain inheritance

<sup>1</sup> 3 Mas. 887.

<sup>2</sup> *Saunders v. Morrison*, 7 Mon. 54.  
See *Benedict v. Morse*, 10 Met. 228.

(a) A conveyance to two persons, provided they pay the grantor's debts, creates a condition, not a trust. Hence, they

are tenants in common. *Lamb v. Clark*, 8 Wms. 278. —

in a moiety, is more valuable than an uncertain right of succession to the whole. More especially is this principle to be applied, where both tenants have, by their acts, manifested an implied assent to the operation of the statute; as where each has brought a separate writ of entry for his undivided moiety against a stranger.<sup>1</sup>

§ 15. The same principle has been recognized in Pennsylvania. The court remark as follows:—The doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings when known, that it was thought best to get rid of it at once. The courts had been long struggling against it, but were unable, without a dangerous prostration of established principles, to go as far as they wished. The aid of the legislature was therefore necessary. The operation of the act is no invasion of vested rights. Who should be the survivor, was in contingency; and in the meantime either joint tenant might have severed the estate by legal means without the other's consent. The act of assembly did for them at once, and without expense, (that) which ninety-nine in a hundred wished to be done. But if there were any joint tenants who desired the chance of survivorship, they might have it by an agreement for that purpose. By putting a limitation on the plain words of the law, we should do an irreparable injury to many, who, reading the words as they are written, have supposed a partition unnecessary, and therefore have died without effecting it. The act deprived no man of his property; but only placed the parties on an equal and sure footing, leaving nothing to chance.<sup>2</sup>

§ 16. Upon the same principle, in New Hampshire, where the demandants in a real action were joint tenants when it was commenced, and afterwards, by operation of law, became tenants in common; held, this change of title was no defence to the action.<sup>3</sup>

§ 17. In the statutes of some States upon this subject, a proviso is inserted, that they shall not affect estates already vested by survivorship. This would seem to be a superfluous caution;

<sup>1</sup> *Miller v. Miller*, 16 Mass. 61; *Holbrook v. Finney*, 4, 568; *Annable v. Patch*, 8 Pick. 868.

<sup>2</sup> *Bombaugh v. Bombaugh*, 11 Ser. & R. 192.

<sup>3</sup> *Hills v. Doe*, 6 N. H. 828.

for the constitutional objection, already referred to, would undoubtedly prevent any such application of the statutory provisions.<sup>1</sup>

§ 18. Independently of statutory provisions, it has been held in Massachusetts,<sup>2</sup> that a grant of land *by the legislature* to several persons created a tenancy in common, and not a joint tenancy, though the words used, if a private person were the grantor, would create the latter estate. It is said, a grant by the legislature is a *statute conveyance*, and the intent of the legislature in passing the resolution must govern. Most of the public lands, which were alienated by the late province, and also by the commonwealth, were passed by virtue of acts or resolutions of the legislature. Generally, the lands were granted in large parcels, to a great number of grantees, on condition of settlement, and for the purpose of forming towns. These grants have invariably, from the earliest settlement of the country, been held to create tenancies in common. From long use, the practice has acquired the force of law; and a decision repugnant to it would produce infinite confusion, and affect very many titles to land in the State. More especially is this construction to be given, where the legislative grant is made to certain persons upon their petition, as, to the heirs of one who had before his death taken possession of the land. *As heirs*, they would not have taken in joint tenancy, and it cannot be presumed that the legislature intended they should so take *as grantees*.

§ 19. So it has been held in New York, that, where several patentees pay equal shares of the purchase-money, and execute deeds among themselves, which recite that they purchase as tenants in common; such tenancy is created, although the patent is made to them jointly. This case, however, was decided rather on the ground of a trust, than upon that of a grant from the State.<sup>3</sup>

§ 20. The same doctrine has been recognized in Vermont. Thus, in the year 1781, the State granted a charter of a township to several persons, reserving one seventieth part for the use of

<sup>1</sup> 11 Ser. & R. 198; 8 Pick. 863  
<sup>2</sup> Higbee v. Rice, 5 Mass. 850.

<sup>3</sup> Cuyler v. Bradt, 2 Caines, Cas in Err. 326.

a seminary or college. The proprietors did not divide or assert their title to the lands, and the whole were occupied and settled by other persons. A college being afterwards instituted, the trustees were empowered to take possession of the lands reserved, and they brought an action for them against one who had for thirty-eight years adversely occupied. The question arose, whether proprietors of lands, constituting towns, were to be regarded as tenants in common. In answer to the objections, that such proprietors may do many things *by vote*—as making a division of their lands into severalty, voting to settlers the lots on which they live, in lieu of their drafts, and authorizing a division *by pitches*; and may gain a title by the statute of limitations, and that their possessions are considered as several: the court remark, that such proprietors are strictly tenants in common, and, where they differ from ordinary tenants in common, the difference has been created either by statute or by a course of decisions in our courts of law. In the grants of charters, certain civil and political corporate privileges are given to those who inhabit the township, but not to the proprietors, who may be wholly distinct from the former. Grants in this country have always been construed to create tenancies in common, which in England would make joint tenancies. Unless the proprietors take an estate in common, it is difficult to define the nature of their interest.<sup>1</sup>

§ 21. But it has been held in Kentucky, that, where a grant by the commonwealth was made to two persons, and one of them died before a patent was issued, (previously to the statute abolishing survivorship,) the survivor took the whole estate both in law and in equity.<sup>2(a)</sup>

§ 22. The estate of a tenant in common is subject to the same

<sup>1</sup> University, &c. v. Reynolds, 8 Verm. 548.

<sup>2</sup> Overton v. Lacy, 6 Mon. 15.

(a) It has been held, in Massachusetts, that persons joining in a disseisin are joint tenants. Hence if one of them died seised, after peaceable possession for five years, no descent is cast, and the disseisee still retains his right of entry. Putney v. Dresser, 2 Met. 588.

And, if one of the disseisors, in possession of land as tenants in common, abandon it, the rightful owner does not receive the benefit of such abandonment, but, as against him, the other disseisor holds the whole. Allen v. Holton, 20 Pick. 458.

dispositions, incidents and charges, as an estate owned in severalty. Thus it has already been seen, (see *Dower*,) that the widow of a tenant in common has *dower*, subject, however, to the qualification, that, if partition has been made after marriage, her claim shall be restricted to that portion of the land which is allotted to the husband.<sup>1</sup> So an estate in common is subject to *curtesy*; and the possession of one tenant in common is regarded as so far that of the other, that the husband of the latter shall be tenant by the curtesy.<sup>2</sup>

§ 23. An estate in common passes to *heirs*; and it has been seen, that this is one principal point of distinction between this estate and a joint tenancy.

§ 24. It is to be observed, however, that the transmission of an estate in common, to any party claiming under one of the tenants, passes nothing more than *the undivided interest* of such tenant, and has no effect to make a *severance* of the estate. Thus, unless otherwise expressly provided, the widow can claim for her dower only an undivided third of her husband's interest. (a) Upon the same principle, a tenant in common may convey his estate to a third person, and the latter will hold in connection with the remaining tenant, merely taking the place in all respects of the grantor. But a tenant in common cannot convey any distinct portion of the land by metes and bounds. (b) Thus, in Massachusetts, where one of two joint tenants, after a parol partition which was held void, conveyed a part of the land by metes and bounds to a stranger; held, the entry of the latter gave him no seisin, but he was a mere several occupant;

<sup>1</sup> *Sutton v. Rolfe*, 8 Lev. 84; Co. Lit. 84 b, 87 b.

<sup>2</sup> *Sterling v. Penlington*, 14 Vin. Abr. 511.

But in a later case it is doubted, whether joint disseisors, entering without title, or color of title, are joint tenants, or tenants in common. *Fowler v. Thayer*, 4 Cush. 111.

(a) Where one tenant in common conveys his interest without release of dower to the other; the widow of the former may by writ of dower against the latter have her dower set out by metes and bounds. *Blossom v. Blossom*, 9 Allen, 254.

(b) While, with regard to parties claiming an interest in the estate *after the death* of the tenant, joint tenancy and tenancy in common are governed by different rules; the principles which regulate the transfer of them during his life, either by his own act or act of law, are substantially the same, and therefore the following remarks may be received as alike applicable to both estates.

that he could not be considered as a disseisor of the grantor, as he entered by his consent; nor of the other joint tenant, because one joint tenant cannot be disseised by a stranger of any particular part, unless all are disseised.<sup>1</sup> In a subsequent case, Jackson, J., goes into a more minute examination of the law upon this subject. It is a general principle, that one joint tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold; although, as to the profits of the freehold, as the receipt of rent, &c., the acts of one may prejudice the other. But a conveyance by metes and bounds by one tenant, would, in many cases, tend to the prejudice and even to the destruction of the interest of the other. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would, on a partition, be compelled to take perhaps ten or twenty differ parcels interspersed over the whole tract, and separated by the parts allotted to the several grantees. Suppose that two men hold, jointly or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land; the other original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one house lot, to which he was originally entitled as against the grantor. The restraint upon such conveyance by one co-tenant, and not the privilege of making it, is to be considered as a necessary incident to the estate. Each tenant was originally entitled to ~~one~~ moiety, for quantity and quality, to be assigned to him in the modes pointed out by law; and this right, on the part of one, cannot be impaired by a separate act of the other. If one co-tenant has the right to convey a part of the land, the others of course have the same. Suppose then that three or more persons hold in common a township of wild land, and that each, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different pur-

<sup>1</sup> Porter v. Hill, 9 Mass. 84; acc. Smith v. Brightman, 21 Pick. 285; Jeffers v. Radcliff, 10 N. H. 242. v. Benson, 9 Verm. 188; Blossom v.



chasers. As the lines of the lots would perhaps never coincide, a partition among the several grantees would be very difficult and inconvenient; and, in case of a large number of owners, perhaps impossible. While the right in question may be thus injurious, the restraint upon it can rarely if ever be so. Thus, if one of two co-tenants of forty acres wishes to sell ten, he may convey one undivided fourth of the whole, and the grantee may obtain partition by legal process. And this he must have done, if the conveyance had been of a moiety of twenty acres taken out of the forty. There is, therefore, no additional trouble or expense, and the only difference is, that the grantor is prevented from selecting any particular part of the land, from which the grantee shall take his share; which is a right he could never claim himself, while he continued the owner of the whole moiety.<sup>1(a)</sup> So, in a case decided in Connecticut,<sup>2</sup> Hosmer, Ch. J., remarks, in regard to the objection, that upon partition the whole of that portion of the land which is conveyed might be assigned to the co-tenant; that it is no answer to this objection, that the purchaser on partition might have an equivalent share in other portions of the land assigned to him; for in these he has no interest, and a partition, being a mere distribution and not a conveyance, is founded on an antecedent estate, and cannot communicate any new right. Upon the same principle, the levy of an execution against one tenant in common, &c., upon any designated portion of the land, is void; it being the general rule, that an execution can be extended upon such property only as the debtor might legally convey.<sup>3(b)</sup>

<sup>1</sup> Bartlett v. Harlow, 12 Mass. 349.

<sup>2</sup> Mitchell v. Hazen, 4 Conn. 510.

<sup>3</sup> Bartlett v. Harlow, 12 Mass. 348;

Baldwin v. Whiting, 13, 57; Webber v. Mallett, 4 Shepl. 88; Slainford v. Fullerton, 6, 229.

(a) A deed by tenant in common of "sixty-four rods, being part of the lot in question, passes no title in common, nor in severalty, without possession taken of the part claimed. Phillips v. Tudor, 10 Gray, 78.

(b) But, in New Hampshire, it is provided by statute, (Rev. St. 393,) that an execution may be levied, after appraisal, upon the undivided interest of the debtor, he being a tenant in common, or a

part thereof. If indivisible, upon his undivided interest, or by such division as the appraisers may think best. Similar provision in Maine. Rev. St. 384. See Thompson v. Barber, 12 N. H. 563; Blewins v. Baker, 11 Ired. 201; Barnes' &c. 46 Penn. 350.

One tenant is not bound to assert his title, by objecting to an unlawful conveyance by his co-tenant. U. S. Dig. 1852.

§ 25. The principle above stated, imposing a restraint upon one tenant in common, &c., in regard to his power of alienation, is therefore applied not merely to a conveyance of a certain portion of the whole land by metes and bounds, but also to a conveyance of his whole undivided interest in a certain portion of the lands designated by metes and bounds. Thus, supposing A. and B. to be tenants in common of twenty acres; in the first place, A cannot convey to a stranger one of those acres by metes and bounds, so as to bind the co-tenant; and, in the second place, he cannot convey all his undivided interest in one acre, designating it by metes and bounds, so as to bind his co-tenant. The rule, as generally stated by the elementary writers, would seem literally applicable to the former alone of these cases. Thus, Chancellor Kent says,<sup>1</sup> "one joint tenant, &c., cannot convey a *distinct portion of the estate by metes and bounds*," &c. But most of the decisions do not fall within these terms; for, instead of attempting to convey *the whole* of any specific portion of the lands, the tenant conveys, or his creditors take upon execution, only his *undivided interest* in a specific portion. And the reasoning of the court seems to make no distinction between the two cases. Thus, in *Bartlett v. Harlow*, (s. 24,) the execution was levied upon an undivided interest in a specific portion of the land designated by metes and bounds; and the remarks of Judge Jackson, already cited, have a particular application to these circumstances. So, in *Baldwin v. Whiting*,<sup>2</sup> the execution was levied upon *three undivided fourth parts of a specific part of the land*, owned by the debtor in common with others. But although there would seem, at first sight, to be a distinction between the two forms of alienation referred to, yet on principle they rest on the same ground. The true meaning of the gene-

<sup>1</sup> 4 Comm. 368.

<sup>2</sup> 18 Mass. 57.

So notice of a conveyance, by one tenant, of a part of the lands in severalty, will not prevent a party from purchasing the share of the other in the whole of the estate. Mere notice of an invalid conveyance cannot make it good. *Ib.*

Conveyance to A and B, as tenants in common. The interest of A

was levied on and sold to C, under a judgment recovered against him prior to the deed. Held, B could not, as against C, show that the deed was intended to operate only as a mortgage for a loan made by A to B. *Campbell v. Lowe*, 9 Md. 500.

ral proposition, that one tenant in common, &c., cannot convey by metes and bounds, is, not that he cannot convey his *co-tenant's share* in a designated portion of the land, or, by his own single act, without consent of the other party, *make severance or partition*, for this seems to be taken for granted; but that a conveyance of the whole estate in a part of the land will not pass *even his own share*. Thus, in *Porter v. Hill*, (s. 24,) Judge Sewall says, "one joint tenant cannot convey a part of the land by metes and bounds to a stranger. If he could, *his grantee would become tenant in common of a particular part with the other joint tenant*, who, in making a legal partition, might, notwithstanding, have the whole of the part thus conveyed, assigned as his purparty." Upon this principle, such grantee not only could not maintain a *real action* for the whole land, but he could not bring a *suit for partition*, claiming only a moiety; and it is in the latter form that the point has often been settled. In *Mitchell v. Hazen*, a case already cited, (s. 24,) the conveyance purported to pass only an undivided interest. In a later case,<sup>1</sup> in the same State, the deed purported to convey *so much land*, generally, by metes and bounds, making no reference to any undivided interest; and the remark of the court, in deciding the deed to be void, that it was an attempt *to make a partition of the property*, would seem directed against the claim that *the whole title* in the land conveyed passed by the deed. So, in a case in Tennessee,<sup>2</sup> where the same point was decided, the deed purported to convey the whole of a certain part of the land by metes and bounds. On the whole, it may be laid down as the true construction of the general proposition referred to, that the objection does not stand upon the form of a conveyance, purporting to pass the whole land; but equally precludes the tenant from conveying his own undivided interest in a part of the land, by a deed which purports to convey nothing more.

§ 26. It is to be observed, that an alienation of the interest of one joint tenant, &c., either by deed or by legal process, is not for all purposes void; but will operate against him and all

<sup>1</sup> *Griswold v. Johnson*, 5 Conn. 868.

<sup>2</sup> *Jewett v. Stockton*, 3 Yerg. 492.

claiming under him *by estoppel*, whether he had notice or not, and can be avoided only by the co-tenant who is injured, or those claiming under him. The assignees of the latter have in this respect all the rights of their assignor. By the assignment, all his interest passes to them, without any entry upon the land. With regard to one claiming under the tenant whose share is alienated, if he also derive a regular title from the co-tenant, perhaps he might be allowed to waive his claim under the former, and avoid the alienation by setting up his title under the latter.<sup>1(a)</sup>

§ 27. Although a tenant in common cannot alienate absolutely his share in a part of the land, yet it has been held, that, where such tenant has been allowed to improve separately a certain portion of the land, he might *lease* this portion to a stranger, and the latter maintain an action for any disturbance by the other tenants.<sup>2</sup> And a lease for a term of years, by a tenant in common, of his interest in the estate held in common, makes the lessee, who takes possession under the lease, and receives the rents and profits, a co-tenant with the other tenants in common, and as such liable to account to them.<sup>3(b)</sup>

<sup>1</sup> Holcomb v. Coryell, 8 Stockt. 548; Varnum v. Abbot, 12 Mass. 474; Baldwin v. Whiting, 18, 57; U. S. Dig. 1852, 14; Howe v. Blanden, 21 Verm. 315.

<sup>2</sup> Keay v. Goodwin, 16 Mass. 1. See Maul v. Rider, 51 Penn. 377; Hayden v. Patterson, Ib. 261.

<sup>3</sup> Barnum v. Landon. 24 Conn. 137.

(a) It has been held in Ohio, by a majority of the court, that a tenant in common might lawfully convey a part of his undivided estate by metes and bounds. but it was admitted that the point was attended with considerable difficulty, for the reasons above referred to. Judge Burnet dissented. Lessee v. Sayre, 2 Ohio, 110; acc. Prentice, &c. 7 Ohio, 129. The general rule is adopted in Tennessee; 3 Yerg. 492; but seems not to be in Maryland; Reinicker v. Smith, 2 Har. & J. 421. It has been held that a deed by one tenant of a certain number of acres in common, which is less than the whole share, is not void for uncertainty. U. S. Dig. 1852. The levy of an execution upon an undivided portion of a farm, such part being specified by metes and bounds, the whole of which farm was holden by the debtor as tenant in common, will, it seems, be valid, until the other

co-tenant has obtained partition, and ousted the creditor from the part so levied upon; and therefore an action cannot be maintained to recover the amount of the judgment satisfied by the levy, until the creditor has been ousted of some part of the land. Godwin v. Gregg, 28 Maine, 128.

In Massachusetts, by the Revised Statutes, where the whole interest of a tenant in common is more than sufficient to satisfy an execution against him, it shall be levied upon an undivided portion of that interest, sufficient, according to appraisement, to satisfy the execution, Mass. Rev. St. 464. See Gen. Sts.

(b) But one tenant cannot legally authorize a third person to cut timber, for the consideration of *the stumpage*. Baker v. Whiting, 8 Sumn. 476.

Where one tenant himself becomes

§ 28. At common law, one joint tenant in common had no remedy against another for the rents of the estate, except by charging him, under an express contract, as a bailiff or receiver. Statute 4 and 5 Anne, c. 16, gave an action of account in such case. This statute is re-enacted in New York, and Chancellor Kent presumes that it has been introduced in substance into the general law of this country.<sup>1</sup>(a) In Massachusetts,<sup>2</sup> the action of account is abolished. But a bill in equity lies in all cases. So assumpsit, on a promise by one tenant to another to pay the latter his share of rent received from a tenant. So also an action of *indebitatus assumpsit* lies by one joint tenant, &c., against another, who has actually received more than his share of the profits.(b) But, unless he has thus received an undue proportion, he is not liable to an action merely upon the ground of sole occupancy, where the co-tenant has made no claim to possession; for, if he were, as each tenant is seised *per my et per tout*, he would be liable

<sup>1</sup> 4 Kent, 869; McKim v. Odom, 8 Bland, 411.

<sup>2</sup> Mass. Rev. St. 500, 695; Brigham v. Eveleth, 9 Mass. 538; 9 Pick. 34. See McMurray v. Rawson, 3 Hill, 59.

lessee, there is no *merger*. Spencer v. Austin, 88 Verm. 258.

Where two tenants in common lease at will, one of them with a conditional limitation; when this takes effect, he may expel the lessee. Ashley v. Warner, 11 Gray, 43.

One tenant in common, who has leased to another, cannot maintain an action for use and occupation subsequent to the termination of the lease. Dresser v. Dresser, 40 Barb 300.

The landlord and tenant process does not lie by one tenant in common against a lessee of the other; more especially upon a notice to quit the whole. King v. Dickerman, 11 Gray, 480.

(a) Similar acts have been passed in Virginia, New Jersey, Mississippi, Vermont and Rhode Island. 1 N. J. L. 156; Missi. Rev. C. 117; Verm. L. 142; R. I. L. 198; 1 Vir. R. C. 111. See Izard v. Bodine, 3 Stockt. 408.

In Connecticut, (Conn. St. 86,) the action of account is provided between joint tenants, &c.; except in cases where

two or more are sued by one, when a bill in equity must be brought.

(b) So in New York, 1 Rev. St. 750. Otherwise in Tennessee, 2 Yerg. 384. In Delaware, one tenant may bring an action for *use and occupation* against another. Rev. St. 286. A tenant in common who agrees with the wife of his co-tenant, that the co-tenant shall have the sole occupation of the land, and pay him a certain sum therefor; cannot maintain an action for such occupation, if he does not prove that the co-tenant had actual knowledge of such agreement, or that he authorized his wife to make it. Wilbur v. Wilbur, 18 Met. 494.

In Maine, under the act of 1848, c. 61, s. 1, one co-tenant cannot maintain assumpsit against another for a share of the profits, without alleging and proving that the defendant has taken more than his share, without the plaintiff's consent. Moses v. Ross, 41 Maine, 360.

In Georgia, one tenant, who receives all the proceeds of a gold mine, is liable to another. Huff v. McDonald, 22 Geo. 181.

in the same way, by reason of occupying any particular part of the land, which would be unreasonable and absurd.<sup>1</sup>(a)

<sup>1</sup> *Hodges v. Pingree*, 10 Gray, 14; *Sargent v. Parsons*, 12 Mass. 149; *Brinsmaid v. Mayo*, 9 Verm. 81; *Gillis v. Mc-*

*Kinney*, 6 W. & Serg. 78. See *Dyer v. Wilbur*, 48 Maine, 287.

(a) Profits received by one tenant give the other an *equitable lien* upon the land. The claim is *personal* on both sides, to be paid from the personal estate of the former, and to the personal representative of the latter, not to his heir, devisee or grantee. 4 Paige, 886.

It seems, one tenant is liable to another, for his share of the expense of necessary repair made by the latter. *Gibbons*, 101. See *Schrenen v. Joyner*, 1 Hill, Cha. 260.

It is said one joint tenant, &c., can compel the others to unite in the expense of necessary repairs to a house or mill; but not of repairs made upon other things—as, for instance, a fence. The writ *de reparatione facienda* lay at common law in such cases, by one tenant against others. To sustain the action, there must be a request and refusal to join, and the expenditures must have been previously made. 4 Kent, 869-70; 9 Pick. 81.

See *Wiggin v. Wiggin*, 48 N. H. 561, (that one is not liable to another for repairs.) Where A, owning a chamber, repairs the roof of the house, he cannot claim contribution from B, the owner of the cellar, because, in view of the law, they own distinct dwellings. *Loring v. Bacon*, 4 Mass. 575. See *Cheesborough v. Green*, 10 Conn. 818. It has been held, that one tenant in common without express agreement cannot charge another on account of buildings or improvements placed upon the land by him. *Thurston v. Dickinson*, 2 Rich. Equ. 817; *Taylor v. Baldwin*, 10 Barb. 582. See *infra*. But also, that one tenant is not liable for such part of the rent which the premises would produce, as arises from such improvements. *Thompson v. Bostick*, 1 McMul. 75; *Hancock v. Day*, *Ib.* 69, 298; *Holt v. Robertson*, *Ib.* 475.

If one tenant make or authorize *new erections*, though with the knowledge of the other, he cannot claim and hold them exclusively till reimbursed. *Crest v. Jack*, 3 Watts, 288.

A and B, owners on opposite sides of a river, having agreed in writing to build and keep in repair a dam, the mill and interest of A was sold to C, under execution

upon a judgment prior to the agreement. Held, though the covenants in the agreement did not strictly run with the land, yet the assent of C, who continued to use the dam, and of B, kept alive the covenants, and bound C by an implied promise to pay his proportion for repairs. *Campbell v. Hand*, 49 Penn. 284.

Where one tenant expends money in improvements, although such expenditures do not strictly constitute a lien, yet a court of equity, in making partition, will first direct an account and suitable compensation, or assign to such tenant or his grantee the portion on which the improvements have been made. *Green v. Putnam*, 1 Barb. 500; acc. *Peyton v. Smith*, 2 Dev. & B. 849. It is not necessary for him to show an assent to his making them, by his co-tenants, or a promise by them to contribute towards the expenses, or a request on them to join in making them, and a refusal. *Ib.*

Where there were two tenants in common, and a third person obtained a deed covering the share of one, and, supposing he was acquiring a good title thereto, entered into possession of the entire premises and made improvements, and subsequently the other tenant brought ejectment against him for his share, and recovered; held, he was entitled to recover against the plaintiff in ejectment, the amount which the share of the land thus recovered had been improved by the betterments upon the entire tract. *Strong v. Hunt*, 20 Verm. 614.

In South Carolina, if one tenant in common buy in an outstanding title, he may claim contribution, on the ground, that in equity it enures to the benefit of both, and he cannot claim it for himself alone. *Field v. Pelot*, 1 McMul. 870.

A and B were tenants in common of an estate, for which B had paid his share of the purchase-money, and which they divided by partition. A died, and his heirs agreed that his widow should retain possession of A's part, which B afterwards leased from her. The former owner brought ejectment against B for A's part of the purchase money, which B paid. Held, he could hold the land as security for re-payment of the pur-



§ 29. It is said, that, if there be two tenants in common of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other may have an action of trespass against him. So, if one of two tenants in common of a park destroy all the deer. So where there are tenants in common of a mill and privilege, one may maintain trespass against another for the destruction of the mill. So where A and B own a mill, and B another below, and B builds a dam whereby the water is made to flow back upon the former mill; A may bring an action against B. So it is said, if there be two tenants in common of a dwelling house, and they severally furnish and occupy different apartments, one co-tenant has no right to disturb the other's occupation by removing his furniture; and trespass would clearly lie for such removal.<sup>1</sup>(a)

<sup>1</sup> Co. Lit. 200 a; Maddox v. Goddard, 8 Shepl. 218; Odiorne v. Lyford, 9 N. H. 586; Keay v. Goodwin, 16 Mass. 8.

chase money, but for no other debt, against the heirs of A. Leitch v. Little, 2 Harris, 250.

One tenant in common may redeem land sold for taxes. Watkins v. Eaton, 30 Maine, 529.

After redemption and release to him from the purchaser, a tender made by his co-tenant to the purchaser of his own proportion of the tax and expenses, though made within the time allowed by law for redeeming, is of no effect. Ib.

If one tenant redeem land sold for taxes, his co-tenant cannot maintain a writ of entry against him for his share of the land, without a previous tender of his share of the amount for which the land was sold. Ib.

It has been held in Kentucky, that, where a suit is brought to recover land from several tenants, and only one of them permanently resists it, and finally prevails; he has a lien against the rest for costs and expenses. Shepherd v. McIntire, 5 Dana, 576.

There is a peculiar provision in Virginia, that joint tenants &c. may give a single *joint vote*, where the whole estate entitles to a vote, but a share does not. Virg. Sts. 1830, 16, 17

(a) In Maine, one tenant in common may have trespass against another who prevents him from entering or occupying the land. Maine L. 1887, 442.

In the same State, if one tenant commit waste, without forty days' notice to the other, he is liable to treble damages in trespass. In Massachusetts and Michigan, there shall be thirty days' notice. The same penalty, for waste committed pending a process for partition. In North Carolina, one tenant may have an action on the case for waste against another, but not trespass, either against him or one claiming under him. In New Hampshire, one tenant may bring assumpsit for trees or other property injured by the other, or for keeping him out of possession. 1 Smith's St. 137-8; Mass. Rev. St. 680; Anders v. Meredith, 4 Dev. & B. 199; (see Causee v. Anders, Ib. 246;) Mich. Rev. St. 497; N. H. Rev. St. 858; Hubbard v. Hubbard, 8 Shepl. 198; Moody v. Moody, Ib. 205.

In Vermont, one tenant in common cannot maintain trespass against another, unless actually expelled, or hindered from occupying. Booth v. Adams, 11 Verm. 156. So in Pennsylvania, where a tenant in common of land is actually ousted by a co-tenant, he may maintain trespass *quare clausum*. McGill v. Ash, 7 Barr, 397. It is no defence, to admit the right of the plaintiff, and offer to account. Ib. See Filbert v. Hoff, 42 Penn. 97.

In Illinois a statute provides, that for assuming and exercising exclusive ownership, taking away or destroying the



§ 30. It was held in an ancient case, that, if there be two tenants in common of a wood, and the one leases his part to the other for years, if the lessee cuts down trees and does waste, he will be punished for a moiety of the waste, and the lessor may recover a moiety of the place wasted.<sup>1</sup> But this doctrine seems to have been overruled in a subsequent case,<sup>2</sup> in which it was held, that such lessee cannot be regarded as standing in a less favorable light than he would have stood if no lease had been made; that, if one tenant in common misuse the common property, he is liable for a misfeasance, but some injury must be done to the inheritance, as by cutting trees which are unfit to be felled. Otherwise he does nothing more than take the fair profits of the estate. In this case, the trees were proper to be cut, and, upon this ground, it was distinguished by counsel from the case in Moore above referred to.(a)

<sup>1</sup> 2 Cruise, 856; Moo. 71, pl. 194.

<sup>2</sup> Martin v. Knowllys, 8 T. R. 145.

common property, lessening its value, injuring or abusing it; one tenant in common, &c., may have trespass or trover against another. Illin. Rev. L. 474.

(a) In many of the States, a remedy has been given by statute for one tenant in common against another, who commits waste upon the common property.

As to the remedy in Massachusetts and Maine, see *supra*. In Michigan and California—the statutes of those States.

In New Jersey, when several hold lands together, and none knows his or their several part, one may have a writ of waste against another; and, when the suit comes to judgment, the defendant shall be required to take a certain part of the land to be assigned by the sheriff and jury, or give security that he will take nothing more from the land than the other tenants take. If the defendant elect to take his part in a certain place, an assignment shall be made to him in the place wasted, making no allowance for the waste done; but, if he does not thus elect, or if the amount of waste exceed the value of his proportion of the land, the plaintiff shall recover damages.

In Rhode Island, a tenant in common, &c., who commits waste, forfeits double the amount of the waste committed.

A remedy is provided in New York.—2 Rev. St. 834; Ehwell v. Burnside, 44

Barb. 447; and Delaware.—Rev. Sts. 288. In Kentucky, it seems to be limited to parceners. 1 Ky. R. L. 562. So in Ohio. St. 1881, 258. Waste may be prevented by an injunction in equity. Twort v. Twort, 16 Ves. 128. If the property is destroyed by the negligence of one tenant, he is responsible to the others. Chelsey v. Thompson, 8 N. H. 9. See Durham, &c. v. Wawn, 8 Beav. 119; Maden v. Veevers, 5, 608. Although, in special cases, one tenant in common may, on the application of the other, be enjoined from committing waste; the jurisdiction is sparingly exercised. Obert v. Obert, 1 Halst. Ch. 897.

A tenant of land may maintain assumpsit against a co-tenant, under the statute of New Hampshire, passed July 5, 1884, (entitled "An act relating to co-partners, co-parceners," &c.,) for his proportion of damages caused by cutting, although the plaintiff has alienated his interest in the land, after the cutting, but before the action was commenced. Blake v. Milliken, 14 N. H. 218.

Nor is it necessary that all the co-tenants at the time of the injury should join in the action; but each co-tenant may have his several action. *Ib.*

But it seems that they may join. *Ib.*

It seems, that it is not necessary in such an action to prove an actual title in

§ 31. In general, the possession of one joint tenant &c., is that of all; that is, not *adverse* to the title of the others, constituting a bar to an action under the statute of limitations; but *amicable* and in support of the rights of all. "Where one of several heirs enters or remains in possession of land at the death of the ancestor, the law presumes that he entered, not to abate the shares of his brothers and sisters, but to preserve them for their use, and his entry being consequently theirs, no mere lapse of time will countervail the presumption and give him title in severalty."<sup>1</sup>(a)

§ 32. The giving up, by a disseisor, to one tenant, of all his share in the land, reinstates all in their title.<sup>2</sup> So an entry by one, though upon part of the land.<sup>3</sup>

<sup>1</sup> Per Woodward, J. *Tulloch v. Worrall*, 49 Penn. 140. See *Ewer v. Lovell*, 9 Gray, 276.

<sup>2</sup> *Vaughan v. Bacon*, 8 Shepl. 455.

<sup>3</sup> *Thomas v. Hatch*, 8 Sumn. 170. See

*Gilman v. Stetson*, 6 Shepl. 428; *Cresswell v. Altemus*, 7 Watts, 565; *Watson v. Gregg*, 10 Ib. 296; *Hart v. Gregg*, Ib. 189

the defendant. His entry, claiming title, is sufficient evidence to make a *prima facie* case against him. Ib.

Nor, it seems, could the fact that the plaintiff's grantors, before conveying to him, cut more than their proportion of timber, in any way affect his right to maintain the action. Ib.

On a bill for partition, by a tenant in common, owning a twentieth part of a farm of 200 acres, an injunction was granted against the tenant in common, in possession, restraining him from cutting timber. The answer of the defendant showed, that he was the owner of eight twentieths, that he had made improvements to the amount of \$2,000, and that he only intended to cut the wood and timber from two acres near the barn, which he had commenced doing when the injunction was served; and he denied all intention to commit waste. The injunction was dissolved. *Obert v. Obert*, 1 Halst. Ch. 897. ¶

As to injuries by tenants in common, and the liability of one for another; see *Simpson v. Seavey*, 8 Greenl. 188. See also 1 N. J. L. 209; R. I. L. 199; Rev. Sts. ch. 204, s. 2; Mis. Rev. Sts. c. 94, s. 42; Va. Sts. 1849, c. 187; Ky. Rev. Sts. c. 56, art. 8, s. 7; Ind. Ib. 2, 174; Iowa Rev. C. 149; Min. Comp. Sts. c. 64, s. 10.

Tenants in common for life are liable to the reversioner or remainder-man for an injury to the inheritance by a part of them or by a stranger, and, having satisfied this liability, may recover over against the wrong-doer; but, until such satisfaction, can recover only for the injury to their possession. *Wood v. Griffin*, 46 N. H. 280.

(a) The plaintiffs in ejectment claimed as devisees of one who with his brothers and sisters had inherited the land from their mother, to whom it was said to have descended, and who took possession and held for over forty years. The defendants claimed as devisees in remainder of the father, who survived his wife for many years, and who, claiming the land, had devised it to the above named deviser for life, with the remainder to them. Held, the mere acquiescence of the mother's heirs in the long possession of their brother would not bar their right to recover, nor be such a recognition and treatment of the title as coming from the father, as to estop them from setting it up under their mother; therefore it was error to submit the question of the treatment of the property to the jury, with instructions to find for the defendants, in case it had been treated as above stated. *Tulloch v. Worrall*, 49 Penn. 188.

§ 33. Though a great lapse of time, with other circumstances, may warrant the presumption of a disseisin; it is merely evidence for the jury.<sup>1</sup> Thus one tenant in common died, being indebted to his co-tenants, and appearing to be insolvent. The co-tenants and their representatives paid taxes and ground rent, for nearly forty years, erected buildings at divers times, received the profits and mortgaged the property. Held, on the question whether these facts constituted an ouster of the heirs of the deceased, that it was for the jury, being sufficient to justify a finding of ouster.<sup>2</sup>

§ 34. Where one tenant received all the rents for twenty-six years, this was held a mere failure to account, not an ouster or expulsion.<sup>3</sup>

§ 35. It has been held in England, that, where one tenant levied a fine of the whole estate, and took the rents and profits afterwards without account for nearly five years; this was no evidence upon which the jury should find an ouster at the time of the fine, against justice, and in aid of gross fraud; that the fine was no ouster, but the court might consider it as rightfully and legally made, and intended to operate only on the party's own share.<sup>4</sup>

§ 36. A *demand of possession*, in order to furnish evidence of ouster, must be a demand only of the party's share, not the whole land.<sup>5</sup>

§ 37. If the tenant, on being notified by the demandant of his claim to be owner of one-fourth part of the estate, merely admits that he is in possession, and adds, "it is hard to pay twice;" this is not evidence of an ouster or disseisin.<sup>6</sup>

§ 38. A mortgage, by one tenant in common, of the whole estate, is not conclusive evidence of an ouster of the others.<sup>7</sup>

§ 39. One tenant cannot, by the purchase of an outstanding title or incumbrance, acquire title to the whole against the other. The purchase inures to the benefit of both.<sup>8</sup> So one heir can-

<sup>1</sup> Purcell v. Wilson, 4 Gratt. 16.

<sup>2</sup> Keyser v. Evans, 30 Penn. 507.

<sup>3</sup> Fairclaim v. Shackleton, 5 Burr. 2604.

<sup>4</sup> Peaceable v. Reed, 1 E. 568.

<sup>5</sup> Meredith v. Andres, 7 Ired. 5.

<sup>6</sup> Colburn v. Mason, 25 Maine, 434.

<sup>7</sup> Wilson v. Collishaw, 1 Harr. 276.

<sup>8</sup> Jones v. Stanton, 11 Mis. 438; 4 Cas. 419; 8 Allen, 186.

not, in an action by another, prove that the ancestor had no title.<sup>1</sup>

§ 40. Where one joint tenant, by articles of agreement, sold the land, and took a mortgage to himself to secure the purchase-money, and afterwards, under proceedings on the mortgage, purchased at sheriff's sale; the effect was, merely to cancel the unsuccessful sale, and not to vest a new title in such co-tenant on his own account.<sup>2(a)</sup> And in late cases a purchase by one tenant at a sale for taxes has been held to inure to the benefit of both; especially if there be any fraud.<sup>3</sup> Thus if the land be sold at a treasurer's sale to a stranger, and a tenant in common take an assignment of the deed before the time for redemption has expired; it will confer upon him no independent title as against his co-tenants.<sup>4</sup>

§ 41. But still one tenant may by special acts *disseise* another, and by length of possession gain an adverse title; though the proof of an ouster ought to be of the most satisfactory nature.<sup>5</sup>

§ 41 a. In a leading English case upon this subject, where one tenant in common had sole and undisturbed possession for thirty-six years, without any account, or any claim or demand by the other, or any one claiming under him, Lord Mansfield left it to the jury to say, whether there was not sufficient evidence to presume an actual ouster, and they found a verdict for the defendant, which was sustained by the court. Lord Mansfield remarked, that the terms *actual force* did not imply real force, or a turning out by the shoulders. A man may come in rightfully, and hold over adversely, and such holding over is equivalent to actual ouster. The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because it is not adverse, but in support of their

<sup>1</sup> Corwin v. Corwin, 9 Barb. 219.

<sup>2</sup> Jack v. Woods, 5 Cas. 875.

<sup>3</sup> Downer v. Smith, 38 Verm. 464; Maul v. Rider, 51 Penn. 877; 80 Ill. 119.

<sup>4</sup> Lloyd v. Lynch, 4 Cas. 419

<sup>5</sup> Adams v. The Ames, &c., 24 Conn. 280. See Newell v. Woodruff, 80 Conn. 492; Izard v. Bodine, 8 Stockt. 403.

(a) But one tenant may purchase a mortgage on the estate, and it will still subsist, so as to prevent partition. Blodgett v. Hildreth, 8 Allen, 186.

Where mortgagee and mortgagor are tenants in common; the whole debt must be paid, in order to redeem. Merritt v. Hosmer, 11 Gray, 276.

common title; and, by paying him his share, he acknowledges him to be co-tenant. Nor is a refusal to pay sufficient, without denying his title; but if, upon demand of payment, the tenant in possession deny the other's title and claim the whole, the subsequent possession is adverse.<sup>1(a)</sup>

§ 41 b. A purchase, by one tenant in common, of a title to the land, does not enure to the benefit of the other, where it was bought in before the tenancy began.<sup>2</sup> And a purchaser, from one of several co-tenants, of part of a tract of land, without reference to the title of the others, does not necessarily become a tenant in common, so as to prevent him from perfecting his title by adverse possession, under the statute of limitations; it being only necessary, in order to constitute adverse possession, that the land should be held as one's own.<sup>3</sup> So although two or more persons, having a joint interest in property, are under mutual obligation not to injure one another; where one party denies a joint interest, and is in possession under color of title in fee in himself, he can quiet his title by producing an adverse claim of title, without abandoning his own, even from one who claims to be a joint tenant with the purchaser.<sup>4</sup> So, where two tenants in common owned certain lands, subject to a mortgage, and, after long litigation, the joint interest was sold to a stranger, and one of the tenants purchased the existing mortgage at a great discount; held, he could hold it exclusively, and enforce it to the full amount.<sup>5</sup> And, it is said, tenants in common do not stand in a relation to each other so analogous to that of landlord

<sup>1</sup> Doe v. Prosser, Cowp. 217; Gause v. Wiley, 4 S. & R. 567; Terrill v. Murry, 4 Yerg. 104; Rickard v. Rickard, 18 Pick. 251; Allen v. Hall, 1 McC. 181; Galbreath v. Galbreath, 5 Watts, 146; Mehaffy v. Dobbs, 9 Watts, 868; Law v. Patterson, 1 W. & S. 191; Reading v. Royston, 2 Salk. 422; Snales v. Dale, Hob. 120; Davenport v. Tyrrell, 1 Bl. R. 675; Doe v. Hulse, 8 B. & C. 757;

Leonard v. Leonard, 10 Mass. 281; Boyd v. Graves, 4 Wheat. 518; Drane v. Gregory, 3 B. Monr. 622; Mason v. Finch, 1 Scam. 497; Colburn v. Mason, 25 Maine, 434; Edwards v. Bishop, 4 Comst. 61; 2 N. Y. Rev. Sts. 807.

<sup>2</sup> Sneed v. Atherton, 6 Dana, 278.

<sup>3</sup> Gray v. Bates, 8 Strobb. 498.

<sup>4</sup> Burhams v. Van Zandt, 7 Barb. 91.

<sup>5</sup> Wells v. Chapman, 4 Sandf. Ch. 812.

(a) By St. 8 and 4 Wm. 4, ch. 27, s. 12, if a tenant in common is in possession of more than his share for his own benefit, or that of any one but the other

tenant; such possession shall not be taken to be that of the other tenant. 1 Steph. 812, n. See Doe v. Horrocks, 1 Carr. & K. 566.

and tenant, as to come under the principle of *estoppel*.<sup>1</sup> So where one of two joint tenants overflows the lands of the joint estate so as to appropriate them, this amounts to an ouster.<sup>2</sup> And it has been decided in New York, that, where one tenant in common undertakes to convey the whole land, the grantee shall not be understood to enter as a tenant in common, but the statute of limitations will run in his favor against the co-tenants. (By the Revised Statutes, without an actual ouster or total denial of right, ejectment cannot be maintained.)<sup>3</sup> So, in Massachusetts, a conveyance by one tenant in common of the whole land in fee, with covenants of seisin and warranty, followed by the entry and exclusive possession of the grantee, is a disseisin of the other.<sup>4</sup> So where the owner of an undivided part of a parcel of land gave a deed of the whole lot, the grantee entered, and afterwards a creditor of the grantee levied upon the whole, and entered under the levy, claiming to be sole owner; held, the co-tenant of the grantor was disseised.<sup>5</sup> So A, one of tenants in common, conveys the whole land to B, with warranty. B enters, claiming the whole. C, the other tenant, requests him to relinquish one-half, but he refuses so to do, saying, he will sooner stand a law-suit. This is an ouster of C, who may maintain a suit for the land against B.<sup>6</sup> So the erection of a building upon the land by one tenant in common is an ouster of the other.<sup>7</sup> So, where a bill in equity for a partition was referred to a committee, whose report, if it did not positively find the fact of an ouster in terms, embraced conclusive evidence of that fact; held, as the plaintiff was not in possession when such bill was brought, it ought to be dismissed.<sup>8</sup>

§ 42. A sale by one tenant, and a receipt by him of the price of the whole tract, does not render him a trustee of the other

<sup>1</sup> Washington v. Conrad, 2 Humph. 562. See Weeks v. Weeks, 5 Ired. Equ. 111.

<sup>2</sup> Jones v. Weathersbee, 4 Strobb. 50.

<sup>3</sup> Clap v. Bromagham, 9 Cow. 551; Bradstreet v. Huntington, 5 Pet. 444; Bigelow v. Jones, 10 Pick. 161; Butler v. Phelps, 17 Wend. 642; Gillet v. Stanley, 1 Hill, 121; Sharp v. Ingraham, 4, 116; 2 N. Y. Rev. St. 306-7.

<sup>4</sup> Kittredge v. Locks, &c., 17 Pick. 246; Parker v. Proprs., &c., 3 Met. 91. See Ross v. Durham, 4 Dev. & B. 54; Thomas v. Hatch, 8 Sumn. 170.

<sup>5</sup> Bigelow v. Jones, 10 Pick. 161.

<sup>6</sup> Marcy v. Marcy, 6 Met. 360.

<sup>7</sup> Bennett v. Clemence, 6 Allen, 10.

<sup>8</sup> Adams v. The Ames, &c., 24 Conn. 230.



for his share of the purchase-money. The legal title remains in the latter, and his remedy is at law.<sup>1</sup>

§ 43. If a third person enter on the land, claiming against one tenant in common, and exclude him; this is a disseisin of all.<sup>2</sup>

§ 44. Where A and B were tenants in common, and C obtained possession, claiming under B, but A knew nothing of his title, and ejected C by process of forcible entry and detainer; held, this was not an ouster of B by A.<sup>3</sup>

§ 45. With regard to suits brought by tenants in common against strangers for recovery of the land, the common law rule is, that, having several titles, they must bring separate actions.(a)

<sup>1</sup> Milton v. Hogue, 4 Ired. Equ. 415.

<sup>2</sup> Price v. Lyon, 14 Conn. 279.

<sup>3</sup> Meredith v. Andres, 7 Ired. 5.

(a) In Vermont, Connecticut and Virginia, they may sue jointly. In Kentucky, Vermont and California, one joint tenant or tenant in common may sue for his share of the whole. McCreary v. Ross, 7 Watts, 488; Hicks v. Rogers, 4 Cranch. 165; Verm. L. 96; Robinson v. Johnson, 86 Verm. 69; Tonchard v. Crow, 20 Cal. 150; Hart v. Robertson, 21 Ib. 846; 1 Swift, 103; Vir. L. 1828, 27; May v. Parker, 12 Pick. 88; Watson v. Hill, 1 M'Cord, 161; McFadden v. Haley, 2 Bay, 457; King v. Bullock, 9 Dana, 41; Chesround v. Cunningham, 3 Blackf. 85. See Starnes v. Quin. 6 Geo. 84; Lane v. Dobyns, 11 Miss. 105; Craig v. Taylor, 6 B. Mon. 457.

In Rhode Island, Maine and Massachusetts, all the tenants or any two may join, or any one sue alone. In Connecticut, if the plaintiff grounds on the title of all the tenants, he recovers for their benefit, and his possession will be theirs. If two join and one is non-suited, the other may recover the whole. (One may sue alone, though also a surviving partner. Robinson v. Roberts, 81 Conn. 145.) In New York, all need not join, except when ejectment is brought as a substitute for a writ of right. R. I. L. 208; 1 Swift, 103; Mass. Rev. St. 611; Me. Rev. St. 569-70; Verm. Rev. St. 216; Kellogg v. Kellogg, 6 Barb. 116.

In Missouri, (Wathen v. English, 1 Misso. 746,) it is held that tenants in common cannot join in ejectment.

In Tennessee, (Barrow v. Nave, 2 Yerg.

228,) it is the uniform practice for tenants in common to declare in ejectment on a joint demise, and recover a part or the whole of the land according to the evidence. If they join in suit and one is barred by the statute of limitations, this is no bar to the rest.

(Tenants in common may join in an appeal concerning a road, but parties having different interests must prosecute separate appeals. County, &c. v. Brown, 18 Illin. 207.

Where two tenants in common recovered land in ejectment against a third; held, they were also entitled to their joint action for *mesne profits*. Camp v. Homesley, 11 Ired. 211.

In an action of trespass *quare clausum*, for breaking, entering upon, and cutting and carrying away trees from land owned by tenants in common, each tenant is entitled to his several action; and it cannot be defeated by a subsequent payment to his co-tenants for the wood thus taken and carried away. Longfellow v. Quimby, 29 Maine, 196.

The general rule is, that tenants in common must join, in an action to recover damages for an injury to the common property; but, where there is no joint injury, and the tenants in common are not jointly interested in the damages, the remedy may be by a several action. Lothrop v. Arnold, 25 Maine, 186.

And if the action is several, when it should have been joint, and there is no plea in abatement, the objection cannot



§ 46. It has been already stated, (s. 18,) that joint grantees of public lands hold as tenants in common. The question has been raised, whether on account of their peculiar title, such grantees can, like other tenants in common, bring ejectment. Although not distinctly decided, it is said that it may be assumed, that ejectment may be brought by one proprietor of lands granted by the State, when the others have actually taken possession and divided to themselves all the lands included in the limits of the grant; though this action would lie, only where the proprietors refuse to divide according to law, and after demand. But there is more difficulty in the application of these principles and extending this remedy to those who are directed, as agents or trustees, to take charge of the rights of land which are usually denominated *public rights*. The nature of their interest does not permit that it be enjoyed in common with other proprietors. In regard to them, it is only the *use* which is appropriated, and not the freehold. Statutes provide that such trustees may *lease* the lands. But it would be of little avail to them, to take possession of a fractional part of every lot or tenement in a town; and it would be impossible to lease them to any profit or advantage. Moreover, if such trustees are to be regarded as tenants in common; inasmuch as one of such tenants, in Vermont, in a suit by himself alone, may recover the whole land, and as public lands are excepted from the statute of limitations, it would follow, that, although the other tenants were barred by the statute, the trustees might still recover the whole land, in part for the benefit of the others, and not merely their own share. Upon these grounds, no action of ejectment can be maintained by such trustees, until a division or allotment is made. But when there is no actual location, ejectment will lie to recover the public lands.<sup>1</sup>

<sup>1</sup> University, &c. v. Reynolds, 8 Verm. 554-5-6.

be taken by a plea upon the merits. Ib.

One tenant may give a release, which will bind the other, of their claim for a trespass. Bradley v. Boynton, 9 Shepl. 287. Recovery in ejectment against one tenant in common alone does not justify

dispossession of the others. Breeding v. Taylor, 6 B. Mon. 62.

Premises owned in common, by defendants in execution, may be sold thereon in a body, unless some one claiming to be part owner require that they be sold separately. Neilson v. Neilson, 5 Barb. 565.)

## CHAPTER LV.

## TENANCY IN COMMON, ETC. PARTITION.

1. Methods of partition; partition in equity.

2 & n. Statutes of the several States concerning; the New England States; New York; Pennsylvania; New Jersey, Alabama and Mississippi;

Maryland; Delaware; Tennessee; Illinois; Indiana; Missouri; Kentucky; Ohio; Virginia; North Carolina; South Carolina; Georgia; other States.

§ 1. SOME remarks have already been made, in regard to the severance of a joint tenancy, &c., by the acts of the parties themselves. Partition may also be obtained by application to the legislature, or by legal process.<sup>(a)</sup> It is to be presumed that the old English statutes already referred to, (ch. 53, sec. 45,) providing a *writ of partition*, have been generally re-enacted or adopted in this country. In practice, however, these remedies are to a great extent superseded by the more summary and

(a) It is said, tenants in common have an absolute right in law to have their estate divided. *Ledbetter v. Gash*, 8 Ired. 462. In general, partition will not be granted, upon the application of parties who own *the whole land*. *Swett v. Bussey*, 7 Mass. 508. (Otherwise in Delaware. See *infra*.)

Devise to sons, A and B, to be divided by running a certain line, and the choice determined by agreement or lot. A and B entered into possession, occupied for some years as tenants in common, and during that time purchased fifteen acres adjoining, and then made a division by a line running nearly as indicated in the will, agreed upon their choice of parts, and executed and delivered, each to the other, a deed conveying such part to him and wife. Held, a partition under the will, and not a purchase and sale of the land. *Taylor v. Birmingham*, 29 Penn. 806.

Also, that the wife of A was not entitled to the estate as survivor, on the decease of her husband. *Ib*.

Between co-parceners. partition by deed, though the better practice, is not absolutely necessary; they may mark and establish the dividing line between them by other competent evidence, and will from that time be seised in severalty. *Cooles v. Wooding*, 2 P. & H. (Va.) 189.

Where deeds by co-parceners recited, that a boundary line had been run, made and established, and the parties had continued in possession up to the line, from the date of the deeds, for twenty years, less two days, and the line in the deeds was different from the line actually run by the parties; held, the possession ought not to be disturbed. *Ib*.

As to the effect of an award upon the boundary of land, see *Byam v. Robbins*, 6 Allen, 68.

convenient methods of *petition* to the courts of common law, of Chancery, or of probate. The jurisdiction of Chancery upon the subject is well established by a long series of decisions. But it is said, equity does not generally interfere, unless the title be clear, and never where the title is denied or suspicious, until opportunity has been had to try the title at law.<sup>1</sup>(a)

<sup>1</sup> 4 Kent, 364; 1 N. J. L. 89; *Homey v. Goings*, 18 Illin. 95; *Hanbury v. Hussey*,

5 Eng. L. & Eq. 81; *Bowra v. Wright*, 3 Ib. 190.

(a) The jurisdiction of equity upon this subject depends very much upon local usages and statutes. In England, by St. 3 and 4 Wm. IV, ch. 27, the writ of partition is abolished, and the only remedy is a bill in equity. In Wisconsin, (Rev. Sts. 570,) partition may be obtained in all cases by bill in equity. But a remainder-man cannot file such bill.

In Rhode Island, courts of equity have jurisdiction to award partition of estates, whether corporeal or incorporeal. *Bailey v. Sisson*, 1 Rhode Island, 233.

If one tenant has transferred his interest; in the mode of division, regard will be had to the equities of the purchasers. *Story v. Johnson*, 2 Y. & Coll. 586. A way over one portion of the land may be assigned to the party taking another portion. *Lister v. Lister*, 8 Ib. 540.

One holding a life estate in one-fifth of certain land, terminable by marriage, may have partition. *Hobson v. Sherwood*, 4 Beav. 184.

In New York, a decree for partition cannot be made, unless all the persons interested are made parties. *Burhans v. Burhans*, 2 Barb. Ch. 398. See p. 828.

A court of equity is not restricted to a partition or sale of the whole lands; but, when it is necessary to prevent prejudice, and can be done without prejudice, may allot their respective shares of land to some, and direct a sale of the residue. *Haywood v. Judson*, 4 Barb. 228.

In general, where the defendant is in possession, claiming adversely to the plaintiff, partition will not be granted in equity; but, where the question arises upon an equitable title set up by either party, the rule does not apply. *Hosford v. Merwin*, 5 Barb. 51; *Burhans v. Burhans*, 2 Barb. Ch. 398.

The defence, to a bill for partition, that the premises are held adversely to the complainant, may be made specially by

plea or answer; but that is not necessary, where the fact is distinctly stated in the bill. *Burhans v. Burhans*, 2 Barb. Ch. 398.

The bill, in such a case, should be dismissed as prematurely filed, without prejudice to the right to institute a new suit, after a recovery in ejectment or otherwise. Ib.

Upon a bill for partition, the rents and profits accruing while the land was held adversely are not recoverable, being more properly recoverable as mesne profits, in an ejectment for the complainant's undivided share. Ib.

A complainant in a bill in equity claimed half of an estate by inheritance from his father, and the other half by inheritance from his brother, and alleged that the will of his brother was void for fraud, &c.; but, in case the will should be adjudged valid, then he still claimed one-half of the estate, and insisted that he was entitled to a partition; and the prayer of the bill was, that the will might be declared void, or that a partition might be had. Held, the bill did not make a case for partition, and therefore was not *multifarious*. *Brady v. McCosker*, 1 Comst. 214.

A decree for partition, by a court of equity, assigning the portions of the distributees, amounts to no more than an ordinary conveyance. *Anderson v. Hughes*, 5 Strobb. 74.

In South Carolina, interests in real or personal property may be severed by the Court of Equity, and the share of each owner ascertained and set off, where the subject matter is not susceptible of division. The justice or practicability of any mode of partition is a matter for the commissioners; and if, in their judgment, no division can be made without manifest injustice, they may recommend a sale, and the court will judge of the propriety of confirming such return. *Steedman v. Weeks*, 2 Strobb. Eq. 145.

§ 2. The statutory provisions of the several States, in regard to partition, are very precise and numerous. With a general similarity, there are still points of difference among them, which require a distinct summary view of the law, in each State. It will be seen that in Kentucky, and in the three States of Ala-

Partition of *standing timber* will be ordered, without regard to the character of the estate of either party, or the difficulty of executing the commission. *Ib.*

On a bill for partition, a court of chancery will not determine conflicting titles; nor, in an action of ejectment, is a partition by decree conclusive upon the rights of the parties. *Whillock v. Hale*, 10 *Humph.* 64.

But it has been held, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued long enough to bar a recovery under the statute of limitations. *Howey v. Goings*, 18 *Ill.* 95; *Overton v. Woolfolk*, 6 *Dana*, 374.

A petition under the statute of partition is a proceeding at law reaching only the legal estates and titles of parties, and not touching their equities. *Greenup v. Sewell*, 18 *Ill.* 53.

Equity will not interfere with a court of law, in a case of partition, if such court had first jurisdiction, and is competent to provide for the interest of parties. *Ib.*

Insignificant improvements of a portion of the estate, by one tenant, will not justify the interference. Nor will equity partition a joint estate, where, by so doing, it accommodates some of the joint owners to the injury of the remainder. *Ib.*

When a trial at law is necessary before a decree for partition can be rendered, the correct practice is to stay proceedings until such trial can be had; and, in ordering it, the defendants may be required to admit the ouster of the complainant upon the trial at law. *Horton v. Sledge*, 29 *Ala.* 478.

A dispute upon a pure question of law, determinable on the face of an uncontroverted deed, on which the complainant's title depends, is not a sufficient reason for withholding or delaying a decree for partition. *Ib.*

On a bill for partition, if title is denied, the court will not order the commission, nor will it dismiss the bill, but will retain it and give an opportunity to establish the title at law. *Obert v. Obert*, 2 *Stockt.* 98.

In a petition for partition, where title is suggested, if the title is equitable, the court will settle it; if legal, it will dismiss the bill, or retain it to put the party suggesting title to his law. *Lucas v. King*, 2 *Stockt.* 277.

If, when the titles are spread before the court on the pleadings, there is no legal objection to the complainant's title, the court will order partition. *Ib.*

The defendant suggesting title must answer the bill and set out his title. *Ib.*

Upon a bill for partition, where the title of the complainant is denied, the general practice is to retain the bill, until the right can be tried at law. *Campbell v. Lowe*, 9 *Md.* 500.

But where the complainant has shown a legal title, and the defence is one cognizable only in equity, equity must entertain and decide the question of title. *Ib.*

A bill for partition averred, that the land was not capable of division, that the defendant refused to divide or unite in a sale, and that a sale was for the interest and advantage of the parties; and prayed for a sale and for general relief. The complainant proved his title, but the court dismissed the bill, because there was no proof that a sale would be advantageous to the parties. Upon appeal, held, that the complainant was entitled either to a sale or a partition, according to the evidence, and, having proved his title, the cause must be remanded under the act of 1832, ch. 302, s. 6, for such further proceedings or proof as the purposes of justice may require. *Ib.*

The statement that the defendant had refused to divide, though improper under the averment that the land did not admit of partition, will not vitiate the case made by the bill, or affect the right to relief under the general prayer. *Ib.*

The right of a tenant in common, to partition of a legal estate, is as absolute in a court of equity as in a court of law. The courts have concurrent jurisdiction, as to an actual partition, and must adjudicate on the same principles. *Donnell v. Mateer*, 7 *Ired. Eq.* 94; *Haggin v. Haggin*, 2 *B. Mon.* 318.

bama, Mississippi and New Jersey, there are respective peculiarities deserving of special notice. The methods of partition among *co-parceners* or heirs, which, however, have very little to distinguish them from that between other joint owners, will be more particularly referred to under the title of *Descent*.(a)

In case of a petition at law, for an actual partition, if the defendant wishes to avail himself of an equitable defence, as, for instance, a claim under a contract for purchase, he must obtain an injunction to stay proceedings at law, until the cause can be heard in equity. *Ib.*

If the application be to a court of equity, it is not sufficient for the defendant to rely upon his equitable grounds of defence in his answer. He must file a cross-bill, for which the court will allow him a reasonable time. But his failure to do so will not prevent him from filing a separate bill for relief, as the partition affects the legal title only, and the share assigned in severalty could still be reached. *Ib.*

On a bill for partition, the defendants' supposed title to a part of the land having failed, they cannot be released from a proportionate part of the purchase-money, due to the administrator of the party whose heirs are plaintiffs, upon a mere reference to the matter in their answer, without filing a cross-bill. *Glick v. Gregg*, 19 Ohio, 57.

(a). In Massachusetts, (Mass. Rev. St. 618-20; St. 1842, 222; Gen. Sts., ch. 186,) joint tenants, &c., may have partition by writ or by petition. See *Burghardt v. Van Deusen*, 4 Allen, 374.

(As to the degree of certainty required in the description of the land, see *Miller v. Miller*, 16 Pick. 215. Petition for partition of three parcels of land. The petitioner was proved to be seised in common of only two of them, and the respondent to be sole seised of the third. Held, the petitioner could not amend by striking out the third parcel, but the respondent should have his costs, and partition was ordered of the other two. *Loud v. Penniman*, 19 Pick. 539. But where a petitioner alleged a seisin in fee, and, upon the facts agreed, it appeared that his interest was only for life; the petition was amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly. *Fay v. Fay*, 1 Cush. 98.)

The shares of the petitioners shall be set off, and the residue of the land remain undivided.

(This may be done in equity, on application of the respondents. *Hobson v. Sherwood*, 4 Beav. 184.)

A remainder-man or reversioner cannot have partition; nor any tenant for years, of whose term less than twenty years is unexpired, as against a tenant of the freehold. But all tenants for years may have partition between themselves; which, however, shall not bind the landlords or reversioners, when the terms end.

(Where the same person owns in fee one undivided part, and holds a mortgage of the remainder, of a lot of land; the mortgagor is not entitled to partition. *Bradley v. Fuller*, 28 Pick. 1. So mortgagees before foreclosure cannot have partition. *Ewer v. Hobbs*, 5 Met. 1.

See *Hodgkinson*, 12 Pick. 374; *Wainwright v. Dorr*, 18, 383; *Liscomb v. Root*, 8, 376. A mortgagee may, though the mortgagor or his co-tenant remain in possession; their possession being his. *Rich v. Loud*, 18 Pick. 322. By Stat. 1858, 998, past and future partitions are made valid, notwithstanding the existence of leases of the estate. So, although one tenant is trustee, attorney or guardian of another. A joint tenant, &c., though disseised, may maintain a petition for partition, if he has a present right of entry. *Marshall v. Crehore*, 13 Met. 462. See *Bonner v. Proprietors, &c.*, 7 Mass. 475; *Barnard v. Pope*, 14, 434; *Fisher v. Dewerson*, 8 Met. 544.)

The petition sets forth the titles of all persons interested, and who will be bound by the partition, whether having a freehold or term, a present or future, a vested or contingent estate. A reversioner, &c., after a life estate or term, is a party interested, and entitled to notice.

(So an attaching creditor of one tenant. And a partition made without notice to him is, as to him, void, and he may levy his execution as upon an estate in common. *Mason v. Luke*, 19 Pick. 89. Where a railroad passes over the land, the corporation need not be made parties. *Weston v. Foster*, 7 Met. 297.)



Unknown parties who are interested shall be notified by public advertisement.

(One may appear, and object the want of legal notice to others, and partition will not be ordered against him. *Ashley v. Brightman*, 21 Pick. 258.)

Where one not named in the petition appears and defends, the petitioner may deny his title. If the petitioner shows himself entitled to partition, an interlocutory judgment is rendered accordingly, and commissioners are appointed to make partition. If there are several petitioners, their shares may be set off together or separately at their election. If a division cannot be made without damage to the owners, a disproportionate share may be assigned to any one who will accept it, on his paying or securing a sum requisite to equalize the value; or the exclusive possession may be assigned to the parties alternately for certain specified times, according to their respective interests.

(See *Codman v. Tinkham*, 15 Pick. 364.)

In the latter case, the occupant for the time being shall be liable to the other owners for any injury to the land, like a lessee without express covenants. For any injury by a stranger, the occupant may recover damages like a lessee; and he and the other tenants may recover jointly for any further damage for which lessors might sue. The final judgment, confirming and establishing the partition, shall be conclusive as to all rights, both of property and possession, of all parties and privies to the judgment, including all parties who might have appeared and answered, excepting, however, any joint owner absent from the State, who is allowed three years to obtain a new partition. One claiming the land in severalty is not bound by a judgment of partition, not having appeared as a respondent. If one, who has not appeared and answered, claim the share assigned to or left for any of the supposed part owners, he shall be bound by the judgment, so far as it respects the partition and assignment of the shares, as if he had been a party; but may still bring a suit for the share which he claims, as a specific portion of the land, against the party to whom it was assigned or left. Where two or more persons appear as respondents, claiming the same share of the land, their relative title may be left undecided, except so far as to determine which of them may defend, and may be settled in a subsequent suit between them. A judgment in the partition suit,

that either of the opposing respondents is not entitled to a share, shall be binding upon him, so far as it respects the partition and assignment of shares; but he may still maintain a subsequent suit against the other claimant. If any person, who has not appeared and answered, claims a share of the land, he shall be bound by the judgment, so far as the partition is concerned; but he may still sue each of the other tenants for his share, each being liable for a proportion thereof.

(It is said, a petition for partition, though founded on statute, is in the nature of a *real action*. The question is one of legal title, not mere equitable interests. But a judgment therein is no bar to a writ of right. *Blanchard v. Brooks*, 12 Pick. 56. See *Mallett v. Bancroft*, 1 Story. 474; *Colton v. Smith*, 11 Pick. 811.

Judgment binds the right of *possession*, not *property*. *Pierce v. Oliver*, 18 Mass. 211.

A judgment is a bar to another petition for the same object, if the parties and the title put in issue or necessarily decided are the same. But where a former partition was only of a part of the land held in common, and all the tenants were not parties; the judgment is no bar to a petition for partition of the whole land, to which all the tenants are made parties. *Colton v. Smith*, 11 Pick. 811.

Where a disseisor of one tenant has obtained partition, the tenant may either recover possession of his undivided share, treating the partition as void; or may affirm it, and recover the part assigned to his disseisor. *Brown v. Wood*, 17 Mass. 68.)

Where a party dies before partition, and a share is still assigned or left him, his heir or devisee may claim the original share, (undivided,) though made a party to the petition. Eviction of any tenant, from the share assigned or left him, by paramount title, shall entitle him to a new partition of the residue. Any person, having a lien upon the share of a tenant, shall be bound by the partition, but retain his lien upon the portion allotted to his debtor.

By Statute 1854, 12, joint tenants, &c., of a mill privilege, water right, or other incorporeal hereditament may be compelled to make partition, either by bill in equity or the statutory process. In the latter case, the commissioners shall state in their return the best mode of partition, and the court may thereupon

pass such orders and decrees in equity as may be necessary to effect justice between the parties.

(It had been previously held, that, where tenants in common hold a mill, dam and stream as one entire tenement, one cannot have partition of the dam and water alone. *Miller v. Miller*, 13 Pick. 287. See *Bailey v. Rust*, 8 Shepl. 440; *Whittemore v. Shaw*, 8 N. H. 898.)

By Statute 1850, 483, partition may take place, where remainders or interests are limited to persons not in being at the time of application, upon notice to the parents or parent. The court will appoint a *next friend* to act in the case in behalf of such persons.

By Statute 1850, 458, where the pleadings show that the respondent denies the plaintiff's title to any part of the land, and claims it in fee, and he is proved to have held it under a title which he believed to be good; he shall have compensation for improvements made by him or those under whom he claims, if the plaintiff prevails, as in case of real actions, by chap. 101 of the Revised Statutes; and also be liable, as provided in that chapter for the plaintiff's share of the rent, profits and damages. If, after these are deducted, anything remains due to him for improvements, it shall be paid before judgment of partition; and the plaintiff shall not have any rents, &c., accruing after the verdict and before payment.

(Before the passing of this statute, a respondent had no such remedy for improvements. *Marshall v. Crehore*, 18 Met. 462.)

Provision is also made in case of a second partition, where improvements have been made after the first. Partition is valid notwithstanding a lease, and though one party is trustee, guardian or attorney for another. The return is to be recorded. See Gen. Sts.

In New Hampshire, (1 N. H. L. 344; Rev. St. 413-6; Comp. Sts. ch. 219; *Brown v. Brown*, 8 N. H. 93. See *French v. Eaton*, 15 N. H. 387,) "any person interested with others" in real estate, "where there is no dispute about the title," may obtain partition by application to the judge of probate. If a division would be injurious, the whole may be assigned to one of the petitioners, he paying or giving bond for the amount of the shares of other parties. Partition may also be made by the Superior Court. Notice is ordered, and issues of fact are sent to the Court of Common Pleas. Partition is made through a *committee*.

No partition shall be avoided by a conveyance after entry of the petition, nor unless recorded; nor by any lien on the property. Such lien attaches to the portion set off to the debtor. If set off to one not having a legal title, this portion belongs to the legal owner. A reversioner after a life estate cannot have partition.

In Rhode Island, (R. I. L. 206; Rev. Sts. ch. 203.) where persons own together in fee, or where one has a particular estate, in connection with others holding a fee or a freehold, a writ of partition or bill in equity lies. The court ascertain the rights of the parties, and partition is made conformably. The proceeding shall not affect any reversion or remainder. A sale by commissioners may be ordered.

Non-joinder of a defendant in an action of partition is at common law matter of abatement merely; and is not made pleadable in bar by the statute authorizing parties omitted in such action to be summoned in, (a right of the plaintiff only to save his action from abatement,) nor by the discretionary power of the court to order the sale. *Hoxsie v. Ellis*, 4 R. I. 123.

Dower, before assignment, is no estate, but a mere right; and the dowress need not be made a party to an action for partition, although her writ of dower be pending in the same court. *Ib.*

But the court will, in its discretion, suspend the appointment of commissioners to make partition, until the writ of dower is terminated, in order that the partition may not be disturbed by the assignment of dower. *Ib.*

In Connecticut, (Comp. Sts. 1854, 480; 1 Conn. Sts. 298, 351,) there may be partition in equity, or a sale, through a *committee*. The writ of partition is also expressly provided. Provision is also made, that the guardians of minors, with the aid of persons appointed by the Probate Court, may make partition.

Partition is held to be matter of *right*, notwithstanding any difficulty and inconvenience attending it in a particular case. *Scovil v. Kennedy*, 14 Conn. 349. It may be obtained by a bill in Chancery. *Ib.* St. 1839, 80. So, though different parcels of land are held by different titles. St. 1839, 80. See St. 1840, 27-8.

The established rule of the common law, (by which the writ of partition would lie only between co-parceners,) that the plaintiff must be in possession, or seised, when the writ was brought, has, since the remedy by partition has been extended to joint tenants and tenants in com-



mon, been uniformly adopted, whether the remedy is sought by writ, or by bill in equity. *Adams v. The Ames, &c.* 20 Conn. 230.

And the statute, authorizing the Superior Court, as a Court of Equity, to order a partition, does not introduce a different rule. *Ib.*

In Vermont, (1 Verm. L. 197-203; St. 1851, 18; *Harrington v. Barton*, 11 Verm. 31; Verm. Rev. St. 231-4; Gen. Sts. 1860, ch. 45. See *Hawley v. Soper*, 18 Verm. 320,) partition is made, upon petition, by commissioners. If the land cannot be conveniently divided, an assignment of the whole may be ordered to one of the parties, he paying such sum and in such manner as the court shall direct, and in case of non-payment execution may issue. If no party will accept the whole, the land shall be sold. The sale shall bind the owners and all claiming under them. The partition shall be valid, though one owner, without the knowledge of the others, had previously conveyed his interest, or though he sell it pending the petition, and though the grantee of one of the tenants, whose conveyance was not recorded, was not made a party. And a partition in such case shall enure to the benefit of the legal owner. Three years are allowed, to any party without the State and not notified, to avoid the partition for good cause. The death of a party does not abate the process. If the petitioner has no title, or a less one than he claims, he is liable to costs, but partition may still be made.

The proceeding is an adversary one, and can only be sustained between those who could be suitors in respect to each other, in the common law courts. A husband and wife, tenants in common, cannot constitute adverse parties. *Howe v. Blanden*, 21 Verm. 315.

A saw-mill, mill-yard, mill-pond, and the utensils of the mill, are not subject to partition. *Brown v. Turner*, 1 Aik. 350. Actual possession is not necessary, if the petitioner is not disseised. *Hawley v. Soper*, 18 Verm. 320.

A grantee of an undivided interest, whose grantor retains the use of the premises for his life, and is still living, cannot have partition. *Nichols v. Nichols*, 2 Wms. 228.

Nor one having a mere right of entry where there is an effectual disseisin. *Brock v. Eastman*, 2 Wms. 658.

In Maine, (1 Smith's St. 145-50; Rev. Sts. 1857, ch. 88. See St. 1860, ch. 136, s. 1; *Ware v. Hunnewell*, 7 Shepl. 291.) a writ of partition is authorized,

and also an application for this purpose to the common law courts, who shall order partition by a committee. Any party aggrieved, if absent from the State, and not notified, may within three years have a new partition upon complaint. The whole may be assigned to one, if necessary.

(The owner of an equity of redemption in possession, and one interested in the estate and having a right of entry, though out of possession, may have a writ of partition. *Call v. Barker*, 8 Fairf. 320; *Upham v. Bradley*, 5, 422. By the Revised Statutes, any lien upon a share attaches to the portion set off to the debtor. Partition does not bind one claiming the whole property, who has not made answer. In case of eviction, it shall be made anew. Rev. Sts. 547-8; *Argyle v. Dwinel*, 29 Maine, 29. But see *Foxcroft v. Barnes*, 29 Maine, 128. Partition must be predicated upon the average value, as well as quantity of the land. *Field v. Hanscomb*, 8 Shepl. 365. And the return of the commissioners must show this fact. *Dyer v. Lowell*, 30 Maine, 217.

The return of commissioners that they have sufficiently notified parties interested, within the State, is not conclusive evidence of such notice in regard to the time and place of partition. The court should ascertain whether such notice has been given, and the commissioners should state what they have done; whether any and what persons were known to them to be concerned and resident in the State; and what notice was given to each of them. *Hathaway v. Persons, &c.* 32 Maine, 136.

A review of the judgment and proceedings can be granted only upon the application of a party to the former process or one representing his interest. There is no provision in the statutes, authorizing a person interested in the estate to be first admitted a party, after partition has been ordered, and the proceedings finally closed. *Elwell v. Sylvester*, 14 Maine, 536.

Under the statutes, no costs can be taxed for the petitioner, after the interlocutory judgment for partition. *Ham v. Ham*, 43 Maine, 285.

Where the commissioners set off to a party the "water privilege now occupied by" a mill; held, the extent of that privilege was matter of fact for the jury. *Munroe v. Gates*, 42 Maine, 178.

And the construction, that the party acquired no right to any more water than was necessary to the full enjoyment of

the mill as it then was, was too restricted. *Ib.*

Commissioners have no authority to assign to one tenant the right of hauling lumber across the land assigned to another, and of driving lumber on the stream through such land, and using the dam there; nor to prescribe the mode of keeping the dam in repair. *Dyer v. Lowell*, 30 Maine, 217.

*Certiorari* lies in behalf of a co-tenant, although not a party to the record. *Ib.*

Where a person owns an undivided portion of lands, which portion is severed, and set out in severalty by legal proceedings, his title adheres to and follows the estate, and becomes limited by it. *Argyle v. Dwinel*, 29 Maine, 29.

The undivided interest of a town, in land which has been reserved for public uses, may be legally located, after the same has been sold. *Ib.*

The subsequent incorporation of the town will operate as a sanction, on the part of the State, of such location. *Ib.*

There may be partition of a mill and mill-privilege. *Hanson v. Willard*, 3 Fairf. 142. See Sts. 1848. 49.

It is held, that the whole object of a petition for partition is a partition among those who have titles in common. Disseisors, unless their possession has been long enough to give them a title, are not proper parties, and their equitable rights are not affected by the proceedings; and an entry of appearance by them does not affect their claim to betterments, in a writ of entry by one of the parties to the partition, the tenants proving their possession and improvement more than six years before filing the petition. *Tilton v. Palmer*, 81 Maine, 486.

Partition will not be granted of a part of the petitioner's land. *Duncan v. Sylvester*, 4 Shepl. 388. Two or more tenants may join in a petition, and have an assignment in common. *Upham v. Bradley*, 5. 423.

In New York, (2 Rev. St. 617; 4 Kent, 366. See *Cole v. Hall*, 2 Hill, 625; *Handy v. Leavitt*, 3 Edw. 229; *Braker v. Devereaux*, 8 Paige, 518; *Van Orman v. Phelps*, 9 Barb. 500; *Underhill v. Jackson*, 1 Barb. Ch. 78; *Horton v. Buskirk*, 1 Barb. 421; *Noble v. Cromwell*, 26 Barb. 475,) any joint tenant, &c., may petition the court for partition, or, if necessary, a sale of the land.

(The petitioner must have an estate entitling him to immediate possession. *Brownell v. Brownell*, 19 Wend, 867. (So in New Jersey. *Stevens v. Enders*. 1 Green, 271. And this is the ancient

English doctrine. 4 Kent, 364, n.) An equitable estate is sufficient. *Hitchcock v. Skinner*, 1 Hoffm. 21. One disseised cannot have partition. *Clapp v. Bromagham*, 9 Cow 530.

Where the owner of a life estate, in the share of one of several tenants in common, assigned his property for the benefit of creditors; held, the assignees were entitled to partition, but not to have the premises sold, it not being for the benefit of the other owners. *Van Arsdale v. Drake*, 2 Barb. 599.

A suit in equity for partition cannot be maintained by an infant, either alone or jointly with parties of full age. *Postley v. Kain*, 4 Sandf. Ch. 508. See p. 822.

A tenant by the curtesy initiate may file a bill for partition. *Riker v. Darke*, 4 Edw. Ch. 668.

A suit in partition cannot be maintained, unless the plaintiff or petitioner is in possession. *O'Dougherty v. Aldrich*, 5 Denio, 885.

Where land is devised, subject to the performance of a condition subsequent, and the devisee enters, and suffers a breach of the condition, a party entitled to an undivided part of the land, in consequence of the breach, as tenant in common with the devisee, cannot maintain partition against the devisee, but must first establish his title by ejectment. *Ib.*

A purchased, from the commissioners of forfeitures in New York, an undivided half of the rent and reversion of a certain lot of land, which was under-leased to B. B, at the time of the purchase or soon after, was in possession of the whole lot, claiming under the lease, and also claiming to own the other half of the rent and reversion. A brings a bill for partition against B. Held, he could not claim partition during the continuance of the lease; that when B, in possession as lessee, acquired the rent and reversion of half the land, the tenancy as to that half was merged and the rent was extinguished; and that, if the lease had for any cause become forfeited, A must first recover his half of the land by entry or action, before he could sustain this bill. *Lansing v. Pine*, 4 Paige, 689.)

The petition shall describe the premises, set forth the rights of all persons, having either present or future, vested or contingent interests therein, and be verified by affidavit. Every person interested may be made a party.

(A decree, in a suit for partition, brought by the committee of a drunkard, and to which he is not a party, will not

transfer the legal title to his undivided share, set off to the defendants in severalty; therefore he should be made party. *Gorham v. Gorham*, 3 Barb. Ch. 24.

Where a bill in equity was filed by such committee for partition, and also for an account of rents and profits, without joining him as a party complainant; held, the omission was a ground for a special demurrer, but, so far as the bill sought an account, it was matter of equity, and therefore, so considered, not a ground of general demurrer. *Ib.*

Under the act of 1813. infants interested in estates of which partition is sought should be notified of the suit, whereby the court acquires jurisdiction, of which it is not ousted, by neglecting to appoint a guardian *ad litem* of the infants. If an infant appears in such a suit by attorney, and not by guardian, the proceedings are irregular and voidable, but not void. *Fowler v. Griffin*, 8 Sandf. 385.

The heirs of the ancestor, from whom the lands descended, and those who have succeeded to their rights, are proper parties to a bill for partition; and, where some of the heirs have parted with their interest, their grantees, and not themselves, are proper parties. In case of defect of parties to a bill under the code in New York, if the objection is taken in the answer, the complainant should amend before trial, if the objection be true; if he lies by till the hearing, the court can allow him to amend in its discretion on payment of costs. *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

Partition cannot be made of lands without the consent of all the tenants in common, while a third person has an irrevocable power of attorney to sell the land for the benefit of all. *Selden v. Vermilya*, 2 Sandf. 568.

Where lands are conveyed to a trustee, with power to sell for the benefit of all the owners, and which he is bound to do on the request of one of the owners, partition cannot be decreed without the consent of all the parties in interest. *Ib.*)

In 1848, A, owing a large sum of money to B and C, secured by his bonds, to become due at different times thereafter, conveyed land to trustees, in trust to manage the same, and sell it as they might deem best, and to apply the income and proceeds to the payment of the bonds as they should become due. In case of default, the trustees, on the request of either creditor, were to sell

so much of the land as would pay the amount due him; the land shares to be sold first, and afterwards the land, and the surplus to be paid over to A. In 1846, A, in consideration of a release by B and C of his personal liability on the bonds, released his residuary interest to the trustees, and procured certain outstanding interests to be conveyed to them. The agreement, then executed by all the parties, provided, that all the property should be offered for sale by the trustees, unless a division without sale should be agreed upon without unnecessary delay. Should any of the parties not consent to a division, then a sale was to be made under the trust deed of 1848, on the requisition of the other parties, for the payment of their bonds, which were due. A division was not agreed upon. Held, even if, by the transaction in 1846, the creditors became tenants in common of all the lands conveyed in 1848, and the trust estate ceased, the power to sell, nevertheless, continued in the trustees; that in such case the power conveyed to them by the instruments of 1846, being by the owners of the land, was not a power in trust, but a simple power of attorney, to convey the land for the benefit of the owners, and that such power was not revocable by one of such owners without the consent of all, and the right to demand a sale was in each. *Ib.*

Held, also, that, after the transactions of 1846, the lands were held under a valid express trust to sell for the benefit of the creditors, and that the power extended to the liquidation of all such bonds, and for their rateable benefit, without preference. *Ib.*

In such case partition will not be decreed of the lands at the instance of one of the creditors. *Ib.*

In case of trust, where all the trustees are parties, if by the death of the surviving trustee the trust has devolved on the court, the master who sells will be appointed a trustee, for the purpose of passing a legal title. *Cushmey v. Henry*, 4 Paige, 345. Allowance shall be made, in partition, for *improvements*. *Hitchcock v. Skinner*, 1 Hoffm. 21.

Where there is a vested estate with contingent remainders over in trust, to persons not *in esse*, and all from whom such after comers can spring are before the court; partition may be decreed. The limitations over are not affected by partition or sale. They are protected and attach to the individual shares, which by the decree are preserved in

trust according to the will. *Cheeseman v. Thorne*, 1 Edw. 629. See 2 N. Y. Rev. Sts. 822; *Manners v. Charlesworth*, 1 My. & K. 830; *Jackson v. Edwards*, 7 Paige, 886.

Under the statutes, partition bars the contingent interest of parties not *in esse*, without notice to unknown parties. *Mead v. Mitchell*, 17 N. Y. (8 Smith), 210.)

If any party or his interest is unknown, uncertain or contingent, or if the title to the fee depends upon an executory devise, or the remainder is contingent—these facts shall be stated. Creditors having a lien need not be made parties; nor shall such lien be affected, except that it shall attach only to such part of the land as is set off to the debtor, and be subject to his share of the costs of partition. After notice of the petition, any party interested may appear as a respondent, and the proceedings shall be according to the usual course of a suit at law. A final judgment or decree binds all parties named in the proceedings, and having at the time any interest in the premises, as owners in fee or for years, or as entitled to the reversion, remainder or inheritance after the termination of any particular estate; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower.

(It has been held, that *the wife* of a tenant in common is not a necessary party. If partition be made, her right of dower attaches to the share allotted to the husband, without any express order to that effect, and although she is not a party. So a sale was held not to bar her dower, the statute merely providing, that, in case of *an existing estate* in dower or by the curtesy, certain compensation shall be made in case of sale; and an inchoate right of dower being a mere possibility. *Matthews v. Matthews*, 1 Edw. 567.

But it has been since held, that a sale bars the right of dower; especially if the wife be made a party, though she is an infant. *Wilkinson v. Parish*, 8 Paige, 658; *Jackson v. Edwards*, 7, 886.)

Also all persons interested but unknown, to whom public notice has been given as provided. But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises. In case of partition by equity jurisdiction, if partition will prejudice some of the parties, compensation shall be decreed

from the others. Whenever there is a denial of co-tenancy, an issue shall be formed and tried by jury, and the respective rights of the parties ascertained. The defendants may plead, that the petitioner or petitioners were not in possession of the land. One defendant may deny the title of another, and an issue shall be made to try it. New parties may be admitted, who have become subsequently interested, or known to be so. The court, having ascertained the respective rights of the parties by default, plea or verdict, shall declare them, and decree partition accordingly, with a reservation, however, of the rights of those tenants whose interests have not been ascertained. Partition is made by commissioners.

(The report of commissioners is regarded in the same light as the verdict of a jury on a trial at law; and, where they are selected by the parties in interest, their report will receive greater respect; and in all cases it will not be disturbed, but upon grounds similar to those which at law would allow of a new trial. *Livingston v. Clarkson*, 4 Edw. Ch. 596.)

The respective shares shall be designated by permanent monuments. If the land cannot be properly divided, it may be sold by order of court, on such credit as they may direct, the price to be secured by bond and mortgage of the land.

(Or the use of the property may be assigned to each tenant for alternate periods; or a receiver appointed, and the profits fairly divided. *Smith v. Smith*, 1 Hoffm. 506.)

Provision is made for ascertaining incumbrances upon the land, and, when they exist, if the premises are sold, they shall be first satisfied from the proceeds; and, in case of any dispute in relation to them, the court shall proceed to try their validity. The court, in their discretion, may order that any life interest in the land be sold, or otherwise. If sold, they shall direct a sum in gross to be paid to the party, if he formally assent; if not, an investment shall be made for his benefit in certain designated amounts, depending upon the nature of the interest. No commissioner or guardian shall be a purchaser. The court shall decree conveyance by the commissioners; which shall bar all parties named, and all unknown, if the required notice has been given.

By statute 1847, 556, the shares of several co-tenants may be set off in common. Where there are conflicting claims as to some shares, a temporary division

may be made until such claims are adjusted. Where there is a right of dower in a share, the widow may be a party.

By statute 1852, 411, the Supreme Court may authorize proceedings in behalf of an infant tenant in common, &c., for partition, or may sell where a division cannot be well made. The court must be satisfied that it is for the interest of the infant.

(Under a colonial act of 1762, one or more proprietors of undivided tracts, inclined to have partition, were authorized, on publishing a notice, to appoint commissioners for that purpose, who, in the absence of objection from other proprietors, should proceed to make partition, and put on file all their proceedings; which proceedings it was further declared should be good evidence of such partition. The plaintiff, having introduced an original grant to V. D. (from whom he deduced title) and twelve associates, next produced the proceedings in 1771 of the commissioners to make partition, under the act. In these were recitals, that the commissioners had been appointed by certain persons styling themselves proprietors, &c., that publication had been made, and other requirements of the act observed. The proprietors were not the original patentees. Under this partition the land claimed by the plaintiff was allotted to V. D. Held, the recital of the appointment of the commissioners, being a "vital jurisdictional fact," was no evidence of their lawful appointment, as it was not expressly made so by the statute; that the act made the proceedings in partition on file evidence of the partition only; and that this was a fatal defect in the establishment of the partition. *Munro v. Merchant*, 26 Barb. 388.

After the commencement of an action for partition, and before the decree, a defendant therein died, and subsequent proceedings were had in the suit, without its being revived against the heirs. Held, by the death of the defendant, and by the proceedings subsequent, the suit became, in effect, abated, as to him and as to his title; and such proceedings were absolutely void as against his heirs. *Requa v. Holmes*, 16 N. Y. (2 Smith) 198.

The omission of a guardian *ad litem* to file his bond according to the statute, is amendable, and does not affect the jurisdiction nor the validity of the judgment sale. *Croghan v. Livingston*, 17 N. Y. (3 Smith) 218.

The court may authorize the filing of the bond, *nunc pro tunc*, even after judg-

ment and sale, if the amendment will be in furtherance of justice, and is made on such terms as are just. *Croghan v. Livingston*, 25 Barb. 336.)

In Pennsylvania. (Purd. Dig. 682-5; St. 1842, 284, 236; 1841, 358. See Sts. 1851, 613; *Clepper v. Livergood*, 5 Watts, 118; *Frohock v. Gustine*, 8 Ib. 121; *Roning*, Ib. 415; *Downer v. Downer*, 9 Watts, 60; *Meheffy v. Dobbs*, Ib. 368; *Kannan v. Rimington*, 10 Eng. L. & Equ. 477; *Biddle v. Starr*, 9 Barr, 461; *Davis v. Norris*, 8 Barr, 122; *Dana v. Jackson*, 6, 284; *Corm v. Huffey*, Ib. 848; *Dewart v. Purdy*, 29 Penn. 113), provisions are made with regard to a writ of partition. When the inquest appointed to make partition are of opinion that it cannot be done without injury, they shall return an appraisement, and the court may adjudge the whole to such tenant or tenants as will take it at the valuation, and the sheriff shall execute a conveyance accordingly. But the land shall be subject to a lien for payment of the price to the other tenants. If neither of the parties will accept the whole land, it shall be sold by the sheriff, and the proceeds brought into court and distributed. Where judgment is rendered by default upon a writ of partition, any party interested may obtain a reversal for good cause within one year therefrom. Where equal partition in value cannot be made of any share or part, the sheriff and inquest may equalize, by awarding a certain sum from one to another, for which there shall be a lien on the land. Where there are several defendants to a writ of partition, the court shall award a mutual partition among them, as well as to the plaintiff, unless all of them declare a wish to the contrary. One having only a life estate, whether legal or equitable, is entitled to partition.

(A deed of partition does not affect the title of the parties, but only fixes the boundaries. *Goundie v. Northampton*, &c., 7 Barr, 238.)

A bill of review, to correct a clear mistake in fact, on which a decree in partition was made, will lie more than three years after the decree, purchasers not having become interested in the estate. *George's Appeal*, 2 Jones, 260.

Where there were several tenants in common, and one died, leaving a will which was contested by his heirs; an act of assembly, authorizing partition, and directing all persons and corporations claiming under him, whether as heirs or devisees, to be made parties, and their purparts to be set out and conveyed to



trustees, for such of them as may be entitled, or the proceeds, if sold, paid to such trustee giving security, was held to be constitutional; and the adverse claimants under the deceased co-tenant were held to have been properly joined. *Biddle v. Starr*, 9 Barr, 461.

Devise to two sons, A and B; the land to be divided by a line running north and south, and the choice to be determined by agreement or lot. They entered into possession, occupied for several years as tenants in common, and purchased fifteen acres adjoining at one end, and then divided the tract by a line nearly according to that indicated in the will, agreed upon their choice, and respectively executed and delivered deeds to themselves and their wives. Held the deeds constituted a partition under the will, and not a purchase and sale of the land; and the wife of A was not entitled, by virtue of such deed, to the estate, as survivor of her husband. *Taylor v. Birmingham*, 5 Cas. 306.)

In Mississippi, Alabama and New Jersey, any co-parcener, joint tenant or tenant in common, may make application for partition. The court shall ascertain the number of joint owners, and appoint commissioners, with directions to divide the land into a corresponding number of shares. Where the bounds of any tract or tracts to be divided are controverted, if the controverted part is valuable, the commissioner shall separate it from the residue, and so make partition as to attach to each share a portion both of the controverted and the uncontroverted part of the land. The parts or shares and the lots laid off shall be numbered, and partition afterwards made by balloting or drawing of tickets in the manner of a lottery; at which, on the application of any party, a judge or justice shall be present. The whole proceedings are recorded, and are effectual to make partition of the land. The rights of any one having a paramount title to the land are not affected. In New Jersey, the act does not apply to lands of general proprietors of the eastern or western divisions of the State. In Alabama, minor devisees or heirs, holding jointly, may have partition on application to the Orphan's Court. In Mississippi, a partition may be re-examined in Chancery. Miss. Rev. C. 232; Aik. Dig. 382-6; 1 N. J. L. 89. In New Jersey, joint tenants, &c., may be compelled to make partition, like co-parceners, by writ of partition. Such process shall bind only parties, their heirs, &c., where either or

both are owners of a less estate than the fee. If *the tenant to the action* or defendant does not appear to defend, the court will proceed to make partition, which shall include all persons whatsoever, whatever right, &c., they have or claim, "although all persons concerned are not named in any of the proceedings, nor the tenant's title truly set forth;" with a saving, however, of one year, or one year, from the removal of any disability, for the purpose of setting aside the partition. Where an undivided share of the land is leased, the lessee shall be tenant of the portion allotted to the landlord, and the latter shall warrant and make good the title, according to his original obligation. If the demandant is himself a lessee of the tenant, the relation shall still continue after partition. If a partition would be injurious, the commissioners may make sale of the land, which shall be valid against the owners and all claiming under them, but no other persons. The proceeds shall be paid to the parties, or, if one is out of the State, invested. Where one or more of joint tenants, &c., are minors, the Orphan's Court may order partition. Nix. Dig. 572; 1 N. J. L. 299, 597; N. J. St. 1835-6, 895; 1840-1, 82. See *Van Riper v. Bendan*, 2 Green, 182; also Miss. L. 522.

(Chancellor Kent says, that in New Jersey, according to the bill reported by Mr. Scott, the reviser, in 1835, partition was to be in just judgment and assignment, and not by lot. 4 Kent, 364, n. In Alabama, the Chancellor will not order a sale for the purpose of partition, but decree the execution of mutual deeds. *Deioney v. Walker*, 9 Por. 497.)

In Maryland, (2 Md. L. 1794, ch. 60, sec. 8; 1797, ch. 114, sec. 5; 5 Ib. 1814, ch. 109, secs. 5-6; Code, 91. See *Hardy v. Summers*, 10 Gill & J. 316; *Hewitt*, 8 Bland, 185; *Chaney v. Tipton*, 11 Gill & J. 253,) the Chancellor may order partition of the estates of infants, idiots, &c. Joint tenants, &c., holding *by devise*, or otherwise, may have partition or a sale by application to court. Commissioners are appointed, and division made as on a writ of partition.

(Every tenant in common is entitled to the separate enjoyment of his interest, either by partition or by a sale and division of the proceeds, under the acts of assembly of Maryland. *Campbell v. Lowe*, 9 Md. 500.

An objection to a return upon a commission, that the commissioners did not distribute the estate by lot, but at their

own discretion assigned the several shares to the parties interested, cannot be sustained either by the practice of the court, the act of the assembly, or the rule of the English Court of Chancery. *Cecil v. Dorsey*, 1 Maryland, Ch. 223.

The legislature did not mean to confine the commissioners to a particular mode of making the partition; they may, if they please, award to each of the parties his share of the thing to be divided, or they may, at the proper stage of the proceedings, draw lots; and their return, otherwise unexceptionable, will not be set aside, because they adopted either of these modes. *Ib.*

It is a fatal objection to a return, that the value of the estate, in money, has not been stated by the commissioners. *Ib.*

The act, requiring thirty days' notice of the execution of the commission, is not complied with, by stating in the return that reasonable notice was given; but the commissioners must say, in their return, either that they gave at least thirty days' notice, or due notice according to law. *Ib.*

As to the effect of partition upon title, see *Coale v. Barney*, 1 Gill & J. 324.)

In Delaware, (Dela. St., 1829, 168; 1833, 242; 1887, 72; Rev. Code, ch. 86. See St. 1843, 527,) partition may be obtained by writ or by application to the Chancellor, who, after notice to parties interested, shall decree partition, after ascertaining the respective shares of the parties. Commissioners are appointed, who make return of their doings, accompanied with a survey of the land. If all the owners join in petition, no notice is requisite. If a division would be attended with injury and loss to the parties, the commissioners shall make a valuation of the property, and the court will order a sale by a trustee appointed for that purpose. Such sale shall pass the estate, subject, however, to paramount claims. The proceeds, with the same exception, are paid over to, or invested for the benefit of, the respective parties. Instead of a sale, one or more of the tenants may take the property at the valuation, either paying the price immediately, or entering into a recognizance with surety for it in Chancery, in such manner as the Chancellor shall direct. But no such assignment to one or more shall be made, where there are conflicting claims to it.

By the Revised Statutes, (p. 286,) the Superior Court has jurisdiction of writs

of partition. The land may set off to two or more of the tenants in common. The jurisdiction of the Chancellor is also affirmed.

In Tennessee, (1 Scott, 641; Tenn. C., s. 8262,) public notice is given by advertisement before presenting a petition for partition. No other notice is requisite, and the partition shall be forever binding on all and every person or persons who shall or may have claim or title to the land as tenants in common, &c. Contrary to the general practice of giving jurisdiction to the courts of probate in case of descent, partition may be made of real estate held by the heirs of an intestate, by application to the common law courts. The commissioners appointed to make partition may charge the more valuable dividend or dividends with such sum or sums, as they shall judge necessary to be paid to the dividend or dividends of inferior value, in order to make an equitable division. The court may order a sale, with a lien for the price; also an investment for those under disability. The return of the commissioners is accompanied by a survey when necessary, and recorded, and the return and appropriation shall be binding among and between the claimants, their heirs, &c. 1 Scott, 385-6.

In Illinois, (Illin. Rev. L. 238-9, 473,) partition may be had by application to court through commissioners. It is provided that their report "shall be conclusive to all parties concerned." But another chapter of the Revised Statutes provides that reversioners, &c., shall not be affected. If necessary, the land shall be sold, and the sale will bind the owners and all claiming under them.

(A simple order that "partition be awarded" is void. The judgment should set forth the estate awarded to each party. *Greenup v. Sewell*, 18 Ill. 58.)

In Indiana, (Ind. Rev. L. 387-90. See St. 1844-5, 39; *Amory v. Carpenter*, 8 Blackf. 280; *Carter v. Kerr*, *Ib.* 378.) Concurrent jurisdiction for partition is given to the courts of law and of equity. It is made through commissioners. If necessary, the land is sold. They to whom partition is made release of record their title to the residue of the land. Commissioners to make partition have no authority to lay out the land into town lots, streets and alleys, without consent of the owners. *Kitchen v. Sheets*, 1 Smith, 27. See *Aldridge v. Montgomery*, 9 Ind. 302.)

In Missouri, (Misso. St. 422; 1838, 89-90; 1840-1, 108; 2 Rev. Sts. 1109,)



partition may be made on petition, and a sale in case of necessity. No commissioner or guardian shall purchase. Many of the provisions are similar to those in New York. Adverse claims may be presented, and in such case the proceeds of sale retained by the sheriff, and a legal process instituted for the purpose of settling the title. A part of the land may be divided, and the rest sold. So it may be divided into lots, with streets, &c. If the commissioners report that a division is impracticable, their authority ceases, and further proceedings will be conducted by the sheriff.

(In partition sales, there is no warranty of title. *Schwartz v. Dryden*, 25 Mis. 572.)

A petitioner can discontinue his suit, at any time before the cause is submitted, on the question of confirming the report. *Ivory v. Delore*, 26 Mis. 505.

A tenant in common, out of possession, must establish his title in an action of ejectment, before he can have a writ of partition against one in possession and holding adversely to him. *Lambert v. Blumenthal*, 26 Mis. 471.)

In Kentucky, (2 Ky. Rev. L. 876, 1070. See *Bates v. Thornberry*, 5 Dana, 9; *Talbot v. Todd*, Ib. 204; *Seay v. White*, 5, 555; *Borah v. Archers*, 7, 176,) where all or a part of joint owners have an inheritance, the writ of partition lies. Reversioners, &c., shall not be affected.

Provision is made for partition, by application to certain *standing commissioners*, appointed generally for this purpose.

(In this respect, the law of Kentucky seems to be peculiar to that State. In all the other States, the application is made to some court or a judge thereof.)

Particular provision is made for the case, where some of the parties are non-residents. It would seem, in this case, that no partition will be made, unless there is a contract to that effect. But, in the case of residents, no contract seems necessary. If no division can be had, either party may enter his proportion of the land with the commissioners, and save a forfeiture by paying the tax thereon.

(It is held, in this State, that, if one tenant has made improvements on a portion of the land, this part should be assigned to him—the value of the improvements being allowed him. *Sneed v. Atherton*, 6 Dana, 281. See *Powell v. Powell*, 9 Ib. 18. In making partition of land, its value, as affected by locality, is to be taken into consideration, as well

as the quantity and quality. *Hunter v. Brown*, 7 B. Mon. 288.)

In Ohio, partition may be effected by petition to the courts of law. There may be a sale, if necessary. In Arkansas, a process for partition is provided, to which all persons interested shall be parties, and which is executed by commissioners. If partition is impracticable, upon a return of this fact, a sale is ordered. Where there are distinct parcels, or a division is desirable, they are sold separately. The conveyance is made by the commissioners. Owners of less than a fee have the same remedies as an owner in fee-simple. Ohio St. 1881, 254. See *Swan*, 618; *Goudy v. Shank*, 8 Ohio, 415; Ark. Rev. St. 592-8; *Harris v. Preston*, 5 Eng. 201.

(By the (Ohio) act of 1826, the guardian of an infant may appear for his ward and consent to partition; and the fact, that a court of record finds that a person assuming to act as guardian was in fact such, is sufficient *prima facie* to show that the court had obtained jurisdiction over the ward. *Merritt v. Horne*, 5 Ohio (N. S.), 807.)

If the report of the inquest shows that the property will not divide, and the land is therefore sold, and the husband of the infant, acting as her guardian, and knowing the facts, acknowledges such person to have been guardian, and receives from him the consideration money; he will be estopped to prove that such person was not duly appointed, and cannot, after the death of the wife, convert the jurisdiction of the court over the infant. Such estoppel is good both in law and equity. Ib. See *Rogers v. Tucker*, 7 Ohio (N. S.) 417.

In Virginia, (Va. St. 1880, 99; Code, 525,) the usual provision is made for a division or sale in equity, or an allotment to one owner. The rights of leasees are saved. Where a part of joint owners are unknown, partition may be had in Chancery, reserving to the unknown proprietors the amount of their shares. Where defendants are either absent or unknown, they may for cause rescind the partition within three years. Partitions shall not affect persons not named, unless they claim as joint tenants, &c., with those who are named. Where a partition is inconvenient, the value of a share in money may be assigned or the property sold.

(A tenant by the curtesy purchased the share in the land of one of the reversioners, the others being minors. On a bill in equity, filed for that purpose by

the tenant by the curtesy, partition of the land was granted. *Otley v. McAlpine's Heirs*, 2 Gratt. 840.)

In North Carolina, (1 N. C. Rev. St. 450-8; Rev. Code, 1854, chap. 82. See *Skinner*, 2 Dev. & B. 68; *Scull v. Jernigan*, Ib. 144; *Amis v. Amis*, 7 Ired. 219; *Irwin v. King*, 6, 219,) partition is obtained upon petition. The commissioners may charge the more valuable dividend or dividends with such sum as may be necessary to make an equitable division; which, however, shall not be paid by any minor tenant till he comes of age. But his guardian shall pay it upon receiving assets. A court of equity may order a sale, where partition would be injurious. So, also, on the application of joint tenants, &c., stating that their land is required for public uses. The proceeds belonging to any party under disability shall be invested for his benefit. Where land jointly owned is subject to dower, and the tenants and the party claiming dower apply together for a sale, the court of equity may order such sale, and that a third part of the proceeds be secured for the benefit of the latter, or ascertain the value of the life estate and decree payment of it to her absolutely.

(A judgment establishes the title, and concludes the parties. *Mills v. Witnerington*, 2 Dev. & B. 484. Where a charge is imposed upon the share of one tenant for equality of partition, an equal division being impracticable, the land is primarily liable, and, if a note is given, it is only collateral security. *Jones v. Sherrard*, 2 Dev. & B. 179. So with a note of the husband, the land belonging to the wife. Ib.)

The money assessed upon any lot, to produce equality of value, is a charge upon the land itself, into whosoever hands it goes; and there is no statutory limitation to the recovery of the money. *Sutton v. Edwards*, 5 Ired. Eq. 425.

Upon a suit for partition, a sale was ordered and made, and the money ordered to be distributed among the tenants. One of them afterwards petitioned to be reim-

bursed, out of a portion of the money which had not been distributed, certain advances which he had made for taxes. Held, the petition could not be allowed, as it would be contrary to the previous order for distribution. *Lewis*, 7 Ired. Equ. 4.

A decree of partition should describe the estate to be divided, and the share which each tenant should have. *Ledbetter v. Gash*, 8 Ired. 462.)

In South Carolina, (2 Brev. 102; 8 Sts. 708; 6, 412. See *Foster. Rice*, 17; *Goodhue v. Barnwell*, Ib. 198.) joint tenants, &c., may proceed in Chancery or apply for a writ of partition, which shall issue to commissioners.

In Georgia, the statute, after reciting that it would be inconvenient to pursue the method of dividing lands by writ of partition, as practised in Great Britain, authorizes parties to apply to the court for a writ of partition, to be devised and framed according to the nature of the case. The writ issues to partitioners, who shall proceed to make a division. One year is allowed, or, in case of disability, one year from its removal, for a party interested to set aside the partition for good cause. *Prince*, 541-2. See *Royston v. Royston*, 21 Geo. 161.

As to partition in Iowa, see Code, 1851, ch. 117; 1860, ch. 145; *Telford v. Barney*, 1 Iowa, 575.

(An erroneous computation or inaccuracy of commissioners may be corrected by the final judgment in proceedings for partition. *Wright v. Marsh*, 2 Greene, 94.

A judgment cannot be attacked collaterally, on the ground that the petition did not show the interest of unknown owners in the land. Ib.)

A petition for partition may be verified by affidavit of an attorney. Ib.)

As to partition in Louisiana, see *Harrell*, 12 La. An. 887; *Harrell v. Harrell*, Ib. 549. In Florida, *Thomp. Dig.* 882. In Texas, *Oldh. & W.* 840. In Kansas, *Comp. L.*, chap. 162. In Oregon, *Code*, 1862, 109. In California, *Wood's Dig.* 202.















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